TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 55.

BACKUS, JR., AND SONS AND ABSALOM BACKUS, JR.,
PLAINTIFFS IN ERROR,

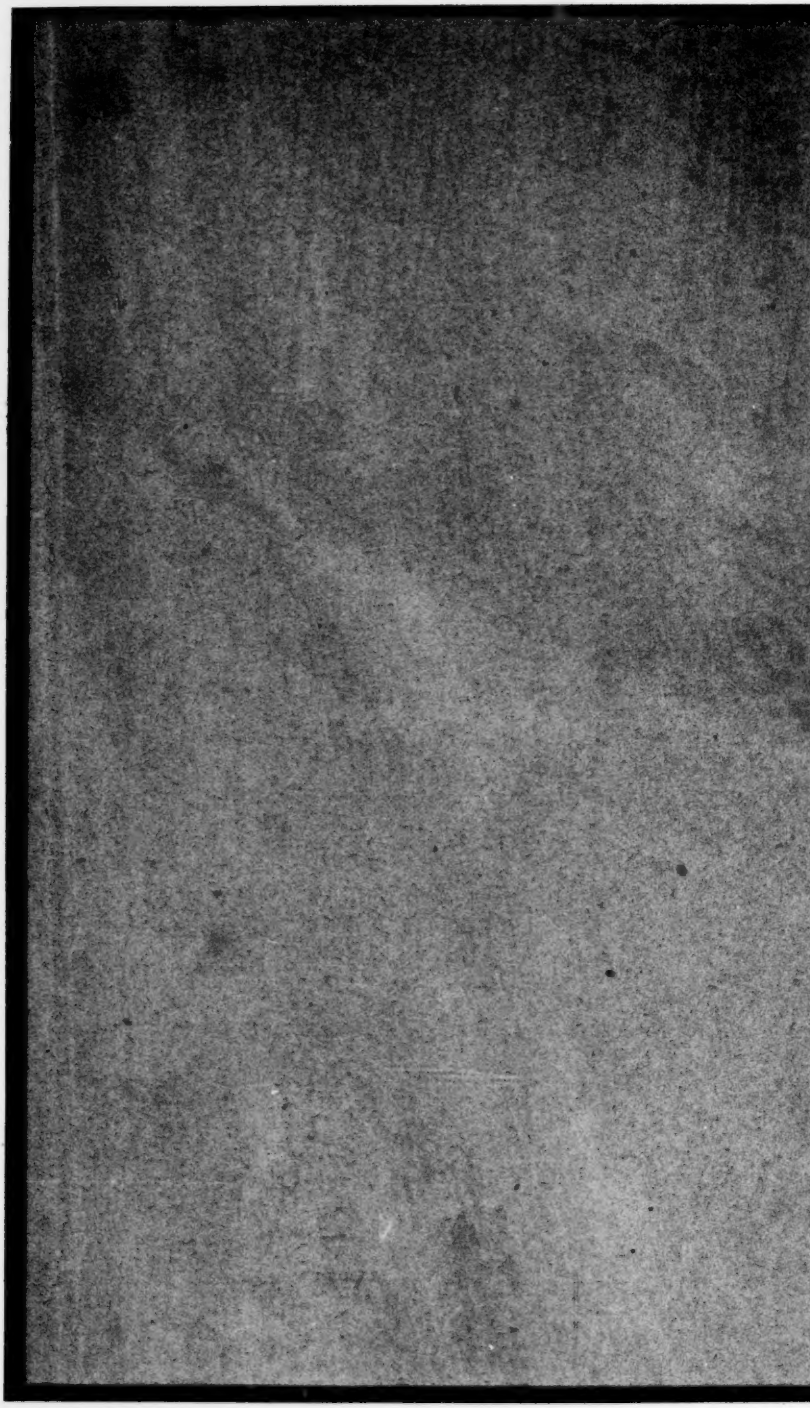
vs.

THE FORT STREET UNION DEPOT COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED AUGUST 19, 1895.

(15,997.)



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vs.

THE FORT STREET UNION DEPOT COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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1 STATE OF MICHIGAN:

To the circuit court for the county of Wayne:

Your petitioner, The Fort Street Union Depot Company, respectfully represents:

1. That your petitioner is a railroad corporation, organized under an act entitled, "An act to authorize the incorporation of companies for the construction of union railroad depots and stations, with the necessary connecting tracks, and the management of the same," approved June 9, 1881, and the amendments thereto; that your petitioner heretofore, to wit, on the 24th day of August, 1889, was duly incorporated by the filing of its articles of association, and annexed affidavit, in the office of the secretary of state, as required by said act.

2. That the capital stock of your petitioner has been in good faith subscribed, as required by said act, to organize such company; that is to say, the capital stock of your petitioner is fixed by said articles of association at the sum of one million dollars, which was not less than the estimated and probable cost of your petitioner's proposed station grounds, depot buildings and railroad tracks proposed to be laid; that more than fifty per cent. of said capital stock was subscribed upon said articles of association, and ten per cent. was in good faith in cash paid in to the directors named in said articles, and an affidavit was made and attached to said articles by William W. Crapo and George Coppell, two of said directors, showing that said amount had been subscribed, and ten per cent. in cash paid in as aforesaid.

3. That your petitioner has surveyed its depot grounds and the route of its proposed tracks in the county of Wayne, and made a map and survey thereof, by which said depot grounds and route are designated, and that it has located the same according to such survey, and filed a certificate thereof, indorsed on such map and survey, and signed by a majority of the directors of said company, in the register's office of said county of Wayne, to wit, on the 12th, day of November, 1889; that before filing said map and survey,

2 to wit, on the 22d day of October, 1889, your petitioner submitted the same to the State railroad crossing board, consisting of the commissioner of railroads, attorney general and secretary of state, for approval, in compliance with section seven of the general railroad law of this State, as amended by act No. 236 of the Public Acts of 1887, p. 294; that thereupon such proceedings were had that afterwards, to wit, on the 8th day of November, 1889, said map and survey *was* duly approved by said board, and a certificate of such approval indorsed thereon, and said map and survey, so certified and approved, now remains of record in the said register's office for the county of Wayne, and to which record reference is hereby made.

4. That the route of the proposed tracks of your petitioner, as shown by said map and survey, lies upon and along River street, in said city of Detroit, from a point at or near Twelfth street to a

point at or near Eighth street, and the terms and conditions under which your petitioner is to construct its said tracks upon and along said River street, have been agreed upon between the common council of the city of Detroit, and your petitioner, as shown by the following ordinance adopted by the common council and accepted by your petitioner:

Copy of Ordinance.

"Whereas, the Fort Street Union Depot Company is a corporation under the laws of this State, for the construction of a union depot on the southwest corner of Third street and Fort street west, in this city, and said company, for the purpose of furnishing access to said union depot, propose to build an elevated railroad in, upon and along River street, from the west line of the Thompson farm to the east line of lot number ten (10) of the Labrosse farm;
3 thence northeasterly to a point south of Fort street, north of Congress street and west of the west line of Seventh street; thence across Seventh, Sixth, Fifth and Fourth streets, between Fort and Congress streets; and,

Whereas, the act under which said depot company is organized provides that the terms and conditions under which said elevated railroad may be constructed in any street shall be agreed upon between the company and the common council, and,

Whereas, the construction of said road may render it necessary to vacate Fourth, Fifth, Sixth or Seventh streets, between Fort and Congress streets, or to change the grade of Sixth or Seventh streets; therefore,

SECTION 1. It is ordered that the terms and conditions for the construction of said railroad along River street shall be as follows:

That is to say, the superstructure of said elevated railroad shall be supported by iron posts not more than 15 inches square or in diameter; that said posts shall be set along the line of the curbing now in said highway, and outside of the roadway and curbing, so that the superstructure will span the entire roadway or paved portion of said highway; said posts shall be not less than 30 feet apart along said curb lines, except in crossing the Michigan Central railroad, where they shall be so placed as to be most convenient for both roads; said posts shall rest wholly upon solid foundations of masonry wholly beneath the surface of the street, and such posts shall be of such length that at no point on the line of the said road shall the space between the surface of said River street, or any street leading into said River street, and the superstructure be less than 13 feet in the clear, and no posts shall be placed within or
4 between the curb lines of any street leading into or intersecting said River street, or within the lines of the sidewalk upon such intersecting streets.

In case said roadway shall be constructed across and over any of the said Fourth, Fifth, Sixth or Seventh streets, the superstructure shall be supported either by stone walls, erected on the street lines, or by iron posts not more than 15 inches square or in diameter, which shall be set so as to span the entire roadway of said streets,

and none of which shall be set between the curb lines of either of said streets, or within the sidewalk lines thereon; the said posts shall rest upon solid foundations of masonry wholly beneath the surface of said streets, and at no point on either of said streets, provided the roadway shall be constructed over either of said streets, shall the space between the surface of the street and the superstructure be less than 13 feet clear under said structure; and,

The superstructure shall consist of iron and steel girders and ties, having an aggregate height of five feet, substantially as shown on the "cross-section" thereof, filed by said company with the city clerk, with a map showing the route of said railroad along said River street and the location of the posts for the support, and which said cross-section and map are made a part of this ordinance.

Suitable iron pans or shields to catch the ashes and refuse from locomotives shall be constructed upon the tracks of said elevated railroad, on and along River street, and over any other street above which said roadway shall be constructed. And the said company shall cause to be properly lighted to the satisfaction of the board of public works the said River street under said superstructure, and any street crossing over which said roadway may be constructed.

SEC. 2. The said company shall keep the posts and superstructure of said elevated railroad in good order and repair, and in constructing the same shall obstruct the streets for a reasonable time only.

SEC. 3. In case the common council should, in its discretion, at any time hereafter resolve and determine to vacate the said Fourth, Fifth, Sixth and Seventh streets, or either or any of them, and take the necessary steps and proceedings to vacate the said streets or either of them, and the same or either of them should be vacated, the said Fort Street Union Depot Company shall pay all the costs and expenses of such proceedings, and shall pay all damages which may be awarded in said proceedings to any person or persons by reason of such vacation.

SEC. 4. In case the said roadway should be constructed by said company over the said Fourth, Fifth, Sixth or Seventh streets, or over either of said streets, at a height leaving a space less than 13 feet in the clear between the present surface of such street and the superstructure of said roadway, and the common council should, in its discretion, at any time hereafter, resolve and determine to change the grade of either or any of said streets and the same be changed, the said Fort Street Union Depot Company hereby agree to pay all the costs and expenses of such change and alteration of grade, and to pay all damages that may be awarded to any person or persons by reason of change of grade, and fully to indemnify the city against any and all claims, awards or judgments that may be recovered against the city by reason of such change of grade.

SEC. 5. The said company shall acquire by purchase or condemnation, from the adjoining property-owners, the right to build

6 said elevated railroad in said street as required by the constitution and laws of the State.

SEC. 6. In consideration of the police and fire protection, and in lieu of local taxes, the said company shall, and it hereby agrees to pay to the city treasurer, on or before the 1st day of July in each year, two and one-half per cent. of the gross earnings of said company, as determined by the State railroad commissioner and auditor general, in pursuance of sections 19, 20 and 21 of the Union Depot act of 1881. Provided, that if by any change in the constitution or laws of this State, the company should hereafter be required to pay local taxes, then the company is to be credited upon the percentage herein stipulated, with the amount of local taxes it may be required to pay.

SEC. 7. The said company shall within thirty (30) days after the passage of this ordinance file a written acceptance of the terms and conditions thereof with the city clerk, and shall procure from the owner or owners thereof, a deed to the city of Detroit, dedicating to the public use as a street, all that parcel of land in the city of Detroit, in the county of Wayne and State of Michigan, from River street to the channel bank of the Detroit river, included between the lines of Twelfth street extended, except the part thereof owned by the Michigan Central Railway Company, and the same to be kept open and clear for public use, and shall cause said deed to be filed with the controller of the city; and

Said company shall execute and deliver to the city of Detroit, a good and sufficient bond, in the penal sum of $500,000, to be approved by the common council, conditioned for the faithful performance of the terms and conditions of this ordinance, and to
7 fully indemnify and save harmless the city of Detroit, from any and all claims for damages for which said city may be made or become liable to pay, by reason of the construction, maintenance or operation of said railroad or superstructure. This ordinance shall take effect upon the filing of said acceptance, the delivery of said deed and the approval of said bond."

5. That at the time of approving the map and survey of your petitioner, to wit, on the 8th day of November, 1889, the State railroad crossing board made an additional and further order requiring the Michigan Central Railroad Company and the Fort Street Union Depot Company to construct and maintain at their joint and equal expense, an overhead passageway for teams and travelers on foot, at the crossing of River street by the tracks of the Michigan Central railroad, and afterwards, to wit, on the 30th day of April, 1890, the commissioner of railroads, in his separate official capacity, made an order to the same effect and caused the same to be served on each of said companies. Reference is hereby made to said orders as they remain of record in the office of the commissioner of railroads. That each of said orders reserved to the commissioner of railroads the power to approve of the plans of the superstructure of the viaduct or elevated railroad to be erected in River street at said railroad street crossing by your petitioner, and also of the plans of the superstructure of the passageways for teams and travelers on foot, to be erected by

the Michigan Central Railroad Company and your petitioner at their joint and equal expense.

6. That afterwards, to wit, on the 15th day of July, 1890, your petitioner submitted plans for the construction of said overhead crossings to the Hon. John T. Rich, commissioner of rail-
8 roads, for his approval, and after a full hearing thereon, he did approve of said plans, and indorsed his approval thereon, and filed the same so endorsed in the office of the commissioner of railroads; and he also delivered a duplicate original of said plans and indorsement to your petitioner, and the same are now in its possession, ready to be produced and proven as the court may direct.

7. That your petitioner has also prepared and adopted plans for the construction of its proposed viaduct or elevated railroad in said River street from a point near Twelfth street to a point near Eighth street, and said plans conform to the said ordinance, the orders of the State railroad crossing board and of the commissioner of railroads, and the crossing plans approved by the commissioner of railroads.

The plans so adopted by your petitioner are made a part of this petition, and a copy thereof is herewith filed and served.

8. That your petitioner desires to build said viaduct or elevated railroad and to construct the same in accordance with the terms and conditions, and in full compliance with all of the requirements, of the ordinance agreed upon between the common council of the city of Detroit and your petitioner as aforesaid, the orders of the State railroad crossing board and of the commissioner of railroads, the crossing plans approved by the commissioner of railroads, and the general plans designed and adopted by your petitioner as aforesaid.

That your petitioner also desires, and holds itself in readiness, to join with the Michigan Central Railroad Company in the construction of said passageways for teams and foot travelers, and to pay its half of the cost and expense thereof.

9. That the Michigan Central Railroad Company owns all
9 the property on the south side and some of the property on the north side of River street, between Twelfth street and Third street, and your petitioner has acquired from the Michigan Central Railroad Company, by due condemnation proceedings, the right to construct said viaduct or elevated railroad along said River street, as herein proposed, and your petitioner now desires to acquire the like right from the owners of the remaining property on the north side of said street, in front of said proposed viaduct or elevated railroad.

10. That of the property so situated on the north side of said River street, one parcel is known as the Backus box factory and planing mill. This property has a frontage on River street of two hundred and thirty-eight and $\frac{6}{100}$ feet, and it extends from River street the same or a greater width to Fort street west and the right of way of the Michigan Central Railroad Company. The River Street frontage of the property is bounded on the west by a lot owned or known as the property of Barbara Steadley, and on the east it is

bounded by a strip of land seventeen feet wide, owned and occupied by the Michigan Central Railroad Company.

11. That the names and places of residence of the parties, so far as the same can with reasonable diligence be ascertained, who own, or have or claim to own, or have estates or interests in said lands and property are as follows:

The property is owned in fee by Absalom Backus, Jr., of Detroit, in said county, and it is in possession of a corporation known as "A. Backus, Jr., & Sons," also of Detroit, in said county, as the tenant for a term of years of said owner.

The estate of the late Crozier Davison is interested in a portion of said property under a land contract executed by the deceased to Absalom Backus, Jr., to the amount of about fifteen thousand dollars, and this interest, which is in the nature of mortgage, is held by James N. Dean, of Detroit, and William H. Davison, of Greenfield, in said county, as executors and trustees under the will of said Crozier Davison.

12. That your petitioner seeks to acquire under this petition, in the county of Wayne, and from the said owners, and others above named who own or have or claim to own, or have or claim to have estates or interests in the lands and property above described, the following real estate, property, easements, rights and franchises, that is to say:

I.

The right of way to construct and maintain said viaduct or elevated railroad in, upon and along River street, and in front of the above-described property, in accordance with the ordinance agreed upon between the common council of the city of Detroit and your petitioner as aforesaid, the orders of the State railroad crossing board and of the commissioner of railroads, the plans approved by the commissioner of railroads, and the general plans designed and adopted by your petitioner as aforesaid.

13. That all of the real estate, property, franchises and easements set forth and described in the preceding paragraph of this petition are required by your petitioner for the purposes of its incorporation and the taking thereof is necessary for the public use; that the union depot and station grounds proposed by your petitioner, and the proposed railroad tracks connecting therewith, are a necessary public improvement, and public necessity requires that all of said real estate, property, franchises and easements, and all of the estate, right, title and interest of the said owners and others interested therein, as herein described and set forth, should be taken for said improvement and for the use and benefit of the public.

14. That your petitioner has not been able to acquire title to the said real estate, property, franchises and easements, and that the reason of such inability is this, that your petitioner has been unable to agree with the said Absalom Backus, Jr., and A. Backus, Jr., & Sons for the purchase thereof, there being a great difference between them and your petitioner as to the price or compensation that your petitioner ought justly to pay for the same.

Prayer.

Your petitioner prays that an order may be granted by the court appointing three disinterested and competent freeholders, as commissioners under the constitution and laws of this State, to ascertain and determine the public necessity for taking said real estate, property, franchises and easements for the purposes of your petitioner and the public use and benefit, as aforesaid, and to appraise and determine the damages or compensation to be allowed to the said owners of, and parties interested in, the said real estate, property, franchises and easements, so proposed to be taken.

F. A. BAKER,
Attorney for Petitioner.

STATE OF MICHIGAN, } ss:
County of Wayne, }

On the 24th day of January, 1891, before me, a notary public in and for said county, personally appeared Fred. A. Baker, the
12 person who signed the above and foregoing petition, and made oath that he is the attorney for said petitioner, and signed said petition on its behalf; that he has read said petition and knows the contents thereof, and the same are true of his own knowledge, except the matters and things therein stated to be on information and belief, and as to those he believes the same to be true.

WILLIAM E. FENWICK,
Notary Public, Wayne County, Mich.

To Absalom Backus, Jr., A. Backus, Jr., & Sons, and James N. Dean, William H. Davison, executors and trustees, etc.:

You will please take notice that on Monday, the 7th day of February, 1891, at the court-room in the city hall, in the city of Detroit, at the opening of court on that day, or as soon thereafter as counsel can be heard, a petition of which the within and foregoing is a true copy, will be presented to the circuit court for the county of Wayne, and at which time and place you are required to show cause, if any you have, against the prayer of said petition.

F. A. BAKER,
Attorney for Petitioner.

Detroit, January 24, 1891.

Endorsed: Filed Jan. 24, 1891. Wm. E. Fenwick, d'p'y clerk.

13 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT CO., Petitioner,
vs.
A. BACKUS, JR., & SONS, A Corporation, *et al.*, Respondents.

In the matter of the petition of the Fort Street Union Depot Company to acquire the right of way to construct and maintain a viaduct or elevated railroad upon and along River street, in the city of Detroit, county of Wayne and State of Michigan.

And this respondent, A. Backus, Jr., & Sons, a corporation, severally answering and reserving all right of exceptions to the said petition filed herein, neither admitting nor denying the matters set up in said petition save as set up in paragraph 14, and as to the matters therein set up it denies that it has refused to sell its interest in the parcels of land described in said petition to the petitioner for a reasonable and just price and compensation, and denies that the petitioner has negotiated with it for the same or made any effort to agree with it for the same.

Wherefore it prays that the said petition of the Fort Street Union Depot Company may be dismissed.

[SEAL.] A. BACKUS, JR., & SONS.
N. D. BACKUS, *Sec.-Treas.*

DICKINSON, THURBER & STEVENSON,
Attorneys for Respondent-, A. Backus, Jr., & Sons.

Endorsed: Filed Feb'y 9, 1891. Wm. E. Fenwick, d'p'y cl'k.

14 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT CO., Petitioner,
vs.
ABSALOM BACKUS, JR., *et al.*, Respondents.

In the matter of the petition of the Fort Street Union Depot Company to acquire the right of way to construct and maintain a viaduct or elevated railroad upon and along River street, in the city of Detroit, county of Wayne, and State of Michigan.

And this respondent, Absalom Backus, Jr., severally answering and reserving all right of exception to the said petition, neither admitting or denying the matters set up in the said petition save as set up in paragraph 14, and as to the matters therein set up he dedies that he has refused to sell his interest in the parcels of land described in said petition to the petitioner for a reasonable and just price and compensation, and denies that the petitioner has ne-

gotiated with him for the same or made any effort to agree with him for the same.

Wherefore he prays that the said petition of the Fort Street Union Depot Company may be dismissed.

ABSALOM BACKUS, JR.,
By HENRY N. BACKUS,
Attorney-in-fact.

DICKINSON, THURBER & STEVENSON,
Attorneys for Respondent, Absalom Backus, Jr.

Endorsed: Filed Feb'y 9, 1891. Wm. E. Fenwick, d'p'y cl'k.

15 On the preliminary hearing, no sufficient cause being shown to the contrary, the prayer of the petition was granted. The respondents demanded a jury. A jury was selected and sworn. They reported to the court that they were unable to agree on a verdict. The following is a copy of their verdict:

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT CO., Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

To said court:

We, the undersigned, inhabitants and freeholders of the county of Wayne, duly empannelled and sworn as jurors in this cause to ascertain and determine the necessity of taking for public use, to wit, for the purpose of constructing and operating a union railroad depot and station grounds in the city of Detroit, in said county, with the necessary connecting railroad tracks and accom-odations, all of the real estate, property, franchises, rights, easements, and privileges described in the petition in this cause, to wit, the property of the respondents in River street for the distance of an abutting frontage of two hundred and thirty-eight feet on the north side of said street, and to ascertain and determine the compensation or damages which ought justly to be made by the Fort Street Union Depot Company to the above-named respondents therefor, do respectfully certify and report that we met at the court-room, in the market building, in the city of Detroit, on the third day of March, 1891; that the Fort Street Union Depot Company appeared by F. A. Baker, its attorney, and the respondents appeared by Don M. Dickinson, their attorney; that we then proceeded to hear
16 the proofs and allegations of the parties, and also proceeded together to view the premises proposed to be taken, and for that purpose we continued our sessions from day to day until the 16th day of March, 1891, when said cause was submitted to us by said parties; that we caused the testimony and the arguments of

the counsel given before us to be stenographically reported and reduced to writing at the request of the parties, and the same are herewith returned and filed. After said cause was submitted to us, having maturely considered the proofs and allegations of the parties and the arguments of counsel thereon, we did fail to agree upon a verdict upon the issues submitted to us.

Dated Detroit, March 18, 1891.

THOMAS BOYLAN.
FRANCIS H. CARR.
JNO. McLEAN.
PETER BRENNAN.
THOMAS F. MANNING.
DANIEL LANE.
JOSEPH DEITZ.
EUGENE SULLIVAN.
JACOB B. BRAND.
D. J. SPINNING.
CHAS. L. FERRIS.
M. P. HURLBUT.

17 A second jury was then selected and sworn, and the following is the testimony and proceedings before such jury on the second trial:

THE FORT STREET UNION DEPOT CO.
vs.
ABSALOM BACKUS, JR., *et al.*

Second trial, commenced June 10, 1891.

Mr. BAKER: Mr. Foreman and gentlemen of the jury, this is a condemnation case instituted by the Fort Street Union Depot Company to condemn a right of way for the construction of an elevated railroad on River street in front of property that is known as the Backus planing mill and box factory. The elevated road is to extend from the vicinity of Twelfth street to the vicinity of Eighth street, longitudinally along River street. The company is the corporation organized under the union depot act that was passed in this city in 1881. The purpose of the corporation, as authorized by the act, and its articles of association, is to erect and maintain a union depot or passenger-house, with the necessary connections, yards, tracks and facilities for the transaction of a railroad business, at the corner of Third street and Fort street west in this city.

18 The depot grounds themselves consist of two blocks and a half, bounded on the easterly end by Third street, on the northerly by Fort street, and on the southerly by Congress street west for two blocks, and in addition to that, at the extreme end, there is a half block which merely comes from Fort street to the alley, and extends from Fifth street to Sixth street. It is proposed to connect these depot grounds with the system of railroads that now terminate upon the old union depot grounds at the foot of

Twelfth street, with such additional lines coming in there in the immediate future as are to be accommodated in this depot.

I may say in this connection that the Fort Street Union Depot Company is a corporation organized by people connected with four different railroad companies. These railroad companies propose to use this depot for passenger purposes, and two of the companies propose to use a small freight-house on the corner of Congress street west and Third street. One of the companies is the Flint & Pere Marquette railroad, which now commences at Monroe or Toledo, and goes through to Saginaw, and from there across to Ludington, and a company that has been accustomed, for the last ten or fifteen years, to come into Detroit over the Michigan Central from Wayne. They now propose to come into the city of Detroit from their line at Plymouth, coming in over the Detroit, Lansing & Northern, and connecting near the vicinity of Woodmere cemetery with the Wabash line at Delray. This arrangement is made possible from the fact that the Detroit, Lansing & Northern is one of the companies that also desires to use this depot. That line runs from Detroit to Howard city with a branch to Grand Rapids, and they also have branch lines that run through to Saginaw by the way of Lansing
19 and in that section of the State. These two companies, the Detroit & Lansing and the Flint & Pere Marquette, have been heretofore accommodated with the Michigan Central depot, but it has been under peculiar circumstances and peculiar conditions, and the business of the State and of these roads has developed to such an extent that it is no longer desirable; and it will appear by the testimony in this case that it is necessary for these companies, both in their own interest, and in the public interest, to have railroad facilities at some other place than in the Michigan Central. It will appear that the Michigan Central has been in the habit, in making a lease, to accommodate other railroad companies, to insist upon provisions by which those companies were prohibited from competing with the Michigan Central at competing points. For instance, if the Detroit & Lansing desires to use the Michigan Central yard, it can only do so by agreeing that it will not compete with the Michigan Central for Grand Rapids business, the Michigan Central having a line into Grand Rapids through what is known as the Valley City line from Jackson. At any rate, these companies are not satisfied with the facilities furnished at the Michigan Central depot, either the passenger facilities or the freight facilities, and they have each agreed to take one-quarter of the stock in the Fort Street Union Depot Company, to advance one-quarter of the money that may be necessary to go on and construct a suitable union passenger-house for the accommodation of themselves, and the other companies interested at the corner of Third street and Fort street west.

The other two companies that are interested in this enterprise are the Wabash system and the Canadian Pacific. The Wa-
20 bash has been in the habit, since it came to the city of Detroit, since the line was built through from Butler, Indiana, to this city, of doing their entire business at the union depot

grounds that were started in '81 and '82 at the foot of Twelfth street; but experience with the business since then has demonstrated beyond question that the foot of Twelfth street is not a suitable place for a passenger-house in this city, either in the interest of the company, or in the interest of the traveling public or of this city. The old union depot company that furnishes facilities upon those grounds for the Wabash, is owned largely by Detroit gentlemen. Mr. James F. Joy, who is connected as a director with the Wabash road, is one of the principal stockholders; Senator McMillan is another large stockholder; and Christian H. Buhl and Allan Shelden are stockholders of the old union depot company, and they agreed to advance money. The Wabash Company, as we all know, was in embarrassed circumstances and unable to advance the money, and these gentlemen made an agreement for advancing one-quarter that is being furnished for the Wabash part of it.

The Canadian Pacific is a railroad company that has had the prestige of the aid of the Canadian government, and they have built a very important and a very long line of railroad in the Dominion, and in the British possessions, extending, practically, across the continent. They desired to come to the city of Detroit, for the purpose of doing business with this city, and they therefore desired to build a line from London, or some point in Canada, to Windsor, opposite this city, if they could obtain proper depot accommodations in this city. It will appear that they came here and looked at the situation, and were not willing to put in any money in an
21 enterprise of this kind unless they were furnished as good facilities and as good accommodations as any other company in the city, and it was through their suggestion, to some extent, that this location was decided upon as a proper location for the union depot, to accommodate them and to accommodate the other companies that are interested in the enterprise.

They organized under the union depot act of this State, as they were authorized to do. They made a map and survey of the union depot grounds, something like five acres, on the corner of Third street and Fort street west; they laid out a route by which those depot grounds were to be connected with the railroad system of the country. That route extends from these grounds diagonally through to River street, and then along River street to Twelfth street, and into the grounds of the old union depot company, and through those grounds down to the vicinity of Mr. Backus' lumber yard, to a connection with the Wabash line at that point, running out upon that line to Delray, or the vicinity of Woodmere cemetery, where the connection can be made with the Flint & Pere Marquette and the Detroit & Lansing.

The Fort Street Union Depot Company have acquired the title, either by deed or by condemnation proceedings, of all of the station grounds, the two blocks and a half that are necessary for the purpose of erecting a suitable passenger-house, with a yard in which trains can stand, and the business of the companies can be transacted. They have also acquired the entire right of way from those depot grounds down to Eighth street, and have also acquired nearly

all the right of way as against abutting property-owners along River street. There are only two or three parcels of property that
22 remain uncondemned, and among them is the property that you are to pass upon, the planing mill and box factory of A. Backus, Jr., & Sons.

Under the constitution of this State, one of the questions that you will be called upon to decide is the question of the public necessity of taking the right of way along River street for the purpose of this enterprise. The constitution of this State provides that a jury of freeholders may be selected at the instance of the property-owners for the purpose of having the question of the public necessity determined, and if the jury find in favor of the necessity, finding that it is necessary to take the property in the public interests, and for the public benefit and for the public use, to assess the damages that are sustained by the property-owners.

In regard to the question of whether it is necessary to lay out this railroad along River street, I desire, at this point, to call your attention and to lay before you what I expect to prove as to the necessity of this particular condemnation.

We shall show you in the first place, by the engineer of the company, who has examined the property in that vicinity, with reference to the selection of the proper route, that the route along River street is the most suitable and the most desirable, for the reason that River street, being at a considerable lower grade than Fort street west, or the property adjacent to Fort street west, you can start on a level at Fort street west at the corner of Third street, and when you reach River street, in the vicinity of Eighth street, you can be eighteen or nineteen feet above River street, enabling the engineers to construct along River street what is known as an elevated railroad or viaduct. The utility of an elevated road in a large
23 city and in such a location as this is manifest, considering the exigencies and the necessities that surround the conduct of any railroad to a populous and thickly settled vicinity. For instance, one of the difficulties in operating a railroad in this or any other city, where you come into the city so as to be convenient to the public, is the difficulty that arises from having a large number of grade crossings. On the D. & M. we have quite a number of grade crossings. At Woodward avenue we have a number of grade crossings, at Gratiot avenue, at Michigan avenue and at River street, and there are some other grade crossings out towards West Detroit. Any sort of a superstructure that will enable you to dispose of those grade crossings is of great public utility in two ways. In the first place, it reduces the danger to the public and the passengers in the railroad trains. It enables the railroad to proceed at a fast rate of speed with their trains and to transact the business for the accommodation of the public more safely and more advantageously and more beneficially.

At the same time, where you have elevated crossings of this kind you avoid the danger to the people who are traveling along the street, either on foot or with vehicles, and every year there are quite a number of people, I would not undertake to say how many,

killed at the grade crossings in this city, and as the city becomes more populous, and the traffic along the street and the traffic on the railroad increases, of course the danger is constantly increasing; but with an elevated structure built along any portion of the city, either in a public highway or outside of the public highway, you can cross all intervening streets with an overhead structure, so as to avoid the danger both ways.

It is proposed in this case to go along River street with such a superstructure, and you will see that it enables all of the in-
24 tervening streets that intersect River street from these union depot grounds to Twelfth street to be unobstructed by this superstructure, because you can drive right along these streets into River street, and, longitudinally, along River street the same as before. The superstructure along that street, under the ordinance, is not to be less than thirteen feet high in the clear. According to the plans, it will be fourteen feet and more in the clear. The lowest point it will be in River street at any point will be fourteen feet. It is to be erected upon posts that are to be set along the line of the curbstone, so that the entire paved portion of the street is to be left unobstructed and open, so that you can drive a large load of lumber, or a large load of any kind, a load of chairs, or a load of hay, or anything of that kind right along under the superstructure without the least physical obstruction. Those of you who have been in New York since the elevated railroad has been in operation, will understand how easily and with what facility traffic can be carried on under such a superstructure. The posts are to be thirty-five feet apart longitudinally. They are opposite each other and are spanned by lateral girders, and those lateral girders support longitudinal girders, on which the rails are laid.

This case has been tried once before by the same counsel who are interested in the case at the present time, and the only question in regard to this right of way, I apprehend, that will be raised before you, will be a question that our distinguished friend, Mr. Don M. Dickinson, raises, as to the advisability or the public necessity of going along River street with this superstructure, his contention being that we should go over the property of the Michigan Central Railroad Company, which joins River street upon the south.
25 The Michigan Central Railroad Company owns all the property from Third street through to Twelfth street. Upon that subject we shall introduce these facts before you, that the Michigan Central Railroad Company uses, and is in occupancy, and in the actual use of every particle of that property from one end of their depot grounds to the other. In fact, that yard has been utterly inadequate for the transaction of their large, accumulating and increasing business, and they have practically made a railroad yard of their entire line from River street out to West Detroit, and use it now practically as one great long railroad yard; and at West Detroit they have acquired something like one hundred acres of land, on which they do a very large freight business, where the freight trains do their immense freight traffic. Of course, they also do a large freight business on these grounds at the foot of Third street.

We shall show you that they are in the actual use of all that property, and that they need it for the purpose of transacting the business that this company does transact at the present time. We do this under a statute which will be read to you, which provides in substance that if these grounds are in actual use by that company, or are needed by them, the property cannot be condemned, but if any portion of this property were not in actual use, then we could condemn the right of way across the grounds of another company. We would have to show that they did not need it, and would not need the property in the immediate future for the transaction of their business. Of course, any one can see that the business of the Michigan Central is on the increase, and will increase as long as the State of Michigan and this country increases in population. So that we shall show to you that it is a legal impossibility for the Fort Street Union Depot Company, or any other railroad company
26 of this State, under existing legislation, to condemn any right of way across the Michigan Central property. The act provides that we could not condemn the property across there when the conditions are such as I have indicated, but, if it were so that we could condemn the property, the question of necessity and value and the need of the company for the property shall be determined by jury, but the first requisite of any such condemnation proceedings is the existence of the preliminary facts, which are essential to the exercise of the jurisdiction, namely, that the property is not in use, and is not needed by the company that holds the title to it.

So that we shall not submit this question with any want of confidence as to what the result will be before you; and in that connection I can call your attention to the fact that a large number of jurors, and the State authorities, and the local authorities of this city, have already acquiesced in and approved the use of this street for the purpose of this elevated road. I shall introduce those facts in evidence, not for the purpose of controlling your judgment, because under the constitution you have a right to pass upon this question of necessity, but as bearing upon the question, as something to be considered by you. We shall prove to you that every jury that has been called, and a large number of juries have been called in these cases and have condemned property along River street, and also the property where the union depot is to be constructed, and all of those juries have been unanimous in their decisions that the public necessity requires this right of way along River street should be taken.

This necessity arises in part from the fact that the private property between River street and Fort street west in this vicinity
27 is occupied by a large number of large manufacturing institutions, and it will be necessary, in order to lay out a route between those two streets, to go right through these manufacturing plants, and there would be another very strong objection to it, as I will show you by the testimony of the engineer, that when you come up towards Fort street the ground rises, Fort street being higher than River street, it will be necessary to cross nearly all the property at grade. There could be no overhead crossing at Sixth street,

or at Seventh, or Eighth, or Tenth, or Eleventh, or Twelfth, or over quite a number of those streets. You would have to cross at grade, so that you would have a railroad running into the city, with all those grade crossings, whereas, if you locate it upon River street, the situation of the ground is such that you can go overhead along River street and leave that open, and leave all the intersecting streets open; and in addition to that it has this advantage, that it does not destroy the manufacturing property that is situated along the line, but that property is left to be used for manufacturing purposes for all time. The property of the Peninsular Stove Co., one of the largest and most successful institutions in the city, is just beyond Eighth street. There is the Diamond Match Company and the Union Mills property, and a large amount of property in that vicinity, and near the railroad is the manufacturing plant in question in this case, the planing mill and box factory of A. Backus Jr. & Sons. We shall introduce all these facts in evidence and submit the question to you, whether or not the public exigencies require that this property should be taken for this purpose.

As far as the public interests are concerned, we shall also prove to you that this route has been approved by the authorities
28 of the State of Michigan and by the city of Detroit. Under the law it is necessary for the union depot company to make a map or survey of its depot grounds and of the connecting lines of railroad by which those depot grounds are to be reached, and the grounds that are so laid out and the routes that are so laid out must be submitted to the State railroad crossing board for approval, under a provision of the general railroad law that if one railroad crosses another, the place of crossing and the manner of crossing is to be determined by the State railroad crossing board. Under this statute the Fort Street Depot Company did prepare a plan which laid out a route along River street. They submitted it to the State railroad crossing board, and that board approved it. The statute also provides that before you can build a railroad along a public highway, either at surface, or at an elevation, it is necessary for the company to obtain the consent and approval of the common council of the city, or of the township board, in a case of a township, and that consent is to be granted upon such terms and conditions as may be agreed upon between the authorities on one hand and the company upon the other. Under that statute the Fort Street Union Depot Company submitted to the common council of the city of Detroit its proposal to build this elevated railroad along River street, and the common council of this city took the matter under consideration, and they agreed upon an ordinance by which the city of Detroit and the Fort Street Union Depot Company fixed the terms and conditions by which this road was to be built along this street. I refer to that for this reason, gentlemen, that as far as the public interests in that street are concerned, it is committed to the care of the common council and to the care of the legislature of the State. The legis-
29 lature of the State has the right to authorize the construction of a railroad along a highway, subject, of course, to the con-

stitutional provisions that the abutting property-owners will be entitled to such damages as they may sustain on account of the railroad being put in the street. But, as far as the public interests are concerned, it can be released by legislature. The legislature authorizes a railroad company to go along a street whenever the local authorities, speaking for the people of their locality, the local authorities being thereby vested with the discretionary power to determine whether a railroad should be built in a public highway or not. Of course, it can be readily seen that the public might want to build a railroad in a public highway where it would not be proper and it would not be a suitable location, the interest of the city and the public being considered. We could imagine such a case, but it is not the case here. We shall show you by the testimony, and by your view of the premises down there, that this property has become a railroad and a manufacturing vicinity, that whole vicinity. The land about there for many blocks is used for that purpose. The property upon the south side of this street is already devoted exclusively to railroad purposes, a very large railroad business being carried on by the Michigan Central, for the distance of three-quarters of a mile, if not a mile. The property along River street years and years ago was regarded as valuable for residence purposes. Probably many of the jurors remember when there were residences up and down the river. Where Col. Larned resides at the present time, I believe, is a residence built by Gov. Porter upon the bluff where it commanded a very fine view of the river, and there were residences of very good quality further towards the city. But as the city has developed, as it has gone along in its progress from a very small place to a place of considerable population, there being something over two hundred thousand inhabitants here at the present time, residence property has been compelled in that vicinity to give way to business, and it has become, as I have already stated, a manufacturing and a railroad center. So that the company in their desire to come here is not invading a residence street, they are not invading a business street in the sense of a street upon which stores, retail and wholesale, are maintained.

It will be your duty, under the constitution and the law, to go and look at the property, to look at the vicinity, and to finally determine, after you have heard all the testimony in the case, and have ascertained all the facts and circumstances that go to a correct conclusion upon the subject, to reach your verdict upon that branch of the case.

If you find that this is a matter of public utility and a public use, such as justifies the taking of this right of way under the constitution of this State, it will be necessary for you to determine the damages that are sustained by the owners, or those interested in the property known as the Backus planing mill and box factory. We shall show you that the property itself is owned in fee by Absalom Backus, Jr.; that the property is in possession, under a long lease, of a corporation known as A. Backus, Jr., & Sons. The stockholders in that corporation consist of the old gentleman him-

self, Absalom Backus, Jr., and his two sons, Henry N. Backus and Newton D. Backus, and they are at present carrying on a planing mill and box factory upon this property.

As to the question of damages, we will show you on behalf
31 of the company, that the damages in this case will be very small indeed; that is, the actual damages that this property will sustain. In the first place, Mr. Backus' property is a manufacturing property, and the elements that are to be considered, and the facts that are to be considered, in determining the amount of damages which will be sustained are very few. We shall show you beyond any possible controversy, by the testimony, that there will be no increase in the fire risk. We shall show you that the way a railroad is operated at the present time, with the improved locomotives and fire-boxes, and appliances in regard to fire, is such that it is almost a physical impossibility for a fire to be set to that planing mill by the presence of an engine upon an elevated road in the street in front of the property. This superstructure, as I have said, will be fourteen feet in the clear. In front of the Backus planing mill it will be something more, so that the superstructure above that will be some five or six feet, so that the rails will be something like twenty-four or twenty-five feet above the street, and the smoke will be twelve or fifteen feet above that. We shall introduce the testimony of competent railroad men, who have had large experience upon that subject, men who have carried on the railroad business, have run engines and locomotives in the Saginaw valley, and in the vicinity of saw-mills and planing mills for years, and who say that as far as the fire risk is concerned there is no appreciable damage. As far as the obstruction of the light to the premises is concerned, we shall show you that the superstructure itself, as it will be described to you by the engineer, and as you can readily see from its dimensions, that it will not produce any effect upon the light in Mr. Backus' mill, or upon his premises. You will
32 understand that this structure is to be fourteen feet in the clear, and that the posts are to be twenty-five feet apart longitudinally along the curb, and that there is the entire width of the pavement, extending from curb to curb laterally, and all that will be left open. In addition to that, it will appear to you by the testimony that this whole superstructure is not solid, that it is not a superstructure that will have a roof overhead, over any portion of the street. On the contrary, in front of this property it will be so constructed as to leave a number of openings—either one or two openings—that will be about four feet wide. I think in front of a portion of the property are three tracks, and between each one of the tracks will be an opening four feet wide. The superstructure will be built in this way: The longitudinal girders, which are steel plates bolted together, will be under the railroad iron, and on top of those girders will be laid cross-ties. The width of those ties will be six or eight inches, and those ties will be nine feet long, and they will be held together longitudinally by what they call bond timber, that will run along the top of the ties upon each end with notches cut in the bottom of the bond timber, so that it fits down on the ties

and holds them in place there. Of course, the end of the ties will be open. There will be six or eight inches space between them, and between the ends of the ties and these three different tracks there will be an open space of four feet, so that on this street there will only be three tracks, nine feet each, or twenty-seven feet, occupied by this superstructure, and that will not be all solid. It will have an open space left in the roof of the structure in such a shape so that a large amount of light would go in onto the street below, so that the superstructure itself could not appreciably darken the premises or the building. There being no increase in
33 the fire risk, as we shall show you by the testimony of insurance men, and men who have had experience in operating railroads, there being no injury of the light, the only other things to be considered are the extent to which the use of the premises would be injured. This is a planing mill, and it is in a manufacturing vicinity. It is not hotel property, it is not residence property, and the effect the noise of passing trains would have upon the premises, or upon the property for manufacturing purposes, would be very slight indeed. There will be some little effect from smoke and small cinders, but, as I say, it is already in a manufacturing vicinity, the fire risk is not increased, and the disadvantage to the property because of the passage of these trains along there would have no appreciable effect in our judgment, as we shall be able, I think, to show by the testimony, upon the transaction of business in this planing mill, or upon the premises in question. These are the only things that go to show that this superstructure and the operation of the railroad upon it would have any effect upon the market value or the rental value of this adjoining property. On the contrary, gentlemen, we shall be able to show you by the testimony of the engineer, and by your own observation and judgment, that this railroad would be of very great use and very great benefit to this property. You will find that Mr. Backus has located his planing mill and box factory right alongside of the Michigan Central railroad; that he built it there long since the Michigan Central railroad was in operation, presumptively built it there for the purpose of obtaining railroad facilities and switch facilities for the transaction of business of his planing mill. But the Michigan Central may have been the only railroad connection that was de-
34 sirable years ago, but it is not the only railroad connection that is desirable now; and we shall show to you that it is perfectly practicable, in fact, it will be an advantage, to put a side track upon an elevation between this superstructure, along this line of lots, so as to furnish side-track facilities upon this elevation right alongside this property if need be, so that he can run cars in upon his property, so that he can load the products of his mill there, if he desired to. In that way his railroad facilities there for this business, or some other business that eventually will be carried on there, will be very greatly facilitated by the presence of this railroad in that street and in that locality. At the first blush, any one might suppose that a side track at an elevation would be undesirable, but it would have this advantage, that the street would be open below,

so that traffic could go right along under the superstructure, and as far as loading or unloading upon an elevated side track, it depends entirely upon how you arrange your building. It is just as easy to load on one floor as it is upon another, and in fact, it will appear, when you come to go through Mr. Backus' mill, that it would be wholly a matter of indifference on which floor he did load, as he takes his lumber by machinery to the top story, and distributes it on the different floors, and can load from one place as well as from another, and as a matter of fact, does load out of the second story a good share of his products. So that when you come to look this property all over, finding out what it is worth, finding out the use to which it can be put and has been put, and we will show to you the value of the property, we will show that the property is not worth to exceed one hundred or one hundred and fifty dollars a front foot upon River street, and we shall also show you what his planing
35 mill and buildings and machinery there are worth, so that all the conditions that are necessary for a correct conclusion will be laid before you, and in addition to that, as I have already stated, you will have an opportunity to go through and look all over the property. The theory of the constitution and the law explained by the Supreme Court, is that where a jury takes a view of the premises, they are to go upon their own judgment quite as much as they are to act upon the judgment of the witnesses who may be called before them. Being men summoned from the vicinity, and more or less familiar with real-estate values, more or less familiar with business, more or less familiar with what can be done with property, it is to be supposed that your judgment will be quite as good in most instances as that of any witness who might be offered before you upon the subject. At any rate, we will give you the testimony, and you will have this view of the property, and it will be necessary for you to determine, in the first place, whether there is any public necessity for taking this right of way along this street, and in addition to that, if you find it is necessary, you will determine the damages to be paid to the respondents and owners of this particular abutting property.

As I say, this is one of the last of the cases. As soon as this is disposed of, the work at that point can be proceeded with. They have nearly reached it at the present time, and we shall go along as rapidly as possible, and submit it to you with the expectation and the hope that you will readily come to an agreement in regard to the question of necessity and the question of damages they will be entitled to. With these remarks I shall proceed to put in the testimony before you.

Mr. DICKINSON: It is of the utmost importance, gentlemen
36 of the jury, in approaching the consideration of a case of this kind, that what we call a jury, impaneled under the constitution of this State, should thoroughly understand their peculiar duties. It has probably occurred to you, when Brother Baker has stated that the State railroad crossing board has approved the route, that the common council have permitted the use of the street, that the Michigan Central had submitted to condemnation and use

of the street, it has probably occurred to you that there must be some great reason here, after all these things have been done, why you should be summoned to pass upon the question of whether a proper route has been selected. That is your great duty, in the view of these respondents who are summoned into court, and in view of their counsel, there should be no question under the law of this State, and under the duty which is imposed upon you by the constitution of your State, to go into the question of damages at all. Backus & Sons, with their great plant, one of the largest of the kind in the United States, which has been the work of a lifetime on the part of Absalom Backus, Jr., the work of forty years, building it up and maintaining it, a great industry here in the city of Detroit, they ask not one penny from this company for coming to the union depot. They do not want a dollar of damages, remember that. When this jury shall have done what we may concede to be its duty, which is reposed and imposed upon it as a distinct governmental agent, as much a governmental agent as the governor of the State, of as independent powers as the legislature of the State, when this jury shall have done its duty as a governmental agent, and sent this union depot company over the proper route to its union depot.

It is not true that the question of this route has been fairly
37 tried. The union depot, on the corner of Third and Fort streets, is a matter that all citizens want, Backus in common with all others. It is conceded that the union depot, on the corner of Third and Fort streets, is a public convenience which should be established. There is not a word to be said in behalf of these respondents against the establishment of that depot. There is not a word to be said against that enterprise, not one. But this is to be said, that before they shall appropriate this street and our property, they shall satisfy a jury that it is the proper route; that in taking it, the greatest consideration and the proper consideration has been shown to the public, and proper consideration to the great enterprises and interests involved along the line of this street. Now, we do not beg this of you, but, under your oaths, you have got to pass upon the great question of whether this is the proper route, considering the interests involved, the interests of the company and rights of the public, as well as the interests of Backus, who believes, and the testimony, I think, will show, that he has fair grounds for his belief, that the running of three great tracks, over which will run four great trunk lines of road, by his business, within nine feet of a part of his structure, and within forty feet of the balance of his structure, will utterly ruin his great business.

Now, let us see. Under the constitution of the State, prior to 1850, the legislature of the State of Michigan authorized a railroad company to take private property. Under the constitution of 1850 that worked so poorly, because railroad companies could influence legislatures to the injury of the people at large, to the injury of private property, the legislatures could confer the right to take
38 private property, or take a street in which the abutting owner has private property, it was subject to so great an abuse under

the constitution of the State of Michigan prior to 1850, because a lobby could go there and get almost anything through the legislature, it was subject to so great an abuse when the right was conferred upon the common council to give the use of the street and the right of property in streets, that there was inserted in the last constitution adopted, in correction of this abuse, in correction of an abuse that had reached a state where the people could not endure it, this coming upon them of private interests, railroad corporations, because after all they are private corporations, nothing public except the right to take a man's private property if he stands in the way of it—so great was the abuse of the influence brought to bear upon bodies that were sent to Lansing to take property in the interests of private investments, like this, that there was inserted, by the unanimous vote of the constitutional convention, and adopted by the people of this State, this provision, that no railroad should proceed across a street, or along a street, or across private property of any citizen, even if the legislature of the State by an act signed by the governor of the State should authorize it, even if the common council should authorize it, should not proceed and touch that private interest until a jury of twelve freeholders of the vicinity, neighbors of the man whose property interests were invaded, citizens of the State where public interests were taxed, should say that that route was absolutely necessary. So that, gentlemen, you are by the constitution of your State, under which governors are created, under which legislators are created, under which councils are created, under which all governmental agents are appointed, by the constitution of your State, which has
39 for its first duty, its first purpose, the conservation of private property, the protection of private interests, the private liberty and the right to hold property against your neighbor, against any combination of capital, over and above governors, over and above legislators, over and above railroad boards, appointed by the legislature and the governor of the State, over and above common councils as the chief governmental agent, from whom there is no appeal over and above the court, you have no judge to direct you; the judge cannot direct you as to your duty, he cannot speak to you, except as you ask him for advice, and then you are not bound by it. You are sitting upon this question, and when it comes to the question of the disposition of the private rights of citizens, you are set over and above courts and governors and legislatures and common councils, and all other constituted authority, and before a route can be taken you must say, even after the engineers have laid out the route, even after common councils have authorized the route, even after legislatures have authorized the route, even after crossing boards have authorized the route, it is all subject, first, last and always, to the decision that you shall give, whether this route is the one which is necessary to be taken, as compared with other route, as the route by which the railroad entrance to the union depot must be taken, as a necessary one, and as the route which will do the least injury to your fellow-citizens. This is your duty. And why it should be said here, in view of the constitution and of the act

of the legislature—the legislature did not constitute you. You do not owe your existence here to a legislature. You do not owe your existence to having been drawn from a list made by a jury commission. You do not come forth out of the jury commissioners' box. You are not created by the legislature of the State.

You owe your existence to the fundamental law, the constitution of the State, not by legislators, but by the people, the source of sovereign power. You are taken directly from the hands of the people, by that fundamental instrument, the organic law by which we are a State. By that you hold your office. I appreciate it, gentlemen, appreciate it, and the reason for it, because legislators could not be trusted to do their duty, because common councils could not be trusted to do their duty, because railroad commissioners could not be trusted to do their duty, you, coming fresh from the body of the people, who adopted your constitution, are chosen to do your own duty, under your oaths to take the responsibility, and from your decision there is no appeal.

I have thus endeavored to present to you, with such poor language as I can command, the dignity of the place which you occupy, and to present to you the responsibility and show you that the adoption of a route by a railroad company, the selection of a route by a combination with the Michigan Central, and its approval by the Michigan Central, the selection of a route by the constituted authorities of the State, can cut no figure here, because as they cross here is the first place, as they cross from the old union depot grounds, the first place they enter by the route they selected, as they enter upon it, as they propose to enter upon it, the first place is the Backus property. Hundreds of jurors he has said have passed upon this question. Jurors have passed upon this question of the condemnation of property for the union depot, it is true, but let me say because the union depot has been established on the corner of Third and Fort streets, it is no reason why this route should be adopted. Let me illustrate by as strong an illustration as I can take. Because the union depot is established on the corner of Fort and Third streets, and because the State crossing board and the common council and the legislature should authorize an approach to that union depot down Woodward avenue and down Fort street, have you got to vote for it? That is as strong an illustration as I can take. It does not follow because a union depot is established, that you have got, you, the constituted authorities of the State, the representatives of the people of the State, under the constitution, that you must bow to it and say, Mr. Union Depot, you have got your union depot, you may select your route down this populous street, Woodward avenue, and we have got to pass it. You are called upon to say whether they have adopted the proper route, with due consideration to abutting owners. Who would approve it for one moment? If they had already approved it, if they got a common council to approve it, if the engineer had laid it out, if the crossing board had laid it out, if the legislature had approved it, is the city to permit the railroad company to put their tracks down Woodward avenue? Not much. And they can-

not build it until they have passed this tribunal of twelve men, and they cannot build this road up River street and take possession of this street, and take our property in River street, until they have passed this tribunal of twelve. The engineer lays out his route on paper, subject to the decision of this jury of twelve. The crossing board adopts the plan of the engineer, and say that, as far as the State is concerned, we approve the structure as you have placed it, but you have got to submit the route to the jury of twelve. The common council approve of the plan, provided that they get
42 the approval of this jury of twelve. They cannot enter River street, and this is the entrance, this is the channel through which they seek to pass. This Backus place is where they enter River street. They know that with the common council proceedings and the legislation and the action of the crossing board nothing can be done as to the structure which they propose to build; everything is upon the express condition always that they satisfy you that this route is necessary in their approach to the union depot. Suppose they had established the route down Woodward avenue, and they had come before you and said that it was the action of the union depot company in laying out their route to give this the preference, and that they had got the approval of the authorities, and attempted to urge upon you that they had done all this, and should say to you: Do not turn us back on another route, whereas they should have laid out their route and submit it. They should have said: This is the route we would like; this is the route for which we have obtained permission of the State authorities. They should call the jury and submit this route, and if it does not satisfy the sole tribunal that can pass upon this route, these twelve men, we will take the other.

I do not propose to read you a long decision, but I do propose to do my duty in this matter. My duty as counsel, and it is a sworn duty like yours, is to show you what I can by extracts from the opinions of such judges as Campbell, whom you all respect and revere, and Cooley, a man of national and world-wide reputation, that this railroad cannot select its route, and it does not bind any one if it marks on paper what route it wants to take, and that your duty is to cast aside every wish or every interest of those in-
43 terested in the matter, and find that it is necessary to take this route, that it will do the least harm to take this route, and that none can be taken that will do less.

What is this power of eminent domain? This is not a public corporation. The right of eminent domain originated, as you all know,—you know if there is anything sacred to a man, it is the right to hold his home and his property. No one can touch it. It is what he pays taxes for, to be protected, first in his life, second in his liberty, and third, in his property. That is why you organize State governments, why you organize county governments, why you organize city governments, for the simple protection of life, liberty and property. Private property cannot be taken, except for public use. For public use they may come and take your property if the jury find it is necessary—for a court-house, a school-

house, or a public street. As railroads were built they were not considered public agents. They are private corporations, but as a necessity, when railroads came to be built, if they came to a man's farm and it was necessary to lay the road out in a direct line, and he said I will not sell to you, under the constitution there was handed over to these private corporations to condemn a man's land when he would not sell it at any price, handed over the same right of eminent domain that is exercised for condemning land for a public street, and that is all there is of it. At the same time, bear in mind, it is provided, as a guard, a check against private enterprises of this kind, that they shall not take it nor use it except on a vote of twelve freeholders and neighbors of the parties in interest.

Let me refer for a moment, not for long reading but for brief extracts upon the law, as you will have no court to charge you, and as you are the judges of the law and the facts, so that no one can influence this jury of twelve freeholders.

44 Judge Campbell says, in the case of People *vs.* Salem, 20 Mich., 496:

"Unless railroad companies can be regarded as in some way representing the public, then they cannot stand before the law on any other footing than private citizens. So far as their business is concerned, they furnish on a large scale and in a more perfect way the same benefits which are extended to the population by other carriers, by land or by water, and benefits quite similar in principle to those conferred by enterprising hotel-keepers, millers and others who find it to their benefit to entertain all applicants impartially. They benefit the municipal corporation or the State in their corporate capacities in no way whatever beyond paying their taxes, for which they are presumed in law to get a full equivalent. They benefit the neighborhood, large or small, in the same way that all other business and enterprise aid it, by increasing population and stimulating commerce and industry. They do on a large scale what every industrious settler does on a small scale, and they do it just as every private person is supposed to conduct his affairs, primarily for his own benefit, and incidentally for any advantages that may follow or attend their private success to the benefit of others. There is nothing in the nature of their business which distinguishes them from any other persons, so as to make it in any legal sense a public undertaking. It is said, however, that by the exercise of the right of eminent domain they are affected with a public character, and become invested with public functions. If the exercise of this power is never valid, except on behalf of some public agency, then it might follow that it could not be used on behalf of these companies. It is reasoning in the wrong direction to determine the character of the

45 beneficiary from the fact of its use. But it has been customary from time immemorial to allow lands to be taken for turnpikes and canals in the hands of private corporations, because the land could not otherwise, as a general thing, be obtained for the whole line. The fact that the work was one of general utility, and that no work of that description was possible without the

exercise of this power, has created precedents which were readily applied to railroads. They were always found on necessity, and were the extreme application of a power which in a much smaller degree has frequently compelled private owners of property to submit to some obligations whereby their neighbors might be enabled the more securely and conveniently to use theirs. In some cities of England, by ancient custom, there were regulations concerning party walls, drains and the like, which rested on similar principles, and in some cases, modern legislation has followed the same rule. The courts, when railroads were first invented, recognizing the necessity and endeavoring to find some plausible basis for it, carelessly said that the railroads must be regarded as agents of the State, and in this apparently simple way solved the difficulty. But it was a mere figure of speech and made them no more State agents than the decision that many things are lawful because devised by the Government as necessary to carry out some governmental power makes every one who avails himself of the privileges of the law a Government agent. Such a theory would make agents of preemptioners and national bankers and ocean captains, all of whom receive certain powers and privileges in order to further the policy of the United States."

As to the duty of the jury, I refer also to the opinion of Judge Campbell, and I call your marked attention to this in con-
46 nection with this opening by Brother Baker, that because the railroad has located the route you have got to give it. I read from one of the last decisions of that distinguished judge, who for so many years defended the rights of the people, asserted and made luminous the fundamental law bearing upon the rights of liberty and life and property from that bench.

I refer to the case of The Grand Rapids & Indiana Railroad Company *vs.* Weiden, 70 Mich., 393:

"It seems to be imagined that railroad companies are to be presumed entitled to proceed to condemn lands at their own option, and that nothing more than a formal effort is required to give them the right to do so. But under our constitution this is not a correct view of the subject. Under the old constitution, when the legislature chartered a railroad the right to build it became fixed, and could not be questioned, and, consequently, land-owners were obliged to acquiesce. But, under our present constitution, there is never any presumption that a railroad is necessary, or that any particular land ought to be given up to its uses. Every land-owner, therefore, has a perfect right to object to giving up his land, and is not confined to objections depending upon price or value. He may object to the lack of necessity for the road at all, or for its location, or extension over his land, at any price or on any conditions. In law, his use is presumptively as important as that of a railway company, and it must devolve on any such company to establish affirmatively that all is needful to make out a clear case of necessity. And a road already established has no better claim than any other to extend or change its lines. Although railroads are allowed by

public policy to condemn land, because they cannot exist
47 otherwise, nevertheless the enterprise is, under our laws, which prohibit public ownership of railways, one of private interest and emolument, and must show its claims to legal assistance."

In the case of Ryerson *vs.* Brown, 35 Mich., p. 341, Judge Cooley, concurred in by Judge Campbell, says:

"If in individual instances (in the fixing of the route) obstacles are encountered in the unreasonable objections of individual landowners, the rare instance cannot justify a general law which would be likely to breed as many grievances as it would cure, for legislation of this sort is always grievous when no great necessity justifies it; and it is always an invasion of liberty and of right when one is compelled to part with his possessions on grounds which are only colorable. A person may be very unreasonable in insisting on retaining his lands (we shall show you that Backus is not unreasonable, but that he is quite reasonable), but half the value of free institutions consists in the fact that they protect every man in doing what he shall choose, without the liability to be called to account for his reasons or motives, so long as he is doing only that which he has a right to do."

I am careful thus to give you just the highest authorities upon these questions, especially as there is danger of confusing the rights of citizens. You can see that this great fundamental right of property is here involved, and that is why I take the time to impress your minds with the high duty under the law. I do not merely make my own statement of it, but in connection with my assertion of it, I give you the highest authority in the land.

Upon the question of the necessity in taking land for public uses, in the case of Powers' appeal, 29 Mich., p. 509, Judge Campbell uses this language:

48 "The determination of this necessity has sometimes been allowed to be made by legislative or public agencies. But our constitution has taken away this power from all bodies except those indicated, and in cases like the present, the fact of necessity must be found by the jury. The common council (that was a street-opening case) instead of acting judicially or finally on the policy of opening a street over private property, which they cannot obtain without adverse proceedings, become no more than petitioners, and the decision rests with the jury and not with the city. (And not with the common council.) Where the constitution is so imperative, no legislation can be maintained which does not plainly require that question to be left to the jury. Their finding, without such a requirement, is not within their oaths, and is extra-judicial. The oath is the measure and limit of their legal action. And it is impossible to say that property has been taken by due process of law unless the statutes provide expressly for every constitutional safeguard framed to govern such action. Cases have frequently arisen where the verdicts of juries have shown that they have had no such rule before them. There is very serious doubt whether the repeated provisions leaving it to the jury to determine the necessity for using

the property intended to be taken for such improvement, do not most naturally convey the idea that they are not to pass upon the necessity of the improvement itself. Their oath is not specific, but merely swears them generally to discharge the duties imposed upon them by this title, and is not in any way calculated to help them in ascertaining their duties."

And then he passes upon the question of the legislature as to street openings not requiring the necessity of passing with authority on that route for the public improvement, and it was invalid because it was not so decided.

49 Let us see what Judge Cooley, concurred in by Judge Campbell, says in the case of Grand Rapids *vs.* Grand Rapids & Indiana Railroad Company, 58 Mich., 645–'6:

"The claim is raised that the jury were not required to find the necessity for the opening of the street, but only the necessity for taking the land in question for the street declared necessary by the council. This is a practical difficulty which has caused much trouble. It has often happened that juries have been led or allowed to evade their own responsibility in passing on the necessity for the work itself. That is, as we have frequently pointed out, their most essential duties, because, if it is taken for granted the road is to be laid out (and Mr. Baker says it is to be, because the engineer has laid it out on paper and the common council has approved it, and the board of crossing commissioners have approved it), the position of the particular parcels on the line is fixed when the road is fixed. The object of the constitution is to prevent all needless appropriations of private property, which are too often made for ends in which the public are in no strait, and for private fancy or emolument rather than the general welfare."

I have only given you, gentlemen of the jury, extracts from the leading cases, and I now give you a statement as to the strict rule to be applied in these cases, from Judge Cooley, at present one of the Interstate Commerce Commissioners, and whose fame as a constitutional writer and as a writer upon the rights of the people is as wide as the Anglo-Saxon speech; Cooley is read in the highest courts of England, wherever the English language is spoken, as high an authority as was ever penned upon the rights of the

50 people at large. I read from his book on Constitutional Limitations, which is the standard authority upon fundamental rights, 4th edition, marginal paging 530, upon the power under this right of eminent domain to take private property:

"The powers granted by such statutes are not to be enlarged by intendment, especially where they are being exercised by a corporation by way of appropriation of land for its corporate purposes. There is no rule more familiar or better settled than this, 'that grants of corporate power being in derogation of common right are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the State itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property.' It has accordingly been held, that

where a railroad company was authorized by law to enter upon any land to survey, lay down and construct its road, to locate and construct branch roads, etc., to appropriate land for necessary side tracks, and a right of way over adjacent lands sufficient to enable such company to construct and repair its road, and the company had located and was engaged in the construction of its main road along the north side of a town, it was not authorized under this grant of power to appropriate a temporary right of way for a term of years along the south side of the town, to be used as a substitute for the main track whilst the latter was in process of construction."

I read this, and have read from these decisions, to show you how sacredly the rights of the people are held in this matter as against the corporations to whom has been delegated this great power of eminent domain, and to show how strictly this power must be construed.

51 Now, for its application, gentlemen of the jury. I say to you that there is no necessity whatever for this elevated structure to come up River street. I say to you that I shall show you beyond a shadow of a doubt, by the statutes of the State, a provision in the statutes of the State, and in an act passed at the time of this union depot legislation, providing that this union depot must confine its routes to approach its union depot along the line of railroad property already acquired within the city limits. Brother Baker says, "We have already had condemnations; we have got our route from the Michigan Central." The Michigan Central, of course, they have got 2,000 feet; they paid the Michigan Central $29,000 for using River street along the margin of their track, of their property. They condemn the right of way of the Michigan Central, and in the suit of the Michigan Central, before three commissioners, they let the commissioners find that it was necessary to come up River street. That is one of the precedents they establish. He says they have condemned most of the way up there; that is the Michigan Central crossing. They have not had any suits of any account except with the Union mills. They have not had any with the Peninsular Stove Company or with the other large companies there, but what they have condemned is to go along the line of property of the Michigan Central. They own to the middle of the street; a property-owner abutting on the street owns to the middle of the street, subject to the public easement. They say they have condemned all this, and you must give them this, although we are just entering here; this is the threshold, and the jury must pass upon the threshold; you must give us this entrance on the threshold because we have condemned the Michigan
52 Central. Of course, the Michigan Central did not want to give a lease of its ground, did it? Of course, it would permit the finding of necessity along River street, so that it would not find the necessity to use the Michigan Central ground. Is that going to be a precedent for this jury, that a railroad, owning 38 acres of ground in the city of Detroit, and the best business property in it, has preferred that the union depot, in approaching its own

property, should take one of the city streets, instead of taking Michigan Central ground. Of course, they would say so, if they got pay, $29,000, and have their ground intact.

Now, let us see, gentlemen of the jury. I tell you that this union depot company, if it does not make its agreements with the Michigan Central not to do it, and does not come into court with it, they can come upon the margin of the Michigan Central property on the south side of River street, and leave Backus' property untouched, without paying Backus a dollar. The Michigan Central do not want them to; they say, use River street and leave us alone. Why don't they condemn Michigan Central property instead of condemning our property in the street and imperiling our business? They say they won't do us any damage. We say they will. We say they will ruin our business. We say "You will ruin our business; if you think you will not, if you don't want to pay us, and we don't want a dollar of your money, this business that we have built up is worth more than all you can pay us—it is the business of this man's life, he has just settled it so that his boys can run it, and he can have some rest, after he has accumulated this property—if you don't want to pay us, and we don't want your money, go over there and condemn Michigan Central property, condemn your line along the Michigan Central ground 25 or 30
53 feet up River street, and don't pay us a dollar, leave us our street free." And I tell you, gentlemen, to say that you cannot condemn Michigan Central property is the merest sophistry. I will show you the statute which says you may take the property if it is not needed by the other road. But how shall the question of the need of the other road or company be passed upon? Precisely as these 12 men are passing upon this question. It goes before a jury of 12 for condemnation. The Michigan Central will say to the union depot company, "It is not necessary to take our route," just as we say it is not necessary to take this. They will say to the union depot company, "We need all our property." "Very well," says the union depot company, "you need all your property; we will try that question before a jury of 12 men in the city of Detroit, whether you need 38 acres of ground of the best business property, on River street, to carry on your business." It is of the most vast importance to Detroit that it should be understood that the Michigan Central has 38 acres of ground there, near the business center, valuable for manufacturing and all business purposes, on the river front, extending from Third to Twelfth-and-one-half street—9½ great squares of property, all the property between River street and the channel bank, and between Third and Twelfth-and-one-half street, are Michigan Central property. Below that is this great railroad holding forty acres: that makes 78 acres; here is the Grand Trunk and the Detroit & Milwaukee, with 36 acres, making 105 acres, right here in the city limits, mostly of our best and choicest and most valuable business property. Aye, more, and it has not paid and does not pay a dollar of taxes. Are you going to give them some more? In addition to giving them your best business prop-
54 erty, are you going to give up your public streets? Are you,

at the expense of other business enterprises, going to give these railroads your public streets, and drive out good business enterprises that have been established here by a lifetime of work? Weigh it carefully, gentlemen of the jury; consider how much property is occupied by the Grand Central depot in New York, and compare it with what is held here. How many trains do you think come in these three depots with 105 acres of ground, in the business centers? One hundred and five trains daily in and out—68 on the Michigan Central, the rest between the Wabash and the Michigan Central depot, including the trains that come in on the Flint & Pere Marquette, the Detroit, Lansing & Northern, and everything that comes into the depot, and everything that comes into the D. & M. and Lake Shore, and everything. Do you know what is occupied of the business property in New York for the great Grand Central, into which come 245 trains daily? It occupies but 6½ acres of this high-priced property. Do you know how much the great union depot of St. Louis, which accommodates all the great trunk lines of the country that go east and west, with 244 trains daily, occupies in the business centre? Ten acres. Council Bluffs, with the great number of trains coming there, in that great trading place, occupies 5½ acres. St. Paul, with a large area of new property, in a new town, occupies 11 acres, with all the railroads going to St. Paul. Indianapolis occupies less than 8 acres, with every train that goes to Indianapolis going to that depot. The passenger depot in Chicago occupies no more than 7 acres. Of course the railroad business takes more acreage, but not in the valuable business portions of the city. Why? Because they cannot afford in Chicago, where they are taxed, and in Missouri, where they are taxed, and in any other such place where they are taxed, in Indianapolis, where they are taxed, in New York, where they are taxed, they cannot afford to do their freight business on the choicest business property. Choice business property, when it is taxed on its valuation, must give way, and the railroads must retire where they can get cheaper property for freight business. In every other city in the land the railroads are compelled to do that business in the suburbs, where it can just as well be done. There is no city in the land, nor in the world, which permits its freight business to be done in its business or near its business center, upon valuable real estate, except Detroit. It does its passenger business in business centers, and it holds an area on which it can do all its passenger business with great convenience, and does its freight business where it belongs, except the mere package business, which can be done in the business centers conveniently without much space. There is no doubt about this, and you can go down to the Michigan Central road and see how they do their freight business in the central part of the city. You must remember that the Detroit, Lansing & Northern and the Flint & Pere Marquette roads are going out of the Michigan Central, with its 38 acres, and are going to use the union depot with its 5 acres. You will find that on the Michigan Central they are storing all their freight cars on this 38 acres, in the business portion of the city, and

we are permitting it, and exempting it from taxation. They say they use it all. They may use it for freight, to store freight cars, or whatever you please; but they cannot stop the union depot from approaching their union depot over the Michigan Central road, except by showing a jury of twelve men, when the union depot
56 seeks to acquire that route up the margin of its road, south of the River road, that it is necessary; they will say that they need it; they will say they need 38 acres, when they cannot show that any road in the world occupies in any city of the world, to exceed 12 acres for ten times the business. You see, there is something in the position that his learned friend, Mr. Dickinson, takes as to the use of this River road, when there is abundance of railroad property to confine the railroads to. How are you going to get rid of this holding of the Michigan Central, if it is too much? You cannot appropriate it, you cannot tax it. An old legislature gave them a special charter, exempting them from taxation. The policy of Chicago, which is the best illustration of great prosperity, founded upon a right basis, taxed every manufacturer that came into Chicago for every dollar of property that he bought there for the prosperity of Chicago. Illinois allowed Chicago to tax every dollar of railroad property that entered Chicago for the general good of Chicago. Every man who bought a dollar's worth of real estate in Chicago contributed his tax for the general prosperity of Chicago. Every manufacturer of boots and shoes, clothing or tallow, or whatever investment went into Chicago, pays its tax for the general prosperity of Chicago. Every railroad there pays its tax for the general prosperity of Chicago. Detroit, on the contrary, voted its great area on the river front to railroads, and exempted them from taxation forever. How are you going to get rid of it? Why, here is your statute which provided, the legislature having taken thought at last, that if any railroad company shall refuse to give terminal facilities to another, that other may take it under proceedings laid down in the statute. If any railroad company does not need any part of its property, it may be taken for the approach of any union
57 depot railroad company, or any other railroad that desires to enter. Now, we will say that you, gentlemen, not in this case, but we will say you were a jury called in a case of the union depot company against the Michigan Central, and the Michigan Central say, "I cannot let you go up this margin of mine up the River road; I cannot let you build your elevated road up this margin beyond 30 or 40 feet there." Why? "Because I need it." The union depot company replies, "We will go to a jury upon the question of whether you need 38 acres of land, when you bought nearly half of Grosse Isle down here just to keep your money invested, when you bought land all over here around the suburbs; we will just go to a jury and see if you need 38 acres of that land on the river front; we will go to a jury and show that jury that no other railroad on earth has such a holding of property near a business center, and does not need such a holding of property, and never has to exceed 10 acres; and how long do you think it would take us, on a presentation of facts, to get a verdict of the jury that the

Michigan Central shall play dog in the manger no more, but shall give this land at a fair price to the union depot company? We want no more combinations of railroads to keep the property they have and to take more. We will not surrender our city streets." I stand here to protest, in behalf of Backus, and in behalf of Detroit, that no more public property shall be given to railroads so long as they have ten times the area that they need. Confine them to the area they have got. Nay, more. I stand to protest that no property-owner, no enterprise, be injured. No man shall be put out of court and say that his business is ruined because Detroit, with her 235,000 inhabitants, has given more of her property and of
58 the public streets that runs by these manufacturers, to railroads, which already have ten times the area that railroads in other cities in the land have.

Now, I ask you to discharge your minds of any condemnation by other juries or other commissioners of the Michigan Central property, and any finding of necessity, on the part of anybody else, common council, or whoever it may be, juries or whatever it may be, when here is the crucial test: Will you at the threshold—and Backus stands at the threshold—find for the city as well as for his parcel? Here at the threshold is the test you must make; here is where you sought it at the other trial; here at the threshold we tell you to stop and to go to this Michigan Central property. You see what they are going to build by us there. They are going to build that roadway with three tracks. They say it will be light. How light will they be with these trains passing over, with the ties that they put across there, 8 x 9, 6 inches in the spaces, with three tracks, thundering by there, not with light engines like the elevated roads in New York, of 700 or 800 tons, but of 2,000 tons, driving their heavy passenger trains; and they are going to run a freight depot up here on 2½ acres devoted to a freight depot, on the new union depot grounds at the corner of Third and Fort streets. They are not only going to trundle with one great trunk line on that trestle-work, covering the whole body of the road, but they have three tracks there on which will go the Wabash, the Canadian Pacific, the Flint & Pere Marquette and the Detroit, Lansing & Northern, with all their business, three tracks, with four roads, day in and day out, Sundays included, over this structure, covering the street, within nine feet of Backus' dust-room, in front of the building that he has arranged to carry on his business, a building that is arranged as to the Michigan Cen-
59 tral tracks, with fireproof sides on that side, arranged to do business by the Michigan Central road, but not contemplated in any way in any of its internal arrangements to do business with reference to an elevated road running by its second-story window, running by with a track level with the second-story window, and with the smoke of the engine as much higher as the smokestack of the engine is near to the top, sweeping down with cinders and smoke, coming in at the windows, endangering his dust-room from fire, cinders, smoke, and so on. This goes to the third-story window here, and they may say it will be a great benefit to us to switch in

at the third story. How is he going to give us a switch? They have three tracks; they have got to have room for the three places. Will they show us how we can turn a switch within the space of Backus' front. It will have to have cars with elbows, to make a short turn. They have not the property beyond Backus; they have only the use of the street; they do not condemn property above or below Backus, so that they will have to find a place on his front to turn in and out. They will have to have cars with elbows, won't they, gentlemen of the jury? We shall urge upon you with confidence, that your duty will not be done to Detroit or to your fellow-citizens, the duty which you are expected to perform under the constitution of your State, as explained and fully illustrated by the highest court of your State, if you permit this route to come up there, when we shall show you, by such men as Mr. John B. Mulliken, that the best route for the union depot company itself is up this Michigan Central property.

It will appear to you in this connection that the stove works and the Union mills and all those manufacturers up there have
60 side tracks that connect with the Michigan Central and other roads running up that side of the street and up close to the buildings, and they take upon such side tracks, engines with smoke-stacks of the tallest kind and cars of the largest description, and the heaviest freight cars, and load them with stoves or wheat or flour, or whatever they have to ship, and run them out on the side track. Now, this elevated road is run over that, and they will show that this elevated structure is to be built so high, 14 feet in the clear and 18 feet in some places, that it will not in any way obstruct that broad-gauge side track that runs in front of those manufacturers. If it will not obstruct that for large manufacturers, if they do so construct it that it will not, how much does it interfere with the track of the Michigan Central then? If they can build their elevated structure so as not to interfere with the side track, which does an immense amount of business in the shipment of stoves and flour and other goods along River street, cannot they build it over on the Michigan Central side so that it will not interfere with the business of the Michigan Central on any track that the Michigan Central went to use there. When you come to look at it you will find along the margin of the Michigan Central there some of the oldest tumble-down buildings that you ever set your eyes on, and it would be a blessing to the Michigan Central to have this structure put up there.

In addition to giving the Michigan Central $29,000 for their interest in the street, it is agreed that the Michigan Central shall give—they don't get anything, they give 25 feet of their entire margin for the building of a viaduct for teams, which shall run along the side of the Michigan Central property. For instance, there is the elevated structure (illustrating with law books) running
61 along River street. Here is the Michigan Central property and here is the Backus property. On this side, on the Michigan Central side of the structure, they have arranged to build along the Michigan Central a viaduct for teams, so that teams can reach the Michigan Central property all right without going under the

superstructure of the elevated road. In other words, the Michigan Central will have a structure for teams along this whole margin, on which their teams can enter. The Michigan Central pay half and these people pay half. But the Michigan Central does not pay a dollar; that is no part of the combination.

Mr. BAKER: What is that?

Mr. DICKINSON: The viaduct for teams; no part of the money was paid for that. They build this from the curb, it is about 25 feet of the Michigan Central ground; afterwards they have clear to the river. Here is the structure along River street, here is the Backus property, and the property of these manufacturers, and over here is a viaduct running alongside the elevated road, and you can enter it from Twelfth street down here where the elevated road enters River street, you can enter with teams on the viaduct and go alongside of the whole Michigan Central property in front of Backus and for a long way above Backus. It is a part of this improvement, and will have to be shown to you as a part of this structure. The Michigan Central of course can conduct its business on the street, but what will we do with our immense business, especially with our immense local freight; we have this entrance upon River street; we have an immense local trade, and we sell not merely boxes, but we sell to this local trade, for teams to carry away, and for which we bring the raw material to the extent of 20,000,000
62 a year, which we work up in that mill; we bring our raw material along this street which is to be covered, we sell there at our front door and deliver, aside from our shipments abroad by the side tracks given us; we want no more side tracks from the union depot company or any one else; we have all the capacity we want, of side tracks; we have adjusted our mills as we want them, but we have a large local custom in which we sell not merely boxes, but flooring, ceiling, and wainscoting of the finest quality, both of hard and soft wood, siding and beveled woods, German woods and lath, moldings, basings and casings and house finishings, matching, deckings for ships, car sidings, roof lining, and material for boxes, slats and brush backs, stocks for shingles, screen doors and windows, all kinds of panel stock, pattern and finishing lumber, and of all thicknesses and widths, box chutes, water tanks, dressed backing, sign boards, etc., in all kinds of woods as desired; and we have the largest assortment, probably, of fine material, of the most expert quality, and the largest number of patented articles for the making of this fine work of any place in the Northwest, and we have been a lifetime building it up. Now to say that the New York elevated road bears any comparison to this is to say what strikes any man who has been in New York as a downright absurdity; but we shall show you that even in New York, with that light structure and a little box engine, carrying light cars and burning hard coal, the streets have been ruined for the purposes for which they have been used, in all clean businesses and for residential purposes; rents have been cut down from one-half to a quarter everywhere in New York where these elevated roads come, and business in which there

is danger from fire cannot be carried on; it is the story in
63 New York, even in streets wider than this, that the elevated road has been practically a ruin to real-estate holdings, and the railroad company has been held to account for this obstruction and injury from smoke, cinders, noise and fire.

I think, gentlemen of the jury, that if I have impressed you at all with the distinction between the ordinary jury duties and your high functions as a distinct tribunal under the constitution of your State, I have not wasted my time.

Documentary Proof.

Mr. BAKER: I will put in some record evidence. I first offer in evidence the articles of association of the Fort Street Union Depot Company. They were filed in the office of the secretary of state in Lansing on the 24th day of August, 1889. The capital stock of the company is placed at $1,000,000, and the corporation is organized under the union depot act for the purpose of acquiring the necessary station grounds and constructing and maintaining railway, freight and passenger depots in the city of Detroit, in the county of Wayne, in this State, with the necessary railroad tracks and other conditions; to make suitable and proper connections with all railroads terminating in or passing through said city; to make desired access to such depots, and also all necessary buildings for the convenience and accommodation of all business usually appertaining to such depots. The first of board of directors are named as of Ossian D. Ashley, Randall G. Butler, a resident of Detroit; William W. Crapo, George Capell, and William L. Webber, a resident of East Saginaw, and the articles locate the union depot grounds upon the two blocks and a half of land at the corner
64 of Third street, and extending down to Sixth street. The incorporators are W. C. Van Horn, of Montreal, in the province of Quebec (I may state here that he is the president of the Canadian Pacific railroad, an American railroad man with great experience in operating railroads, and by reason of his ability he was elevated to the presidency of that corporation, but he worked his way up on western roads in this country); Mr. O. D. Ashley, who is president of the Wabash road, and who lives in New York; Mr. Edmund R. Ostler, of Toronto, also connected with the Canadian Pacific; William W. Crapo, an ex-Congressman, lives in New Bedford, Mass. (he is a nephew of H. H. Crapo, who was formerly governor of this State, and he is the president of the Flint & Pere Marquette railroad, that runs here from Saginaw and Ludington); R. G. Butler, Detroit, Mich., is a stockholder, and he is the local manager, passenger agent of the Wabash road; Louis Pierce, of Portland, Me., and George Cappell, of New York, are connected with the Flint & Pere Marquette road; Alfred Stebbins and Frank H. Daman, both of Boston, Mass., are connected with the Detroit, Lansing & Northern (that road is owned by Boston people, the road that runs from here to Lansing and Grand Rapids); William L. Webber, of East Saginaw, is the land commissioner and attorney for the

Flint & Pere Marquette. Annexed to these articles is the necessary affidavit of Mr. Crapo and Mr. Cappell, two of the directors, that 50 per cent. of the stock has been subscribed and five per cent. has been paid in in cash at that time, and the company is properly organized under the law. Those articles were filed on the 24th of August, 1889.

Adjourned to Thursday, June 11, 2 p. m., to court-room No. 2.

65 JUNE 11, 1891—2 o'clock p. m.

Mr. BAKER: I offer in evidence the map and survey of the Fort Street Union Depot Company, certified by the board of directors on the 3d of October, 1889.

"We, the undersigned, majority of the board of directors of the Fort Street Union Depot Company, hereby certify that the company has surveyed its depot grounds and the route of its proposed track in the county of Wayne, and made a map and survey thereof, by which said route and depot grounds *is* designated, and have located the same according to such survey. We further certify that this map and survey is a true copy of the map and survey so made by said company. We hereby certify to the same for the purpose of having said map and survey with this certificate, filed in the office of the register of deeds of said county of Wayne, as required by law. Given under our hands and sealed with the seal of the said corporation on this 3d day of October, 1889.

WILLIAM W. CRAPO,
R. G. BUTLER,
O. G. ASHLEY,
Directors of the Fort Street Union Depot Company."

Upon this map and survey is the following indorsement: "State of Michigan. Approved this 8th day of November, A. D. 1889, pursuant to the provisions of sec. 7, art. 11, chapt. — of the Acts of 1883. John D. Rich, commissioner of railroads; G. R. Osmun, secretary of state; S. V. R. Trowbridge, attorney general, members controlling the board."

The route of this company commences at the east line of the Backus lumber yard, which would be on a line of Eighteenth
66 street, if Eighteenth street were extended across Woodbridge street, and then it runs on the red line of this map through the old depot grounds and along the south side of Woodbridge street on those grounds until they reach Twelfth street. It there crosses Twelfth street and goes into River street, proceeds along River street over the Michigan Central crossing, which is marked on this map, continuing along River street until it comes to the vicinity of Eighth street. It then angles off from the property to the corner of the alley on Sixth street and between Fort street and Congress street. It there reaches the depot grounds, which are marked on this map in blue, composing two blocks and a half, commencing at Third street, taking the block bounded by Third street and Fort street and Congress street, the next block west of it

and half of block next west of that. The depot grounds commence at Sixth street and extend through to Third street with these two blocks and a half of land.

Mr. BAKER: I now offer in evidence the ordinance agreed upon between the city and the company, which was approved by the mayor November 19, 1889. As it is important to have this ordinance in full before you, I will read it at this time. I read from the Revised Ordinances of 1890, page 413.

"Whereas, the Fort Street Union Depot Company is a corporation under the laws of this State for the construction of a union depot on the southwest corner of Third street and Fort street west, in this city, and said company, for the purpose of furnishing access to said union depot, propose to build an elevated railroad in, upon and along River street from the west line of the Thompson farm to the east line of lot No. 10 of the Labrosse farm; thence
67 northeasterly to a point south of Fort street, north of Congress street, and west of the west line of Seventh street, thence across Seventh, Sixth, Fifth and Fourth streets, between Fort and Congress streets; and

Whereas, the act under which said depot company is organized provides that the terms and conditions under which said elevated railroad company may be constructed in any street shall be agreed upon between the company and the common council; and

Whereas, the construction of said road may render it necessary to vacate Fourth, Fifth, Sixth or Seventh streets, between Fort and Congress streets, or to change the grade of Sixth or Seventh streets; therefore,

SECTION 1. It is ordained that the terms and the conditions for the construction of said railroad along River street shall be as follows:

That is to say, the superstructure of said elevated railroad shall be supported by iron posts not more than fifteen feet square, or in diameter; that said posts shall be set along the line of the curbing now in said highway, and outside of the roadway and curbing, so that the superstructure will stand the entire roadway or paved portion of said highway; said posts shall be not less than thirty feet apart along said curb-lines, except in crossing the Michigan Central railroad, where they shall be so placed as to be most convenient for both roads; said posts shall rest wholly upon solid foundations of masonry, wholly beneath the surface of the street, and such posts shall be of such length that at no point on the line of said road shall the space between the surface of said River street, or any street leading into said River street, and the superstructure be less than thirteen feet in the clear; and no posts shall be placed
68 within or between the curb-lines of any street leading into or intersecting said River street, or within the lines of sidewalk upon such intersecting streets.

In case said roadway shall be constructed across and over any of the said Fourth, Fifth, Sixth or Seventh streets, the superstructure shall be supported either by stone walls, erected on the street lines, or by iron posts, not more than fifteen inches in diameter, which shall be set so as to span the entire roadway of said streets, and

none of which shall be set between the curb-lines of either of said streets, or within the sidewalk lines thereon; the said posts shall rest upon solid foundations of masonry, wholly beneath the surface of the said streets; and at no point on either of said streets, provided the roadway shall be constructed over either of said streets, shall the space between the surface of the street and the superstructure be less than thirteen feet clear under said structure; and the superstructure shall consist of iron and steel girders and ties, having an aggregate hight*h* of five feet, substantially as shown by the cross-section thereof filed by said company with the city clerk, with a map showing the route of said railroad along said River street; and the location of the posts for the support of the superstructure, as proposed by said company, and which cross-section and map are made a part of this ordinance. Suitable iron pans or shields, to catch the ashes and refuse from locomotives, shall be constructed under the tracks of said elevated railroad, along and on River street, and over any other street above which said roadway shall be constructed. And the said company shall cause to be properly lighted, to the satisfaction of the board of public works, the said River street, under said superstructure, and any street crossing over which roadway may be constructed.

69 SEC. 2. The said company shall keep the posts and superstructure of said elevated railroad in good order and repair, and in constructing the same shall obstruct the streets for a reasonable time only.

SEC. 3. In case the common council should, in its discretion, at any time hereafter resolve and determine to vacate the said Fourth, Fifth, Sixth and Seventh streets, or either or any of them, and take the necessary steps and proceedings to vacate the said streets or either of them and the same or either of them should be vacated, the said Fort Street Union Depot Company shall pay all the costs and expenses of such proceedings, and shall pay all damages which may be awarded in said proceedings to any person or persons by reason of such vacation.

SEC. 4. In case the said roadway should be constructed by said company over the said Fourth, Fifth, Sixth or Seventh streets, or over either of said streets, at a height leaving a space less than thirteen feet in the clear between the present surface of such street and the superstructure of said roadway, and the common council should, in its discretion, at any time hereafter, resolve and determine to change the grade of either or any of said streets, and the same be changed, the said Fort Street Union Depot Company hereby agree to pay all the costs and expenses of such change and alteration of grade, and to pay all damages that may be awarded to any person or persons by reason of such change of grade, and fully to indemnify the city against any and all claims, award of judgments that may be so recovered against the city by reason of such change of grade

SEC. 5. The said company shall acquire, by purchase or condemnation, from the adjoining property-owners, the right to build said elevated railroad in said street, as required by the constitution and laws of this State.

70 SEC. 6. In consideration of the police and fire protection, and in lieu of local taxes, the said company shall, and it hereby agrees to pay to the city treasurer on or before the first day of July in each year, two and one-half per cent. of the gross earnings of said company, as determined by the State railroad commissioner and auditor general, in pursuance of sections 19, 20 and 21 of the union depot act of 1881, provided, that if by any change in the constitution or laws of this State the company should hereafter be required to pay local taxes, then the company is to be credited upon the percentage herein stipulated, with the amount of local taxes it may be required to pay.

SEC. 7. The said company shall, within thirty days after the passage of this ordinance, file a written acceptance of the terms and conditions with the city clerk, and shall procure from the owner or owners thereof a deed to the city of Detroit, dedicating to the public use as a street all that parcel of land in the city of Detroit, in the county of Wayne and State of Michigan, from River street to the channel bank of the Detroit river, included between the lines of Twelfth street extended, except the part thereof owned by the Michigan Central Railroad Company, and the same to be kept open and clear for public use, and shall cause said deed to be filed with the controller of the city, and said company shall execute and deliver to the city of Detroit a good and sufficient bond in the penal sum of five hundred thousand dollars, to be approved by the common council, conditioned for the faithful performance of the terms and the conditions of this ordinance, and to fully indemnify and save harmless the city of Detroit from any and all claims for damages,
71 for which the said city may be made or become liable to pay by reason of the construction, maintenance or operation of said railroad or superstructure. This ordinance shall take effect upon the filing of said acceptance, the delivery of said deed and the approval of said bond."

Mr. BAKER: I will next offer in evidence the order of the State railroad crossing board, which I have not here at present, and which may be hereafter read, which order they made when they indorsed their approval on the map and survey in making that order that directed the Fort Street Union Depot Company and the Michigan Central Railroad Company to build a viaduct for teams alongside of the elevated road, and in the order they reserve to the commissioner of railroads the right to approve the plans that might be adopted for the building of that crossing. In pursuance of that, the Fort Street Union Depot Company submitted a plan to the railroad commissioner for approval, and I now offer that plan in evidence, with this indorsement:

"Office of the commissioner of railroads, Lansing, Michigan, August 5, 1890. This plan of a proposed viaduct or overhead passageway for the use of teams and footmen at the crossing of the tracks of the Michigan Central railroad and River street, to be erected by the Fort Street Union Depot Company in pursuance of the order of the undersigned of April 3d, 1890, is hereby approved. John T. Rich, commissioner of railroads."

This plan relates to the crossing of the Michigan Central track. The track of the Fort Street Union — Company is represented by these two double lines that come across the corner of Twelfth street and go into River street, with their girders at this point, and it is
to run along River street until it goes over the Michigan
72 Central. Right alongside of this superstructure this plan provides for an approach made of masonry; by turning slightly to one side, there is an approach, an incline, on which you reach a bridge, on which you go over the Michigan Central Railroad crossing and come down on the other side into the street again, so that there will be an elevated railroad through there, and a passageway for teams and foot travelers right alongside of it. The foot travelers will go on a small elevated sidewalk, reaching it by going up a flight of stairs, go over on a little iron-work across the Michigan Central track, and go down on the other side. This will be more fully explained by the engineer.

CHARLES H. ELLIS, sworn for petitioner.

Examined by Mr. BAKER:

Q. What is your business?
A. Civil engineer.
Q. How long have you lived in Detroit?
A. Some fifteen years.
Q. Are you the engineer of the Fort Street Union Depot Company?
A. Yes, sir.
Q. Have been from the commencement of the enterprise?
A. Yes, sir.
Q. The grounds of that company occupy two blocks and a half, as I understand it, on the corner of Third street and Fourth street?
A. Yes, sir.
Q. About what is the area of those two blocks and a half?
73 A. About five acres.
Q. Will you state whether or not that is a suitable piece of land, with respect to size and location, for the erection of a union passenger-house in this city?
A. Yes, sir.
Q. Is it any more land than is needed for the depot grounds and for the depot?
A. No, sir.
Q. Are you familiar with the plans that have been adopted for the construction of a depot there, familiar enough to tell us where the depot will be located, and the size of it?
A. I am not fully acquainted with the architectural details. I know the ground plan of the building.
Q. How long is the depot to be on Third street?
A. The depot proper, the head house, the corner is at Third and Fort. The frontage on Third street extends from the corner of Third down across the alley, some 150 feet front there.
Q. About how long is it on Fort street?

A. On Fort street it extends something like 90 feet, full h-ight, with an L running the entire length of the block and across Fourth street and into the next block some 60 feet, making the entire frontage on Fort street some 420 feet.

Q. What else is to be constructed there besides this passenger-house?

A. I understand that two of the companies contemplate a local freight building on Congress street.

Q. On Congress street, corner of Third street?

A. Yes, sir.

Q. How do you reach these grounds from the old union depot grounds?

74 A. By connecting line of railroad, beginning on the old depot grounds near the west end.

Q. Where are those old depot grounds located, between what streets?

A. Between Twelfth street, extending nearly to Eighteenth-and-a-half street and from River street to the river.

Q. Were you the engineer of the old union depot company?

A. Yes, sir.

Q. That yard down there is occupied by the Wabash?

A. Yes, sir.

Q. Any other company there?

A. No other company in there, except the Canadian Pacific.

Q. The Canadian Pacific does some business there?

A. Yes, sir.

Q. What kind of a railroad is it proposed to have constructed between the old union depot grounds and these new grounds?

A. An elevated road.

Q. Were you consulted by the board of directors when this route was adopted by them?

A. Yes, sir.

Q. Did you prepare a survey of the route?

A. Yes, sir.

Q. Did you examine the property in that vicinity with a view of ascertaining the best and most feasible route?

A. Yes, sir.

Q. Will you go on and state why you adopted the route providing for an elevated structure along River street, what were the reasons that led you to adopt that plan?

A. This is the sketch covering the whole grounds.

75 Q. What I want you to do is to explain to the jury why you go along River street?

A. This sketch is a map of the section of the city embraced between Third street and Eighteenth street, and between Fort street and the Detroit river, showing at the east end of the map the location of the Fort Street Union Depot Company, the point where the contemplated passenger station is to be. The question was presented to me to examine the city, and a section between this corner and the old Wabash grounds, or the old union depot grounds, and to find a line for the connecting road between this passenger station

and those grounds, and I examined that section in reference to running through this property, through the street, in different ways in which it might be done.

Q. What property do you refer to?

A. I mean the property between River and Fort streets.

Q. Can you give any reason why you did not adopt the line through the property between River street and Fort street?

A. The elevation of Fort street is more or less higher than River street, nearly 22 feet at the corner of Third street, Fort street is nearly 22 feet above River street. River street is nearly level, not varying over two feet between here and the Michigan Central railroad. Fort street runs down gradually to Tenth or Eleventh streets, where it rises somewhat to go over the Michigan Central railroad. In running along the Fort Street frontage in this way, with this elevation, we would have to cross these streets at such an elevation that they would all have had to have been closed.

Q. This railroad track would have been so near the surface?

76 A. So near the surface that a grade crossing would have been almost impossible, aside from the fact of the danger.

Q. You mean to say that Fort street is nearly 22 feet higher at the corner of Third street than River street is at the Michigan Central depot grounds?

A. Yes, sir.

Q. Quite a hill there?

A. Yes, sir.

Q. It is higher the whole distance, not being quite so high at Tenth street?

A. Not quite so high at Tenth street. At Sixth street it is about 16 feet higher than River street.

Q. What is it at Seventh street?

A. It is about 14½ feet, and at Tenth street it is about 13 feet higher than River street.

Q. Will you state what is the general character of the property that is situated in this block that extends from Twelfth street through to Third street, and between River street and Fort street west?

A. Beginning at Twelfth street, about one-half of this block is occupied by an inferior class of buildings, and there are some old residences on the River Street frontage. The remainder of this block is occupied by A. Backus & Co.

Q. Is that a large planing mill and box factory?

A. Yes, sir. The next block is occupied by the Michigan Central railroad; the frontage on River street and on Fort street there are some old residences there. The next block is occupied almost entirely by the Peninsular Stove Co., Union Mills property and the Diamond Match Co., and the next block on the Fort Street front is occupied by residences, and on the River Street front this corner is occupied by the Hammond Beef Company, and the

77 remaining portion of the property was occupied by manufacturers, which property has been purchased.

Q. If any route was laid out along this block, it would be necessary to go through the Backus planing mill, and also through the property of the Peninsular Stove Co.?

A. Yes, sir; it would destroy those industries, as it did these two at that corner.

Q. You would destroy a large amount of valuable manufacturing property, and you would also close a number of streets?

A. Yes, sir, and we would not obtain as feasible a line for railroad operation. The profile of this line, as adopted, is shown by this sketch above, which represents the grade as beginning nearly opposite Fifteenth street, rising on the grade 50 feet to the mile to Twelfth street, and with a grade of 20 feet to the mile to the Michigan Central railroad, and with a continuous level grade to Seventh street, crossing all these streets a sufficient height for abundant clearance and with a slight descending grade.

Q. Will you tell us why you did not lay out a route through the property of the Michigan Central railroad?

A. I was advised by legal counsel that we had no legal right to locate there. A parallel route to this, either on the Michigan Central property or on the immediate front of River street, would have presented just the same profile. It would have taken these industries on that side.

Q. The only reason for not surveying the route through the Michigan Central property was a legal obstacle?

A. Yes, sir.

Mr. CHAREST: If I understood you well, you went and surveyed that land after receiving instructions from the company to do so?

78 A. After receiving instructions to find a line between this point and that point.

Q. You said, as I understood, you made a survey of that land. You acted upon their commands to go and survey that land?

A. You did not understand me exactly.

Q. When you were sent to survey that land was that your own survey or the order of the company to go and survey that land?

A. I don't exactly understand you.

Q. When you went and surveyed that land, you went under the instruction, as an engineer, that you had received from the company, was it not?

A. Yes, sir; to survey a line.

Mr. BAKER: Did the company locate the line until you went to locate it?

A. No, sir; I made a survey of different lines, some of them through this property, one of them as shown here, and different lines on different courses, and I presented it all to them for consideration. They came to the conclusion to take River street.

Q. With the report which you gave them in regard to the feasibility of the different routes?

A. Yes, sir.

Q. Did you recommend any route?

A. I recommended this route.

Q. Why did you recommend this route?

A. Because this route is free from objectionable grades. It destroys the least property, does the least injury and it does the least public inconvenience.

Q. Will you state how this railroad is to be constructed along River street, how it is to be constructed in the street? Describe the manner of construction.

79 A. It is to be an elevated railroad, supported by steel-plate girders, supported on steel posts, as required by the ordinance of the city, certain distance apart.

Q. How far apart will your posts be longitudinally along the curb?

A. West of the Michigan Central Railroad crossing they will be 35 feet from center to center. East of the Michigan Central Railroad crossing the span from curb to curb is greater; the width of the pavement is greater.

Q. That is, there will be a row of posts upon the curb on each side of the pavement?

A. Yes, sir.

Q. West of the Michigan Central crossing those posts will be 35 feet apart?

A. Yes, sir.

Q. And east of the Michigan Central crossing they will be 30 feet apart?

A. Yes, sir.

Q. How wide is the pavement east of the Michigan Central crossing?

A. 40 feet.

Q. How wide is the pavement west of the Michigan Central crossing?

A. 34 feet.

Q. How far apart will your posts be laterally across the street?

A. The available width of the paving in the clear, not from center to center, but in the clear.

Q. That is, the posts will be on the curb line?

A. Yes, sir.

Q. So that the entire paved portion of the street will be left open?

80 A. Yes, sir. No part of the posts shall be within the paved portion of the street.

Q. Will those posts that go longitudinally up and down the curb line, 30 and 35 feet apart, will the posts on the opposite side be directly opposite?

A. Yes, sir.

Q. And, as I understand it, a lateral girder will run from one post to another across the street?

A. Yes, sir.

Q. How high above the paved portion of the street will the lower part of that girder be?

A. 14 feet.

Q. Are they all of the same height?

A. Not exactly; the lowest height will be 14 feet.
Q. What will be the greatest height?
A. On the laterals there is not much difference in front of the Backus property.
Q. Along the street?
A. This is an elevation of the viaduct in front of the Backus property.
Q. You say these lateral girders running across the street, the lower portion of the girder will be 14 feet above the street?
A. Yes, sir.
Q. How are the longitudinal girders placed?
A. On top of the laterals at this point.
Q. Do they go on top of the lateral girders the whole distance of the superstructure?
A. No.
Q. How are they fixed at other places?
A. They are riveted to the side of the lateral girder, not in all other places.

81 Q. They go end on to lateral girders?
A. Yes, sir.

Q. In front of the Backus property they are entirely on top?
A. Yes.
Q. How deep up and down are the lateral girders?
A. About six feet.
Q. How deep are the longitudinal girders up and down?
A. Three feet nine inches.
Q. How many longitudinal girders do you have along this structure?
A. One under each rail.
Q. How many tracks are to be built along this railroad?
A. Two in certain distances, and three the remaining distance.
Q. Does the blue print that I now show you contain the plan of the superstructure the entire distance in River street?
A. This is the general plan of the superstructure in River street.
Q. Does it conform to the plan approved by the railroad commissioner?
A. The posts are in the same position.
Q. The extreme left hand or end of this blue print represents Twelfth street, does it not?
A. Yes, sir.
Q. What do the two double lines represent that go across Twelfth street?
A. Those represent the track or the girders, which are immediately under the rails.

Q. Do you mean to say that longitudinal girders will be
82 placed immediately or nearly under each one of those lines?
A. Yes, sir.

Q. And the lateral girders will be used to support those longitudinal girders?
A. Yes, sir.
Q. What do these white marks represent?

A. The position of the posts.
Q. That represents the posts?
A. Yes, sir.
Q. What do these lines across the street represent?
A. The cross-girders or lateral girders.
Q. I find three lines of posts here, one on the north curb line, one on the south curb line, and another one partially on the property of the Michigan Central?
A. Yes, sir.
Q. What is the object of placing these posts there?
A. Because our south track is over the Michigan Central property.
Q. That is, you do not go into River street until you go some distance east of Twelfth street?
A. No, sir.
Q. So that the first lateral girder across River street is in front of property owned by A. T. Boy on?
A. Yes, sir.
Q. And you carry the track by a lateral girder swung over two posts south of the posts on the curb line?
A. Yes, sir.
Q. Does this plan show that the superstructure for the elevated road gets wholly in the street by the time it reaches the property of Mary Speck?
A. Yes, sir.
83 Q. There the posts on the Michigan Central property cease, and from thence east they run along the curb line?
A. Yes, sir.
Q. According to this plan there are only two tracks from Twelfth street until you get to the easterly end in front of the property of Mr. Backus?
A. Yes, sir.
Q. And then does it divide into three tracks?
A. Yes, sir.
Q. Is there room enough upon that 40 feet of superstructure over the pavement there to carry three tracks?
A. Plenty.
Q. Those three tracks continue into the depot grounds?
A. Way up to the depot grounds.
Q. What do the posts south of the street represent?
A. They represent the place where posts for a road viaduct can be placed.
Q. What does this represent?
A. That represents a masonry approach for the highway.
Q. That commences on a level with the street and ascends until it comes over the Michigan Central and then goes down on the other side?
A. Yes, sir.
Q. What is the grade of that viaduct for teams?
A. One foot in 25 feet.

Q. Is it all one grade from the time it starts here until it gets to the summit, and then the same grade down on the other side?

A. It is all the same grade up to the Michigan Central crossing, and then it is level across that.

Q. These dotted lines represent the tracks of the Michigan Central railroad at that crossing?

A. Yes, sir.

84 Q. And the viaduct for teams is on a level when it reaches that crossing until it gets over it?

A. Yes, sir.

Q. And it goes up and comes down on a grade of four feet to the hundred?

A. Yes, sir.

Q. How wide is the viaduct for teams?

A. By order of the railroad commissioner, 24 feet.

Q. Have you made a sketch of this superstructure as it will be erected in front of the Backus property?

A. Yes, sir.

Q. You can now show that.

Mr. CHAREST: Did you ever survey the south side of River street for a route?

A. It would be just the same as this.

Q. Did you ever make a survey?

A. No.

Mr. BAKER: There would not be any difficulty in building a line to the Michigan Central grounds?

A. No engineering difficulty.

Q. In fact, the Michigan Central grounds are about on a same level with River street, so that if you could do it, you could run a line to the Michigan Central grounds, the same as you are building it in the street?

A. Yes, sir.

Mr. CHAREST: All I want to know is whether you made a survey on the south side of River street?

A. I never have set any stakes on the Michigan Central property.

Mr. BAKER: And you were told by the officers of the company that you had no right to go there?

85 A. Yes, sir.

Q. It was something which was not under your control?

A. Yes, sir.

Q. You had no right to go there?

A. No.

Q. You did not undertake to settle the legal difficulty and go there whether or no?

A. No, sir.

Q. Is this the superstructure as it is to be built in front of the Backus property?

A. Yes, sir; the floor plan. This is the floor of the bridge, showing the rails, ties, bond timber, and everything that will appear looking down on the surface.

Q. This represents the entire distance in front of the Backus property?
A. Yes, sir.
Q. Some 338 feet?
A. Yes, sir.
Q. This is the street line of it?
A. That is the street line.
Q. The upper line is the street line of the Backus property?
A. Yes, sir.
Q. And the street line of the Michigan Central property is the line on the bottom of this map?
A. Yes, sir.
Q. Will you tell us what these lateral marks represent?
A. Cross-girders.
Q. At the end of each cross-girder?
A. Those are the posts.
Q. What do these marks represent—the lateral marks?
A. The cross-ties.
86 Q. What do the black lines upon those represent?
A. The rails.
Q. The rails on which the cars are to run?
A. Yes, sir.
Q. Will you tell us how long these ties are?
A. Nine feet.
Q. What do the lines in the ends of these ties represent?
A. Those represent bond timber, put on to hold the ties in place.
Q. Describe the construction of that.
A. These ties are sized down to a uniform depth, sized about a half an inch less than the depth. They are 8 x 8 inches square, sized down to 7½ inches, and the girders are spaced 14 inches apart, and an opening six inches between each tie, and this is a bond timber, notched down two inches and bolted there.
Q. Is that timber eight inches square?
A. Six by eight inches, laid flat so as to be four inches high, the height of the grade.
Q. That is fitted on the top of the ends on each side?
A. Yes; and that is bolted to the bond timber into the tie into the outside of the girder.
Q. From the outside of the bond timber of one side to the outside of the bond timber on the other side will be the length of the tie?
A. Yes, sir.
Q. Commencing upon the westerly end of the Backus property, what, if anything, will be built between these two tracks?
A. There is nothing there of any use to the railroad company.
Q. Will anything be built there, is my question?
87 A. Not that I know of.
Q. Your plan does not provide for anything?
A. It does not provide for anything there.
Q. Will you tell us how far these tracks will be at that point in the clear, between the bond timber?
A. That space is open.

Q. Tell us how wide it is at that end?
A. Nine feet.
Q. Does it maintain that width any considerable distance?
A. About 70 feet from there it is a little more, ten feet, and then it narrows up to no space at all, the whole distance being covered with long ties.
Q. How far?
A. About a bent and a half; about 50 feet.
Q. Beyond that how is it?
A. Beyond that there are two openings, which at the extreme point are four feet apart.
Q. That is, this track divides or separates, so that you have three tracks?
A. So that we have three tracks from this point.
Q. Three tracks in front of the mill?
A. Just about the middle of his property.
JUROR: Does the mill occupy the whole width of the property?
A. No, sir.

Mr. BAKER: The mill is over to this end of it. You will go down and look at it.

Q. The center of the property would be where these ties have commenced to materially widen?
A. Yes, sir.
Mr. DICKINSON: I understood you correctly that this distance and this open *a*pace is 50 feet?
88 A. I said from that point to this point is about 50 feet.
Q. The whole distance of the property is 238 feet, so that this would be 119 feet up to that point?
A. Yes, sir.
Q. So that practically the west half of the property has two tracks, and the east half of the property three tracks?
A. Yes, sir.
Q. Where will your switch be located?
A. Where they are shown here—at that point, at this point, and at that point.
Q. So that you can run from one of these tracks to the other? You can run from the two outside tracks onto the center track?
A. We can run from the center onto either of the other two.
Q. Will you tell us how far it is from the north bond timber on the west line of this property to the street line?
A. I have marked in pencil the distance at this point. It is 12 feet 7 inches at this point; it is about 13 feet at that point.
Q. Will anything be put in there?
A. No, sir.
Q. At the first posts in front of this property, it is 12 feet 7 inches?
A. Yes, sir.
Q. What is it at the next post?
A. Eleven feet.
Q. At the next post?
A. Nine feet six inches.

Q. And the next one?
A. Eight feet.
Q. And the next?
89 A. Seven feet three.
Q. And the next?
A. Six feet.
Q. And the next one?
A. Six feet.
Q. The width of the sidewalk is six feet?
A. Yes, sir.
Q. At the easterly end of this property, you take the whole width from curb to curb, with the exception of the open spaces between the two tracks?
A. Yes, sir.
Q. Anything built in there to obstruct the light?
A. No, sir.
Q. Can you tell us where these pans or shields referred to in the ordinance are to be constructed?
A. It simply requires that they shall be under the locomotives.
Q. The railroad iron is represented by these black lines?
A. Yes, sir.
Q. Where would the longitudinal girders be?
A. Right under those.
Q. A little wider?
A. A little wider; the track from center rail is five feet. These rails will come on the inside edge of the girders. The girders are six feet and a half centers. It comes on the outside of the flange.
Q. Will these pans and shields be constructed between these longitudinal girders?
A. Yes, sir.
Q. So as not to catch anything that falls from the ties?
A. Yes, sir.
90 Q. Outside of the girders, in these vacant spaces, there will be no shields?
A. No, sir.
Q. That will all be left open?
A. Yes, sir.
Q. Both where there are only two tracks and where there are three tracks?
A. Yes, sir.
Q. Have you made a side view or elevation of the superstructure in front of the property of A. Backus, Jr.?
A. Yes, sir.
Q. Does this represent it?
A. Yes, sir. That is four feet to the inch, and this other sketch ten feet to the inch.
Q. What does that darkest line represent?
A. The very upper line is the top of the rail.
Q. The top of the rail or bond timber?
A. Either; they are the same height.
Q. The darkest line represents the ends of the ties?

A. Yes, sir.
Q. What is the space immediately below the ties?
A. That is the longitudinal girders.
Q. What do the dotted lines upon these posts represent?
A. Those are the cross-girders.
Q. It represents the end of the cross-girder?
A. Yes, sir.
Q. What does this bracing across here represent?
A. That is the bracing between these two posts.
Q. Why do you put that brace in there?
A. It is necessary to brace at certain intervals certain sections of the viaduct, which have to be made rigid like piers.

91 Q. How high will that bracing be above the street?
A. Fourteen feet at least.
Q. The same hight at the lateral girders?
A. Yes, sir.
Q. Will you go on and tell the jury what the distance is from the street to the bottom of the longitudinal girder at the most westerly posts on the Backus property?
A. About 18 feet and a half. At the base it is 18 feet 9 inches.
Q. At the next post?
A. 19 feet 1 inch.
Q. Give the distances at the other posts.
A. 19 feet 9 inches; 19 feet 5; 20 feet 1 inch; 20 feet 5 inches; 20 feet 9 inches.
Q. So that there will be that amount of open space, except whatever space is occupied by the lateral girders running across the street?
A. Yes, sir.
Q. Between the lateral girders will be on the average in front of this property an open space between 19 and 20 feet high?
A. Yes, sir.
Q. Do you preserve the 14 feet all the time?
A. Yes, sir, we have to make a lateral girder less deep and strengthen the bottom plank.
Q. Does the longitudinal girder go on top of the cross-girder there?
A. Yes, sir.
Q. It does not go end on?
A. No, sir. The next one we will have to connect on the side, because I could not get depth enough here?

Q. You say the next post goes end on?
92 A. Yes, sir, because I could not get 14 feet.
Q. Will you explain the necessity of this bracing a little more in detail?
A. In a structure of this kind it is necessary to provide for expansion and contraction, which amounts to considerable, and for that purpose we leave one end of the girders open every third bent.
Q. What do you mean by leaving them open?
A. They are not bolted to the cross-girders.

Q. Suppose you had a superstructure of this kind and bolted together solid, the whole length of it, what would become of it?

A. There is no power that could stand the expansion and contraction, and it would tear it to pieces.

Q. This climate, the difference of temperature causes an iron or steel superstructure to expand and contract?

A. Yes, sir, that is considerable from the extreme cold of winter to the extreme heat of summer.

Q. About how much play do you allow for on the end of one of these sections?

A. In this distance something over an inch.

Q. How do you construct that?

A. In this point it rests on top of the girder. In the bottom flange of the longitudinal girder are slotted holes, through which bolts are placed to prevent it moving laterally. The girder can expand and contract through that slotted hole. In providing for this expansion and contraction, unless we braced at the end of this girder, the whole structure would move back and forth, so every third bent it is necessary to brace and make rigid like a pier to resist this thrust.

93 Q. What you mean is, that every third bent is a fixed bent, it is fastened right there?

A. Yes, sir; and this brace has to be fastened and connections made in a proper way so as to resist the thrust which we calculate is coming there. That thrust is the grip of the driving wheels of the locomotive on the rail. The locomotives have to take hold of the rails to draw the train. When it takes hold of the rails going ahead, it pulls the structure back. When the train stops with the brake applied, it is greater, and that is a force tending to push the structure ahead. That force has been very accurately determined by experiment on the stopping of trains in the use of the Westinghouse brake, and from that we calculate what the thrust will be on the bridge, and by bracing the frame to resist that thrust, we make every third bent rigid.

Q. Describe how you make a foundation to carry so much weight.

A. I have already some sixty of these foundations finished and they are covered up. We determine first the weight that is coming on the foundation. It is the weight of the structure, the weight of the train, and we can calculate very close what the exact weight will be on the foundation.

Q. Do you get that down to a minimum, or up to a maximum?

A. Up to a maximum weight that can come on it. The bridge is designed to carry, if necessary, two locomotives on each track, followed by a train of three thousand pounds to the foot. These locomotives weigh 210,000 pounds, 105 tons. Those are about the heaviest locomotives that are used.

Q. Do you mean to say that this superstructure will carry two trains with double locomotives?

94 A. Yes, or three, wherever the three tracks are, if they ever happen to be that. That is as great a load as ever can come upon them. With that load and the weight of the superstructure

we know what the weight will be upon the foundation, and the judgment has to be used, whether the earth, which we find below it, is sufficient to sustain that weight, and we lay the foundation according to our judgment, and distribute the weight over the area necessary for that.

Q. Did you examine the ground along the line of these posts?

A. I excavated there last year, boring down to the depth of 18 or 20 feet below where we shall go.

Q. What did you find?

A. I found, after going through the main earth along the south side of Woodbridge street, a gray, hard clay, and below that the universal blue clay that underlies Detroit.

Q. How do you commence to build the foundation?

A. We excavate into this hard, stiff, gray clay. I don't go through that. I load that in no case over a pound and a half to the foot—it is perfectly safe with that load—and proportion the size of the area, and I form the foundation of Portland cement all the way from eight to ten, eleven, and twelve feet below the surface of the street.

Q. Suppose you find soft dirt down there, what do you do?

A. Drive a number of piles. At the Michigan Central Railroad crossing, I have already driven piles there. I could not find any reliable stiff material at sufficient depth, and I have driven piles.

Q. How many piles would you put in for a foundation?

A. According to the weight the posts are to carry. These
95 posts carry from 80 to 300 tons, and I design never to load piles in any case over twenty tons. These piles are driven down to the surface of the ground and driven with a follower seven feet below the surface, calculated to penetrate the stiff clay at least ten feet.

Q. Is there any difficulty in preserving a pile down there?

A. No; because the top of the pile will be from two to three feet below the level of the Detroit river. They will always be damp.

Q. Won't they rot?

A. No, sir.

Q. Never?

A. No, sir; not to trouble us.

Q. That is the experience of engineers?

A. Yes, sir; we find timbers that have been buried for long ages and no indication of rot.

Q. Is there any engineering difficulty in constructing a post that will carry this weight?

A. No, sir.

Q. Describe the construction of the post.

A. These posts are made of plates and angle iron riveted together.

Q. Is it a square post?

A. It is a square post, but not a hollow post.

Q. Where does the strength come, in the angle of the iron?

A. Yes, sir.

Q. These angle irons are bolted together and make a very strong post?

A. Yes, sir; all the surfaces can be reached and kept painted.

Q. The post is left open so that you can paint inside of it?
96 A. Yes, sir.
Q. Is that necessary in order to keep the material from rusting?
A. Yes, sir.

Cross-examination by Mr. DICKINSON:

Q. How long have you lived in Detroit?
A. About fifteen years.
Q. Where did you come from, here?
A. I came directly here from Massachusetts.
Q. You have been engaged in the railroad business?
A. I have been connected with railroads since '63.
Q. Were you ever engaged in building any road before?
A. Yes, sir; I was connected with the Hoosac Tunnel road. I was resident engineer at the east end of the Hoosac tunnel and had charge of the Ware River branch of the Boston & Albany.
Q. Who laid out the routes where you were division engineer—who made the plans?
A. I did.
Q. You made the plans for the entire structure of the Hoosac Tunnel branch?
A. No; I was division engineer under the chief engineer.
Q. Who was the chief engineer?
A. Alfred R. Field.
Q. You attended to the construction?
A. Yes, sir.
Q. As to the branch road of the Boston & Albany, where is that?
A. It runs from Palmer through Ware.
Q. What part of Massachusetts?
A. Palmer is fifteen miles west of Springfield.
Q. Is there any other road that you planned?
97 A. I had full charge of the construction of the Butler road from here to Butler, Indiana.
Q. That is the Wabash section?
A. Yes, sir.
Q. That was after you came here?
A. Yes, sir.
Q. Prior to your engagement for the union depot company, you were an engineer for the Wabash?
A. No; I never have been connected with the Wabash Company. I was connected with the company they call the Detroit, Butler & St. Louis railroad, which built this railroad.
Q. Were you the chief engineer of the Butler road?
A. Yes, sir.
Q. Did you make any entry into Detroit for the Butler road?
A. When the Butler road was first finished we came to the Detroit junction.
Q. What was called the Grand Trunk junction?
A. Yes, sir.

Q. Laying out a route for the union depot company to approach this depot, you were the chief engineer, were you?
A. Yes, sir.
Q. Did you have any consulting engineer?
A. No, sir.
Q. It was all by yourself you laid out this route?
A. Yes, sir.
Q. Did you consult with any engineers of the Michigan Central road in regard to the route?
A. No, sir.
98 Q. Were you given any directions as to what route you should take?
A. No.
Q. Did you consult with any one before selecting the route up River street, by the manufactories; did you consult the property-owners?
A. No.
Q. Before laying out the route submitted to the common council, did you consult the council?
A. No.
Q. Did you, before laying out the route, consult the State railroad authorities?
A. No.
Q. It has not been changed since you originally laid it out?
A. The map of location is the same as I made it.
Q. You have not swung it one inch in any direction since you originally laid it out and made your plans?
A. The map of location is just the same.
Q. You have not been influenced and have not changed it in any particular, except it may be in the method of crossing the Michigan Central track?
A. No. The route up River street is substantially as we presented it to the railroad crossing board.
Q. And that is what you presented to the common council, what was presented in the petition of the company on which they based the ordinance, the route that you selected?
A. Yes, sir.
Q. Did you also lay out a route for the approach to the old union depot company grounds, the forty acres below Twelfth street?
99 A. Yes, sir.
Q. And the plan of approach to the old union depot grounds?
A. Yes, sir.
Q. Between the Michigan Central property and the old depot grounds, there is Twelfth street?
A. That is all.
Q. Above Twelfth street lies the Michigan Central grounds to Third street, and below Twelfth street the old union depot grounds, consisting of forty acres?
A. Yes, sir.
Q. And still below the old union depot grounds, which end at

Eighteenth street, you laid out the transit road approaching the depot?

A. Yes, sir.

Q. Where does the transit road run?

A. It is not shown on this map.

Q. Tell the jury where the transit road runs below the union depot.

A. The west end begins at Delray and crosses the Lake Shore and the Michigan Central and runs through the different properties about a thousand feet south of Fort street and almost parallel with it.

Q. How far from the river?

A. The river is very circuitous.

Q. On an average, how far will it be from the Detroit river?

A. That would be a mere guess. At Clark avenue it is pretty near the river. Down by the fort it bends off a long distance, an average of a quarter of a mile.

Q. Is this a part of the Wabash system?

A. They run over this into Detroit, into these depot grounds.

100 Q. And this is to be the approach to the union depot and is a part of that scheme?

A. Yes, sir.

Q. That is the approach as projected so far?

A. Practically.

Q. And this is the transit road connected with the union depot scheme, which cuts through the Backus property below the old union depot property?

A. Yes, sir, his lumber yard.

Q. His lumber yard, where he receives from his water front?

A. Yes, sir.

Q. Do you know whether the transit road is an independent company by which the union depot is to be approached, or is it owned by the union depot company as a part of its corporate franchises?

A. I don't know that. I understand it is a different corporation.

Q. The transit road is a different road, and so organized?

A. I think so.

Mr. BAKER: We object to Mr. Ellis testifying to that. Mr. Joy can testify as to that.

Q. (Referring to map.) Will you point out Tenth street. Tenth street has always run down to the Michigan Central yards across River street, to the Michigan Central yard?

A. Yes, sir.

Q. And what is the next street above, which has been cut through, from Fort to River streets?

A. Eighth.

Q. Eighth has always been cut through there to River?

A. Yes, sir.

Q. And never has passed on the Michigan Central grounds?

101 A. Yes, sir.

Q. And the next street is Seventh?

A. Yes, sir.

Q. And that never has come through River street?

A. No, sir.

Q. The same with Fifth street?

A. Yes, sir, Sixth, Fifth and Fourth.

Q. Third goes to the river?

A. Yes, sir.

Q. Point out the Backus property with reference to the Michigan Central crossing.

A. These three large buildings.

Q. And there is how many feet there?

A. 238 and a fraction.

Q. Tell the jury between what streets.

A. That is between Fort and River and between Twelfth and the Michigan Central railroad.

Q. Eleventh?

A. Yes, sir, but that is a questionable street.

Q. The Backus front of their planing mill and their works proper are on River street, are they not; they have an office up on Fort street?

A. This is where they do a good deal of business; they take their lumber there.

Q. And ship their goods there; local business?

A. I don't know about that; I know he receives lumber here, and they take lumber out there (pointing); that is where he takes his material, here.

Q. The planing mill itself is away below the grade of Fort street?

A. It is on this level street.

102 Q. What is the difference between the grade of his front—between River street and Fort?

A. I cannot say exactly; it must be some 15 feet, at least. We can judge by the Michigan Central bridge; that is 18 or 19 feet; that is higher than his front.

Q. I suppose that, if it were possible and legal, you could have passed on the same grade along the margin of the Michigan Central yards and approached the union depot?

A. Yes, sir.

Q. And would not have crossed any of the streets up to the point of your turning across River street, by an elevated structure, and going to the union depot?

A. Taking the locations we have here, it would be commencing this curve further down and making a tangent on that property, and going through there, that is all (pointing).

Q. Will you point out the Michigan Central property along which your road does run—point out the Michigan Central property, if you know, on both sides of the street?

A. The Michigan Central property runs from Twelfth through to Third. We pass all the way in front of that until we leave the

street, which is just west of Eighth street, and also own the property between the railroad and there on that side.

Q. How much of the Michigan Central property is occupied for the viaduct for teams, on the projected, proposed plan, in width?

A. On the east side about 11 feet; on the east side of the Michigan Central crossing.

Q. But on the Backus side?

A. On the Backus side they take there—they use the sidewalk; take the sidewalk out of 24; that would be about 18 feet to 20 feet of the Michigan Central on that side.

103 Q. This structure for teams is commenced about Twelfth street, or back further?

A. No, sir, the structure for teams begins wherever this grade, which the commissioner fixed, meets this grade here, which is some 400 or 500 feet west of the crossing.

Q. But the way is open to approach that on the street itself?

A. Yes, sir.

Q. Uncovered by the elevated railroad structure, and out from under the railroad structure?

A. I will have to refer to another map. To go up the elevated structure the route you would take would be to come from the west, right through Woodbridge street, and passing under these girders up to this point, and then striking right through there (pointing to map).

Q. That is not the entire structure?

A. No, sir, that is nothing; that begins at nothing and then commences rising.

Q. What is the extreme length of the elevated structure for teams that is provided on the Michigan Central side?

A. We can scale that.

Q. Give us the extreme length.

Witness scales it.

A. Fifteen hundred feet.

Q. Now we will resume our view of this thing. How is that supported, upon masonry?

A. Part way. I cannot testify specifically about this because it has to be designed by the two companies jointly. I have provided in the construction of this railroad viaduct for its possibility in foundations; the details must be settled by the two companies, the Michigan Central engineer and myself. I have designed in

104 this way, to commence on the approach of masonry up to the height of perhaps eight feet, then commencing an iron construction and continuing over the Michigan Central with iron construction, and down the other side until I reach an elevation again of about eight feet.

Q. You have on your plan all the way through a masonry construction?

A. Oh, no, sir. Up to this point, that is to represent a wall of masonry here filled in with earth up to this point.

Q. And this is your reference to the Backus property (pointing)?

A. Yes, sir.

Q. And then what is beyond here according to your plan?

A. That would be open work, just bridge-work. That is probably the best construction to make there. That may be changed, because they may have some preferences in regard to its construction.

Q. How high is it in front, so far as it is in front of the Backus property there—the masonry, according to your plan?

A. That would be 220 feet; that would be nearly 9 feet high.

Q. What would be the width of the roadway?

A. 24 feet; that is the order.

Q. And that was to immediately adjoin the elevated railroad structure?

A. Yes, sir.

Q. If that immediately adjoins the railroad structure, and this is masonry to the height of 9 feet, so far as it is a bridge-work, that would hardly be the profile, in viewing it from the Michigan Central side?

105 A. It is not intended to have anything to do with the highway; it is simply the railroad.

Q. The profile to that structure, without taking into consideration the viaduct?

A. Yes, sir.

Q. So, beyond the elevated railroad structure, in making it a solid roadway, the roadway seems to be solid, that is, not upon girders or ties?

A. Not where the masonry was.

Q. So that the plans of the team viaduct and the railroad viaduct join right onto each other?

A. Yes, sir.

Q. Extending to the total width over onto the Michigan Central, how much? How much for your railroad structure; the total extreme width between the longitudinal girders, the outside longitudinal girders or the outside ties, which is the same thing?

A. Oh, no.

Q. The ties don't extend beyond the girders?

A. Oh, yes.

Q. You testified, as I understood, that they came even?

A. Oh, no; you misunderstood. The rails are just over the side of the girder.

Q. I mean these bond timbers, not the girders. The tie does not extend beyond the bond timber?

A. The bond timber is at the end of the ties.

Q. Now, from the extreme outside of the bond timbers, what is the width of the elevated structure in front of the Backus property?

A. You will see that that varies.

Q. Just give it.

106 Mr. Baker tells the witness to give it exactly, and the witness takes a map.

A. I scale that distance between the ties as 9 feet, 9½ feet; that would be three times nine, 27½ feet at that point.

Q. There?

A. Yes, sir; that is the extreme width. It would be 35 feet there (pointing).

Q. Give the mean distance here, near the centre?

A. Here is the centre, here.

Q. What is the distance at the centre across there?

A. 32 feet.

Q. And at this point here, where your other post is, I think, what do you call this mark here?

A. Yes, sir; that is a post.

Q. Give us the extreme width there?

A. That would be 33½ feet there.

Q. Then beyond that is extended the viaduct for teams, how much further?

A. That would be 24 feet.

Q. That makes at this point about 57 feet, the total?

A. 24 and 26, 50 feet at this end; the extreme width here would be 35 and 24, 59.

Q. This is the plan which you have shown, which you are now looking at, of the front of the Backus property?

A. Yes, sir; floor plan.

Q. That is what it was made for?

A. Yes, sir.

Q. (Showing another plan.) On your plan for this structure, with the elevated viaduct for teams along this side, is there any method, or manner, or way in which Backus can use this viaduct for teams in his business?

107 Mr. BAKER: We will save an objection here. I object to any cross-examination or any examination in regard to the viaduct for teams, on the ground that that is something that is to be done by the Michigan Central Company and the Fort Street Union Depot Company, and it is not to be considered in this case.

Mr. DICKINSON: I will insist on the question and proceed with it. Will you please tell whether, from the plans which have been discussed so far, as you have arrived at them, Backus could make any use of the viaduct for teams in his business?

A. I don't know of any, because I don't know what business he does east of the Michigan Central railroad.

Q. It would be on the other side of the street from him?

A. Let me see the other plan. We can describe the situation here on this other plan. There is the entrance to the approach at this point. Mr. Backus' gates are here and there and there; there is where he goes in there, a gate there, a gate there, a gate there.

Q. It is perfectly plain he would not have any method to get up on top of that to connect with his business there?

A. I don't know what his business would be. He would go there if he wanted to go uptown with his teams, or he could go underneath, on the Michigan Central.

Q. Underneath?

A. He could do that, or he could go back and go over.

Q. But there is no approach provided to drive up there with his business, is there?

A. To drive up there would not be feasible; I don't know what he would want to do it for.

Q. (Showing another plan.) Will you tell the jury the space between the ties?

A. Six inches.

108 Q. What is the diameter of the ties?

A. They are 8 inches square.

Q. And the space between the ties is less than the tie itself?

A. Yes, sir.

Q. Then underneath all the track, under this ordinance, underneath every track is to be put the pan?

A. There is to be a protection there, a close protection.

Q. All the way through?

A. Yes, sir.

Q. Making it a solid pan all the way under the tracks?

A. Yes, sir.

Q. Wherever there are tracks, switch-tracks or any tracks?

A. Yes, sir.

Q. Will you please tell the jury what is the height of the rail, the top of the rail above the roadway, the pavement of the street?

Witness takes side elevation.

A. We are on an ascending grade there and the street is descending, so it varies; at the east end the top of the rail is 21 feet 3 inches above the street, and at the west end of this property it is 25 feet 6 inches, an average of about 23 feet, or 23 and a half feet.

Q. I think you gave us the grade of the structure for teams. What is the grade in front of the Backus property, of the elevated structure?

A. The rate of ascent?

Q. Yes.

A. It is shown on the plan there about 20 feet to the mile; 22 feet to the mile; four-tenths per cent. grade.

Q. What is the grade from the entrance; take the grade

109 from the commencement of the structure, on the old union depot property?

A. It is one per cent. grade, that is one foot per hundred, 52 feet and eight-tenths per mile.

Q. That is the grade up or down?

A. That is the grade from the old depot grounds running up to Twelfth street; there the grade eases off to 20 feet up the Michigan Central crossing. I gave that in the testimony before.

Q. Do you know the height of the ordinary locomotive engine above the track—the smokestack?

A. About 15 feet.

Q. And the top of the ordinary car above the track?

A. They run 10 and 11 feet.

Q. Eleven feet?

A. Yes, sir; well, our sleeping cars and large cars will run up to 12 and 14 feet, some of them.

Q. How far will the cars project over the track itself?

A. Over those bond timbers do you mean?

Q. Yes.

A. That is 9 feet wide; our cars vary somewhat in width, from 10 feet, some 10 feet and a half, but not many of that size; the width of centers on some of the old roads prohibits their running over that; from the Harlem river to the New York Central depot the track width is only seven feet; there are certain cars that cannot go into that depot, so that 11 feet will give something and to spare on the average car; about 10 feet.

Q. Suppose that if the route on the Michigan Central property were legal as you say——

A. I don't say that.

Q. If it were legal as you say it is not, if you prefer to have it put that way——

110 A. I don't say it is not. That is a question for you.

Q. Any way you please; you would not be obliged to go through the Michigan Central property; you could take the margin of it, that is you would not be obliged to leave in coming up on the west side of your track, you could go up on the margin, right on the margin of the street?

A. Yes, sir. You remember the contest at Lansing, when you were there; you remember the morning you were there; the contest with the Michigan Central; you were a spectator there?

Q. I was there to argue a case in the supreme court, and I just looked in.

A. There was a discussion with them about endeavoring to move beyond the Michigan Central property, to get the railroad commissioner to allow us to move to the south side of the street; he forced us to the north side of the street for the benefit of the public, to get this highway crossing in, forcing us away from the Michigan Central, when I would have liked to move onto them; I had a contest with the engineer in regard to keeping my line to the south.

Q. There was no one represented there except yourselves and the Michigan Central?

A. That is all. It was a bitter contest between the two roads.

Mr. BAKER: The commissioner was there, representing the public?

A. Yes, sir, and forcing us to give the highway structure which this company had no interest in, and this other company had.

Mr. DICKINSON: The Michigan Central had an interest in the highway structure, and you had none?

111 A. We hadn't, that I know of. We were endeavoring to get a line from one depot ground to the other.

Q. And thus the structure was planned to go where it is now suggested to go?

A. It was put there by the railroad commissioner.

Q. The location of the structure is settled; the method of the structure may be changed?

A. The location is fixed by the railroad commissioner.

Q. In going along this street along by the stove works and the Union mills, and the Diamond Match Company or the old Richardson match factory, which is still used as a match factory, is it not——

A. Yes, sir.

Q. —you discovered the old side track there, which had been there for many years?

A. Yes, sir.

Q. Which had been in use for loading freight from the stove works and the match factory and the Union mills and so on?

A. Yes, sir.

Q. Right up the street on the side, and they run engines in there, don't they?

A. Yes, sir.

Q. It is a broad-gauge track?

A. Yes, sir.

Q. They run the ordinary locomotive in there, and the ordinary freight cars of all descriptions?

A. Yes, sir.

Q. How are you going to get along without destroying that business?

A. We span the whole thing; we give them the clear standard height for locomotives and cars under it.

112 Q. And you won't interfere with them in the slightest degree?

A. I don't think that we will.

Q. They can run their freight cars in there and load their flour and wheat and stoves and matches just as well as though you didn't have your elevated structure there?

A. Yes, sir.

Q. On this broad-gauge track?

A. Yes, sir.

Q. And you don't interfere with it or injure it?

A. No, sir. They have a franchise there of their road.

Q. That runs up pretty close to the manufacturers' buildings?

A. It runs in the paved portion of the street, 15 feet away from them.

Q. Do you know how far your structure is away from the "L" of Backus' building that goes down on the lower part of his property?

A. I did know. We measured it when we were on the ground in the last case, but I don't remember now.

Q. And you don't remember from the main structure, either?

A. I think it was 40 feet, but I have not got the minutes of it here.

Mr. BAKER: Forty feet at one end and 38 feet on the other?

A. I have taken a good many measurements since then, and I have forgotten it.

A JUROR: Who surveyed the driveway on the Michigan Central ground?

A. That was ordered by the railroad commissioner.

Q. Did you survey it yourself?

113 A. No, sir; there was no survey made of it.

Q. Were you present when they consented to it?

A. Yes, sir.

Q. What is the width of it?

A. Twenty-four feet.

Q. The whole upper structure is 35 feet at the extreme end?

A. The highway is 24 feet, and our width is from curb to curb, whatever that is, 34 or 35 feet.

Q. Then if you had decided to take the Michigan Central side you would have taken the difference between 24 feet and 35 feet; there would be only 11 feet difference taken on the Michigan Central ground, to have your railroad pass?

A. Then the highway would have been on the north side.

Q. Then you would have left River street alone; you would not have any driveway then?

Mr. BAKER: We leave it alone now.

A. We don't touch River street except with the posts, just as telegraph poles touch the street; our posts touch the street and we leave it alone.

Mr. DICKINSON: Except as you cover it with your structure?

A. That is not touching it.

Q. You cover it with your structure, and with solid pans under every track, do you not?

A. Yes, sir; right between the tracks.

Redirect examination by Mr. BAKER:

Q. River street, the paved portion of River street is left open, so that Mr. Backus and every other property-owner and the entire public can go right along there the same as before?

114 A. Yes, sir.

Q. It is not obstructed at all?

A. No, sir.

Q. The Michigan Central has some 13 or 14 tracks across there?

A. Thirteen.

Q. And in the controversy before the State railroad crossing board and in the supreme court, that has been carried on ever since this enterprise was started, the Michigan Central endeavored to get a ruling to close the street, did they not?

A. Yes, sir; they endeavored to make this company close the street by putting abutments instead of posts there.

Q. And the work that you are doing down there is the work of building the elevated road?

A. That is all.

Q. You are not engaged now in building the viaduct for teams?

A. Nothing to do with it.

Q. That is something the commissioner ordered the two companies to do?

A. Yes, sir.

Q. And the commissioner in passing upon this controversy located the viaduct on that side?

A. The highway viaduct; yes, sir.

Q. And it was ordered put in there by the railroad commissioner in the public interest?

A. Yes, sir.

Q. Now suppose the Fort Street Union Depot Company had legal authority to go along the Michigan Central property with their railroad, then the viaduct for teams would have to be over on the north side and close to the property of Mr. Backus, would it not?

115 A. Yes, sir.

Q. And there would have to be an approach there that would be right in front of his property?

A. Yes, sir.

Q. So that his property would be cut off, it would be put below the grade?

A. Yes, sir.

Q. The same as it is at Fort street, and at Howard, and other streets where they have elevated the grade in order to get over the railroad?

A. More like Fifteenth or Fourteenth streets.

Q. Did the commissioner of railroads go down and examine that whole crossing, and examine it carefully?

A. Yes, sir.

Q. There were three or four hearings before him and his associates?

A. Yes, sir.

Q. And there was a controversy carried on before him between the two companies?

A. Yes, sir.

Q. The Fort Street Union Depot Company objecting to any viaduct for teams, and objecting to the closing of that street or the interfering with it, and the Michigan Central insisting upon it?

A. Yes, sir.

Recross-examination by Mr. DICKINSON:

Q. Did the Michigan Central want to crowd the viaduct for teams on the other side?

A. They wanted to crowd our railroad on the other side, and I wanted to keep further to the south, away from the properties on the south side of the street.

116 Q. Do you say that the Michigan Central wanted to have the viaduct where it is, or that they objected to having it there; I mean the viaduct for teams?

A. They endeavored to put the viaduct for teams in the street, to force this railroad out of the street and prevent its construction;

that was the object of the Michigan Central, the manifest object to prevent the construction of this line.

Q. They wanted to put it in the street, to close the street.

A. Close the street, and close this project.

Q. They didn't want to close the street. If they objected to the union depot company approach, what excuse would they have for closing the street if they didn't let you approach up the street?

A. The excuse they gave us was that it was an objectionable crossing.

Q. But they wanted to close the street, you say?

A. Yes, sir; they wanted to acquire that property there, which is now a part of their freight ground, which is apparent on this map.

Q. They objected; they wanted to have the street closed?

A. Yes, sir.

Q. For the purpose of letting you come up it?

A. No, sir.

Q. They wanted to have it closed anyway?

A. Yes, sir.

Q. They wanted to acquire that street themselves?

A. Yes, sir.

Q. Without letting you come up?

A. They would accomplish two objects.

Q. Did they want the street closed without letting you
117 have an approach; let us have it. Will you state whether the Michigan Central insisted upon having the street closed and also insisted upon not letting you come up that street?

A. I don't understand you.

Q. Did they insist upon having the street closed before the commissioner of railroads, and also insist upon not letting you come up that street?

A. They insisted upon having the street closed, which the commissioner decided he had no power to grant.

Q. Did they also insist upon your not going up the street if the street could be closed—let us have that. You have said that the Michigan Central made this objection in order to keep you from getting to your union depot?

A. Yes, sir.

Q. Did they at the same time insist that the street should be closed?

A. They insisted that the street should be closed; they did at that time, they did in the condemnation proceedings.

Q. Did they, if they got the street closed, object to your coming up the street?

A. That is another question; now let me answer that question.

Q. I want you to answer the question. You say they insisted upon closing the street. I want to know for what purpose. Did they say to the railroad commissioner that if that street should be closed they should not permit you to come up the street?

A. Oh, no, sir.

Q. Then they said if the street was closed you were perfectly wel-

come to go up the street, did they not; that if they closed the street you were welcome to go up the street, did they not?

118 A. Yes, sir, but at a different time.

Q. Now I will have an answer?

A. I say, yes, but at a different time and under different circumstances, after.

Q. You have said that they fought the viaduct because they wanted the street closed, and wanted to keep you from coming up the street?

A. Yes, sir.

Q. But they said distinctly to the commissioner that if the street would be closed, you could come up the street, and that was the way to do it?

A. I don't know how that was to the commissioner, but they said to this company—I will admit they said to this company, if this company would close the street—how good that proposition was—that they would not make any further objection; but that was at a different time, different circumstances.

Q. And it was finally adjusted by the railroad commissioner ordering you to cross their tracks at an elevation?

A. No, sir.

Q. And to give this viaduct?

A. No, sir, it was not.

Q. Is not that the order of the commissioner today?

A. You are mixing things of different kinds.

Q. I am not mixing anything. My questions are plain, which anybody can understand.

A. This has been in contest for some time.

Q. And the end of it was that the commissioner ordered you to build the structure up over their tracks—this elevated structure?

A. That is the end, when they failed at one time.

Q. And also to build a viaduct for teams as the Michigan Central insisted upon?

119 A. Well let me explain it clearly.

Q. Go ahead if you want to?

A. My statement was that they endeavored to crowd this railroad out of the street.

Q. Which side did they want to crowd you on?

A. They wanted to crowd us out of the street, and to destroy all this property, coming in at that time and advocating the construction of a highway viaduct, a thing which, undoubtedly, was a good thing to have there; they never showed any disposition on their part to build a highway structure until they saw it was possible to crowd this railroad out, after the location was made. The commissioner considered all those objections and all their points, taking a great deal of time over it, and he decided, finally, that we should give as much of the street as possible to them on the south side for the highway. Then the next contest was their interpretation of a certain agreement, which was, as they understood, that the depot company would close this street, and then they would not make any further objection.

Q. You have reference to another agreement. Your company and the Michigan Central Company did enter into an agreement?
A. Yes, sir.
Q. And then had a controversy as to its meaning.
A. Yes, sir. There are the two different times; at that time the Michigan Central were willing that we should go through the street if we closed it. That is the explanation—two different times.

Redirect examination by Mr. BAKER:

Q. You made this map and survey locating the line along River street?
120 A. Yes, sir.
Q. And under the law, or at any rate as a matter of fact, that route was submitted to the State railroad crossing board?
A. Yes, sir.
Q. Whether they would approve of it or not?
A. Yes, sir.
Q. And when that was before the State railroad crossing board the question came up whether there should not be a viaduct for teams put in there?
A. Yes, sir.
Q. And the Michigan Central objected to the approving of the route because it would interfere with the building of a viaduct for teams in the street?
A. Yes, sir.
Q. And insisted that this railroad, the union depot railroad, should go on the north side of the street or onto the private property, so as to leave room enough there for a viaduct in the street?
A. Yes, sir.
Q. And without going on the property of the Michigan Central; they didn't want you to go on the property of the Michigan Central?
A. No, sir.
Q. But finally the commissioner approved of the route along River street?
A. Yes, sir.
Q. And ordered the two companies to put in a viaduct?
A. Yes, sir.
Q. Reserving the right to approve of the plan?
A. Yes, sir.
Q. And when the plans were submitted he approved of the plan by which the elevated road goes along by the paved portion
121 of the street, overhead of the paved portion of the street, and the viaduct for teams is on the south side of it?
A. Yes, sir.
Q. So that the Michigan Central land is taken by virtue of his authority, and not by anything that the union depot company did?
A. Yes, sir.
A JUROR: How will the switches be operated?
A. That is a matter of operation. I should suppose they would

be operated automatically, which is the most approved method of handling switches, to keep men off this structure. The freight yards of the principal railroads of the country now, the depot yards especially, the passenger yards, are operated without any switchmen; they are operated from a signal tower with a system of interlocking switches, so that one man controls the movements of all the trains, with not a man handling a switch. All the trains going into the Grand Central depot in New York are handled that way, and on the Boston & Albany; they are much more reliable than any human action can be; the switch cannot be wrong if the signal is right; it is mechanical; but a man can wave his hand when his switch is wrong; that is a matter of operation.

Q. You provide your elevated road with lights?

A. The top of it; I don't know that that would be necessary in the city. We are obliged under the ordinance to furnish light wherever it is necessary. I think the ordinance requires that the way shall be lighted if it is necessary. That is in the ordinance.

122 ANOTHER JUROR: Whether there will be used locomotives of ninety or a hundred tons?

A. There are no locomotives of that weight on any of the railroads that are going to use that structure, but engineers now are providing in the construction of all bridges for heavier weights. We do not know when they will come upon them; but there are no locomotives of that weight upon any of these roads. The Pennsylvania Central has freight locomotives upon their mountain divisions, where they have heavy grades, but there will be no long freight trains coming up into these depot yards.

Mr. BAKER: What is the average weight of locomotives used now for passenger trains and ordinary freight trains?

A. For our express trains our lines use a heavy locomotive; our passenger locomotives in use now will weigh possibly some 50 tons and some 60 tons; those are very heavy locomotives.

Q. Are there any locomotives in use here now that weigh 105 tons?

A. No, sir.

Q. But there are such heavy locomotives in existence?

A. Yes, sir; that is the heavy weight for the Pennsylvania road, where they go up in the mountains with heavy trains.

Recross-examination by Mr. DICKINSON:

Q. You are familiar with the heavy locomotives of the Canadian Pacific?

A. No, sir.

Q. You don't know anything about the standard size of the Canadian Pacific locomotive?

A. No, sir; I don't know the standard size of the freight locomotive, but none of their locomotives will be used on this structure—they will be across the river.

123 Mr. BAKER: Why will they not be? Their railroad terminates on the other side, and the cars would be brought across and handled by a switch-engine on this side?

A. I don't think their locomotives would cross the river.

Mr. DICKINSON: You don't think so?

A. I don't think so. I never saw one crossing the river.

Q. We don't want guess-work, Mr. Ellis.

Mr. BAKER: Are you guessing, Mr. Ellis?

A. I am not. I have never seen one and never heard of one, and I have spent a good part of the last ten years in observing traffic on the old depot grounds. I have constructed both slips down there and had occasion to notice the operation, and I never saw a locomotive on those ferry-boats.

Mr. DICKINSON: Do they propose to keep locomotives on this side?

A. The Wabash handle their trains now, and it would be presumable that the Wabash or some other road would handle their trains here much more economically than they could keep locomotives themselves, and if they did it themselves they would have it specially for that purpose.

Mr. BAKER: They would not be moving their locomotives backwards and forwards?

A. No, sir.

Mr. DICKINSON: They propose to run their trains into the union depot here?

A. Yes, sir.

Mr. BAKER: Does the Michigan Central send their locomotives across with their trains that leave for New York?

A. I never saw one.

124 FRANK H. MACKINTOSH, sworn in behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you reside?

A. New York.

Q. What is your business?

A. A lawyer.

Q. How long have you lived in New York?

A. Very nearly two and a half years.

Q. Have you had, during those two and a half years, any business connection with the elevated roads in New York?

A. Yes, sir.

Q. What has been that connection?

A. I was in the office of their attorneys.

Q. Who are their attorneys?

A. Davies, Short & Townsend.

Q. How many elevated railroad companies are there in New York now?

A. There are three, all told; a suburban and three in the city.

Q. What are the main elevated roads; what company do they belong to?

A. They are all under the Manhattan Railway Company.

Q. And the Manhattan Railway Company is the client of Davies, Short & Townsend?

A. Yes, sir.

Q. What was your position and duties in their office?

A. Settling the cases or claims of owners of abutting property.

Q. How long have the elevated roads been built in New York?

125 A. In anything like their present shape since about 1876; from 1876 to 1879 they were constructed.

Q. Will you state whether or not the companies that constructed those roads were compelled to pay the property-owners in the first instance?

A. No, sir.

Q. Why?

A. Because they had the authority from the legislature and from the city, and they were advised that that was as far as their liability extended; that they were not under liability for damages to the abutting owners; that this use of the street was the same as any other use of the street.

Q. Did that question finally go to the court of appeals?

A. It did.

Q. In the meantime did the companies go on and construct the elevated railroads?

A. Yes, sir.

Q. And the court of appeals subsequently held that the property-owners were entitled to damages?

A. Yes, sir.

Q. Have the property-owners all been settled with since then?

A. Oh, no.

Q. About how many cases have there been in court?

A. Between two and three thousand; about 2,500, I guess.

Q. That have been disposed of?

A. No, sir; there have been about 400 judgments and awards, and then there have been some eight or ten hundred appraisals disposed of by payment.

Q. How many suits are pending now?

A. About 2,200.

126 Q. So there are a large number of property-owners that have not brought suits yet, I suppose?

A. A great many: there must be 10,000 that have not brought suits.

Q. How long is it since this decision or opinion was delivered in the court of appeals?

A. I think it was in 1884, or 1885 or '86; in the neighborhood of 1885 the Story case was decided.

Q. So that for five years since then there are some 10,000 property-owners that have not commenced suit?

A. At least there are 10,000 pieces of property on which no suit has been begun.

Q. How many miles of elevated road are there in New York?

A. Between 35 and 40; about 40.

Q. About what is the height ordinarily of the elevated roads in New York in the clear above the pavement?

A. Well, with the exception of short spaces, it is about 15 feet. There are places where it is only about 12, and there are places where it is 54 or 55.

Q. Where it is very high?

A. Yes, sir; but those are only for short distances.

Q. Will you state whether or not the traffic goes right on under these elevated roads?

A. Yes, sir.

Q. How are they supported?

A. By iron columns.

Q. Sometimes the post is on the curb?

A. Sometimes on the curb and sometimes in the center of the street; in all the streets it is, I think, on the curb; on all the avenues I think it is 18 feet from the curb.

Q. Are the streets and avenues down there of different widths?

127 A. Yes, sir; the avenues are 100 feet, I think; the streets vary.

Q. Wider than that?

A. All narrower than that, except there are ten or twelve streets uptown, Fifty-seventh and Eighty-sixth, and every tenth street above that, I think, are 100-feet streets.

Q. Does the elevated road run in front of a great deal of business and manufacturing property?

A. Yes, sir, all kinds of property practically.

Q. And residence property?

A. Yes, sir.

Q. You say that you had to do with the settlement of cases with property-owners?

A. Yes, sir, both for and against them.

Q. So that you are familar with the subject?

A. Yes, sir.

Q. About how many tracks do the elevated roads usually have in the streets of New York?

A. There are two as a general thing. There are places where there are four and places where there are three, but the greater part of the road is a two-track road.

Q. Have you heard the claims of property-owners as to how they were damaged?

A. Yes, sir.

Q. Have you assisted in trying cases of that kind?

A. Yes, sir, both for and against them.

Q. Are the trains on the elevated roads operated with locomotives?

A. Yes, sir.

Q. What kind of coal do they use?

A. Anthracite.

Q. What is the weight of the engines?

128 A. They are about 23 tons, I understand; I don't speak from my own knowledge.

Q. You never weighed one of them?

A. No, sir; but that is the way they are rated in the company's offices.

Q. Are they in size about half the size of an ordinary locomotive?

A. About 26 or '8 feet long and about 12 feet high, and will weigh about 23½ tons, and carry about a ton of coal.

Q. How wide is the gauge of the road?

A. Standard gauge, about 4 feet 8½.

Q. Just the same as the ordinary railroad?

A. Yes, sir.

Q. How often do the trains run there?

A. Every minute and ten seconds to 20 minutes apart, according to the time of day.

Q. During the business part of the day?

A. At intervals of a minute and ten seconds.

Q. When do they commence at that rate of speed?

A. About 7 in the morning, I think, to 9 or half past, something like that, during the hours when the people are going downtown in the morning and uptown at night; it may be from 7 to 10, and from about 5 to 7 or half past, something like that.

Q. How often is that?

A. A minute and 10 seconds. Of course they vary, but that is the time they are placed to follow each other.

Q. And in the night how often do they run?

A. After 1 o'clock they run every 20 minutes.

Q. Up to 1 o'clock, from 7 to 1?

A. 4 to 8 minutes.

Q. Do they run all night?

129 A. Yes, sir; they run all night, except on the South Avenue line south of Fifty-ninth street; they don't run after 1 o'clock there.

Q. But on the other lines they run continuously?

A. Yes, sir.

Q. But after 1 o'clock at night there is a train every 20 minutes?

A. Yes, sir. I think on the Second Avenue line they don't run after 1 o'clock, because they run on the Third Avenue line, which is within a block of it.

A JUROR: The elevated road which starts from Greenwich street and goes to Harlem runs all night?

A. Yes, sir. There are two tracks north of Courtland street.

Q. How much do you say the locomotives weigh?

A. Twenty-three and a half tons. They have smokestacks and everything just the same as an average locomotive, except they are smaller.

Mr. BAKER: They are like an ordinary locomotive?

A. They do not have any bells.

Q. Have a whistle?

A. Well, but that is only blown in case of assistance.

A JUROR: You stop at every block or every other block?

A. No, sir; there are stations about four to ten blocks apart on the Greenwich Street line.

Mr. BAKER: Have you gone down and looked at the property of Absalom Backus, Jr., & Sons?

A. Yes, sir.

Q. You have heard described in court here this afternoon and heretofore just what is proposed to be built in front of it?

A. Yes, sir.

130 Q. And that it is proposed to operate an ordinary railroad in front of that property?

A. Yes, sir.

Q. I suppose you have become very familiar, with your experience in New York, with the amount of damages that are awarded there?

A. Yes, sir.

Q. With reference to the value of the property?

A. Yes, sir.

Q. And in every conceivable shape?

A. Yes, sir.

Q. Will you *you* tell us what, in your judgment, Mr. Backus' property will be damaged per foot front?

A. Ten dollars a foot.

Q. That you think would cover the actual damage to the property?

A. Yes, sir.

A JUROR: How do you arrive at the damages?

A. Well, I compared the property with the property in New York, and I know what we pay there and what is considered the damages, and I compared the two properties together and I inferred what the damages will be.

Mr. BAKER: Perhaps the juryman has reference more particularly to how you estimate the damage.

A. The elements that enter into the damages are the impairment of light, the impairment of access—ease of access, and smoke, and noise to some extent. Those are the principal elements that enter into it.

Q. You consider all those things in estimating the damages?

A. Yes, sir.

A JUROR: Is there anything on account of fire?

131 A. I don't consider the fire risk at all in my estimate, because if the road is properly operated there will be no risk, and if it is not properly operated, they will be liable for whatever damages are caused.

Q. Has there not been damage from fire?

A. Not in New York.

ANOTHER JUROR: Do you consider this traffic equal to any elevated railroad in the city of New York?

A. I think it would be just about equivalent. There would not be so many trains, but perhaps they would be of a more damaging character. The trains would not run so often, but they would be heavier trains, and I think that your roads use bituminous coal, etc., and I think, taking it all in all, the damage would be just about the same.

Q. Are you aware how much business they will do here?

A. I only judge by the time-tables, which I have looked over coming and going. I should not suppose they would have one-twentieth the number of trains that run over the elevated roads.

Mr. BAKER: We will show just what that is.

ANOTHER JUROR: Do you use the elevated for freight?

A. They are all used simply for passengers, except a baggage.

Q. Do you know what this railroad is to be used for?

A. I understand it is to be a passenger station only.

Q. Don't you think that from the fact that it is a passenger station, people coming from all parts of the country, and compared with a street railroad, would you, according to your judgment, put the amount of damages of the same standing?

A. Oh, no.

Q. You said that according to New York, compared with New York, it would be $10.00?

132 A. I will explain that. We have not any property in New York in front of which the elevated road runs which is worth much less than $1,000 a front foot, the land alone, and on an average the damages do not exceed $100 per foot front. Now, this land down there in my judgment is worth $100 a front foot, and it is in a location, and the character of the property is of an inferior character to anything in New York entirely, especially from the mere fact that if it is used, it is used away down near the river front, there is nothing but depot yards all around there, and I don't consider this use of the property inconsistent with Mr. Backus' business at all, except as it might interfere with the access and light and air, and the noise of the cars might make some trouble.

Q. At this rate he would be getting how much?

A. $2,500.

Q. For all time?

A. Yes, sir.

ANOTHER JUROR: You say you live in New York?

A. Yes, sir.

Q. How did you arrive at the conclusion that the property was worth $100 a foot in that locality; was it from your judgment?

A. Yes, sir.

Q. I don't see how you are capable of judging what anything is worth in this town.

A. I may be wrong. If I have judged wrongly, it might affect my estimate.

Cross-examination by Mr. DICKINSON:

Q. What is your age?

A. I will be 27 next Wednesday.

133 Q. And you have lived two and a half years in New York?

A. Yes, sir.

Q. Do you own any property in New York?

A. No, sir; no real estate.

Q. Have you ever been the agent of property-owners in the collection of rents in New York?

A. Yes, sir.

Q. Where do you live in New York?

A. I live at One hundred and fortieth street and Twenty-seventh street.

Q. Is there an elevated road on that street?

A. No, sir.

Q. The elevated roads in New York are used wholly for street-car purposes?

A. Wholly for passenger business, except that one baggage car runs from Fifty-third street and Eighth avenue to connect with the New York & Northern.

Q. Just across the street from Fifty-third to Eighth avenue?

A. No, sir, it leaves Fifty-third street and Eighth avenue and goes out to Harlem and connects with the New York & Northern road.

Q. No baggage car runs downtown?

A. No, sir.

Q. And it is used only for passenger street car service?

A. Yes, sir.

Q. Give us an idea of how heavy one of those cars is compared with the cars of a trunk-line road.

A. I cannot tell you how they compare. The weight is about 15 tons when empty.

Q. And the engine is generally boxed in like a dummy?

134 A. No, sir.

Q. Have you seen the dummy engine that our street car company runs here on Jefferson avenue?

A. Yes, sir.

Q. How does it compare with that?

A. There is nothing like that on the elevated road.

Q. Do you wish to be understood as saying that the engines of the elevated road are not inclosed in wood frames?

A. I don't think any of them are in wooden frames. Some of them are in iron frames, so that the tender and the cab are one, but there are none of them but what have smokestacks separate from the boxing, standing out away from the boxing.

Q. But is there any frame about that, either wood or iron, painted the same color as the cars?

A. Some of the old ones are. As I say, they include the tender and the cab, and some stand up to the boiler a little ways.

Q. They burn anthracite coal?

A. Yes, sir.

Q. They are compelled to do that under the ordinance?

A. I don't know as to that.

Q. Do you know what locomotives in this part of the country burn usually?

A. From seeing an advertisement, I conclude that the Lackawanna is the only one that uses hard coal.

Q. Do you know whether there is more cinders, smoke and fire from bituminous or anthracite?

A. I know there is some smoke; I don't know anything about cinders. I suppose there would not be any difference about that, I don't know; more smoke from bituminous.

135 Q. What hotel are you stopping at?

A. The Cadillac.

Q. Do you know the Russell house?

A. Yes, sir.

Q. Did you notice the furnishing store below there of Mabley & Company, extending down there—hats and caps, boots and shoes, clothing—next below the Russell house, at the left as you stand in front of the Russell house?

A. Yes, sir.

Q. What would you say would be the damage to that to put an elevated road, over which would run four or five great lines of standard-gauge track, three standard-gauge standard tracks, over which freight and passengers would be carried, pulled by locomotives, as on the great trunk lines of the country—what damage per foot would it be to Mabley's?

A. Where would the line run, right along Woodward avenue?

Q. Yes, right on, from within 15 to 40 feet of their front, from the store itself, what would be the damage per foot front?

A. That is a dry-goods store, is it not?

Q. It is furnishing goods, shirts, etc. Do you take into estimation the business in estimating the front-foot damage?

A. Yes, sir, I do.

Q. How much per front foot would you estimate it if it was a shirt store, Mabley's?

A. It would depend upon whether it was 15 or 30 feet.

Q. Suppose it was a shirt store; suppose there was an elevated structure running by there, three tracks, over which the great trunk lines would run?

A. How far from the front of the building?

136 Q. Fifteen to 20 feet.

A. It would make a great difference whether it was 15 or 40 feet.

Q. Well, say 20 feet?

A. I should think perhaps it would be damaged from $100 to $150 a foot front.

Q. If it was a shirt store?

A. Yes, sir.

Q. What if it was a clothing store?

A. It would not make any difference.

Q. Would boots and shoes make any difference?

A. I don't think so. The road would probably change the character of the business down there.

Q. You know the store?

A. I have seen it.

Q. You give an estimate of the value of their real estate here. What is the value of that real estate per foot front?

A. You mean with the buildings on it?
Q. Give the real estate; never mind the buildings.
A. Assuming that was a vacant lot, and the others around it?
Q. Yes.
A. I should think it would be worth $400 per front foot.
Q. You are a great deal out of the way. You say a large number of property-owners have not sued the Manhattan road?
A. Yes, sir.
Q. Do you know of any one getting a judgment against the Manhattan road that they are unable to collect?
A. What do you mean by unable to collect?
Q. Unable to get their money after they have got a judgment.
137 A. No, sir, I don't.
Q. Who is the president of the Manhattan road?
A. Jay Gould.
Q. What is the amount of the mortgage on the Manhattan road?
A. Forty millions of dollars.
Q. And the judgments sought to be collected are against the Manhattan corporation, are they not?
A. They generally run against them, and one or the other of the companies.
Q. They don't run against the bondholders or the mortgagees?
A. No, sir.
Q. So that when you get a judgment and seek to levy, the bondholders object?
A. I never knew them to object. I never knew a judgment that was affirmed by the court of appeals that was not paid within three days after it was affirmed.
Q. Are you familiar with all the business?
A. I am familiar with the payment of every judgment the last three years.
Q. But there is a forty-million debt on that property, and a mortgage on it all?
A. Yes, sir.
Q. And any man that levies upon it levies subject to the forty-million-dollar mortgage?
A. I suppose he does.
Q. Has that occurred to you as any reason why men have not sued; has that been any reason?
A. I presume it has.
Q. Had anything to do with the settlements you have made?
138 A. I never heard of that point being raised.
Q. Did you ever hear the point raised that they could not collect?
A. No, sir.
Q. You have been there in New York two and a half years?
A. Yes, sir.
Q. And you have represented suits against the company?
A. Yes, sir, and I have got 25 of them now.
Q. You have got 25 suits against the company now?

A. Yes, sir; I am by myself now.

Q. And you were a clerk in the office of Davies, Short & Townsend?

A. Yes, sir.

Q. Are you now?

A. No, sir.

Q. Have you left the office since you were here the last trial?

A. Yes, sir.

Q. And you have now taken suits against the company?

A. Yes, sir.

Q. When you were here before you had been in the employ of the company, and you had been away from that office for about two weeks once?

A. Yes, sir.

Q. And in the meantime you had a suit against the company and against that office?

A. I had a claim and settled it.

Q. One of these claims, and settled it, for a client, and you then returned to the employ of the company two weeks afterwards?

A. Yes, sir.

139 Q. Let us understand it clearly. You took a retainer from a citizen who had a claim for damages against the company and went out of that office and out of the employ of the company for taking that claim; is that right?

A. No, sir. I will explain the facts. There was a question of salary between Davies, Short & Townsend and myself, and I retired from the office, and after I retired from the office a man came to me with a claim against the company, and after I went back to the office I informed them—afterwards I agreed to go back on an advanced salary, and after I had gone back I informed them of the claim being placed in my hands, and that I thought I could settle for so much; and I told this man then they would give so much and they agreed to it, and that was the end of it.

Q. What was your man's name?

A. Whitecar—it was a woman who owned the property. The real-estate agent was the man I saw.

Q. Which did you represent, the agent or the woman?

A. I never saw the woman.

Q. But you knew you represented the woman?

A. I didn't represent her exactly.

Q. How long a time were you out of the employment of the company before you went back at an increased salary?

A. About two weeks.

Q. Then you went back at an increased salary and settled the woman's claim against the company, after you went back in the office?

A. Yes, sir.

Q. And you never saw the woman?

A. I never saw the woman.

Q. Will you give us her name?

A. Margaret Whitecar.

140 Q. And now you are out of the employ of the company again?
A. Yes, sir.
Q. How long have you been?
A. Since the first of April; I think about the 6th of April.
Q. In forming your judgment of the damage to the Backus property, you take nothing into consideration, do you, except your experience in the elevated-road business in New York?
A. Well, I went down there and looked the property over.
Q. You used your experience to determine?
A. Certainly.
Q. You estimate it about as you would if the elevated roads were running by as in New York, and similar kind of property?
A. No, sir.
Q. You have had no experience in adjusting claims to property by which runs the ordinary lines of the great railroads?
A. No, sir.
Q. You don't pretend to?
A. No, sir.
Q. So that all the experience you have had has been with the New York elevated passenger roads?
A. Certainly.
Q. And property there?
A. Yes, sir.
Q. Do you know anything about the planing-mill business?
A. No, sir.
141 Q. Were you ever in one?
A. In a regular mill like Mr. Backus'?
Q. Yes.
A. I don't know the exact character of his, but I have been in places where all sorts of interior wood-work, etc., were done.
Q. Do you know anything about such planing mills as Backus'; were you ever in one?
A. Not exactly that kind that I know of.
Q. Have you ever been through that?
A. No, sir.
Q. You have not even been inside?
A. No, sir.
Q. And you estimate your damage at $10 a foot without looking at the property or seeing what kind of property it was?
A. No, sir; I have been down there twice or three times and looked the property all over.
Q. Do you know where the dust-room is?
A. No, sir.
Q. Do you know anything about the nature of a dust-room in a planing mill?
A. No, sir.
Q. Do you know that a lighted pipe or a spark would ignite it as it would powder?
A. No, sir. As I have already testified, I didn't take any fire risk into consideration.

Q. Were you ever in a flouring mill?

A. Yes, sir.

Q. Did you ever know anything about the readiness with which dust will ignite, from wheat or wood?

A. I have been in a flouring mill.

142 Q. Did you know anything about the nature of the dust that accumulates in a flouring mill?

A. No, sir; but I know it does accumulate.

Q. And about its highly inflammable character?

A. No, sir.

Q. Did you know that the dust in a planing mill was more highly inflammable than wheat dust?

A. No, sir; I didn't know anything about it.

A JUROR: In giving the amount of damages to be fixed or settled, don't you think the amount of business done by the men that you award damages to has a little to do with it in settling the damages?

A. I didn't think this will interfere with Mr. Backus' business.

Q. That is not my question.

A. I don't consider that Mr. Backus' business is going to be injured at all.

Q. My question is whether, according to your judgment, the amount of business that a man does has got something to do with the amount to be given him as damages?

A. Yes, sir; it would naturally. Every element must be taken into consideration.

Q. If there was a candy store next door, would you allow as much damages to that candy store?

A. I estimate my damages per foot front, and if there was a candy store on the same land, and right out on the street, I should consider that property more damages than Mr. Backus'; I don't mean more in the gross, but more per foot front.

ANOTHER JUROR: Do you know how much business Mr. Backus does?

A. No, sir; I suppose a very large business.

143 Mr. BAKER: He does not pretend to know. He says that he does not consider that the road would affect his business, and therefore he does not estimate his damage on that; the property would be damaged ten dollars a foot.

A JUROR: If you think in your opinion it will damage his business nothing at all, why should he be entitled to ten dollars a foot, if it is no damage to him?

A. It won't interfere with his business. I have no doubt that Mr. Backus will make just as much money after that, and do just as much business, but it will not be quite so easy to transact that business there; there will be posts in front of his property, and those posts might interfere with it, and you cannot turn loaded lumber wagons around there as well as where there are no posts or obstructions, and these things damage it to some extent.

Questions by Judge CHIPMAN:

Q. You say you have never been in Mr. Backus' mill?

A. No, sir.

Q. Were you ever in a planing mill in your life?

A. I have been where they plane.

Q. Were you ever in a regular planing mill in your life, such as we have in this western country?

A. I don't suppose I have been through such as you have out here.

Q. Do you know how big an establishment it is or how large a business it does—do you know anything about that?

A. I don't. I don't consider the business will be damaged a particle.

Q. If you don't know anything about this business, how can you tell this jury in this flat-footed manner that it cannot be damaged?

144 Mr. BAKER: I want to take an objection. He is testifying upon the physical effects of that property.

Q. If you don't know anything about the business, how can you tell this jury that it cannot be damaged?

A. From the general nature of the lumber business I conclude that he cannot be damaged from it, except in the ways I have stated.

Q. But this is not a lumber business—this is a planing mill and box factory, scroll-work.

A. I understand all that.

Q. You understand its business operation, do you?

A. I heard the details here of all the kinds of business that Mr. Backus does. Mr. Dickinson asked me that when I was here before.

Q. Are you giving an estimate of the damage done to the business based on your knowledge of the business?

A. Yes, what I know about it.

Q. What do you know about it?

A. I know they transact a general lumber business there and make all sorts of finished work, panels, sashes and one thing and another.

Q. What do you mean by a general lumber business?

A. General fine interior and exterior wood-work.

Q. You don't mean that they buy and sell lumber there—a lumber yard?

A. I understand their lumber yards are elsewhere.

Q. You don't even know that there is what is called a dust-room in a factory of that kind?

A. I don't.

Q. You don't know the nature of that dust?

A. No, sir; if I did it would not make any difference, for I don't take that into consideration.

145 Q. I don't believe it would make any difference?

A. No, sir.

Q. Are you aware that a spark will blow up that dust?

A. I am, and I am aware that if it does and the railroad company have been negligent, you will have your remedy; otherwise you will have no remedy.

Q. Your idea of the law of this case is that we are to be damaged or take the great risk of damage and of being blown up, and to take the chances of the railroad company paying us by and by if it happens—is that it?

A. Yes, sir. If the road is properly operated, you will have no damage.

Q. You say you are a lawyer?

A. Yes, sir.

Q. Do you mean, here, to say, as a lawyer, that the risk of fire from an improvement of this kind is not an element of damage in this case?

A. Yes, sir.

Q. To be considered?

A. Yes, sir.

Q. You so testify?

A. I do.

Q. Where did you get that law from?

A. I am not here to explain my sources of information; I simply say that the fire risk is not to be taken into consideration, for the reason I stated.

Q. I have some curiosity and would like to know where you get the law.

A. The question of fire risk has never been raised that I am aware of in any case in New York city; it may have been, but I am not aware of it; and I never knew of a cent of damages being awarded for fire risk.

146 Q. Do you know of any case where a planing-mill property was attacked between these corporations as this is here?

Objected to as wholly immaterial.

Q. Do you know of a single instance of a mill like this?

A. Not exactly of this kind.

Q. They don't have many of them in New York?

A. No, sir.

Q Are you aware that this establishment ships enormously to New York, and supplies, very greatly, your market?

A. Very likely.

Q. So that, in estimating the damage, you exclude this idea of any risk from fire entirely?

A. I do. If there is any risk and you are entitled to it, I should state the damages higher.

Q. Now, in regard to light. Do you know how much light is needed to carry on that business?

A. What do you mean by how much?

Q. Do you know how much?

A. I know there must be light enough to see your work, and especially if it has fine carving work to be done.

Q. Do you know whether this requires a great deal of light?

A. I presume so; but your light for fine work cannot be interfered with by that structure without you change your buildings.

Q. Now you base your ideas entirely by those railroads in New York?

A. I have so testified three times.

Q. You consider that those roads do not interfere with the light in New York?

147 A. They do interfere with the light; that is what I have said I estimate as an element here.

Q. Do you consider that those roads do not interfere with business in New York?

A. They do on some streets.

Q. Those are the streets where there is business?

A. No, sir.

Q. What streets do they interfere with business on, if not streets where the business is?

A. Mostly on streets where there are cheap retail stores, and so forth.

Q. What do you call a cheap retail store street?

A. Division street.

Q. What do you call Sixth avenue?

A. I call that a dry-goods district; the largest stores, practically, in New York are in that street.

Q. Do you call that a cheap retail store street?

A. No, sir. That practically is not damaged, and the railroad company has recovered judgments on that very street.

Q. You say the property is not damaged on Sixth avenue in New York by these structures running on that street?

A. No, sir; it is quite a benefit.

Q. How about Twenty-third street?

A. It is not damaged one cent, but vastly increased.

Q. Has not the theory of your companies, or at least those companies, been that they do not damage property anywhere?

A. No, sir. The theory has been that they were not liable until they were found liable.

Q. But they have been obliged to pay damages?

A. Yes, sir.

148 Q. Why?

A. Because they did damage. In some cases they have been compelled to pay where they did not, too.

Q. In regard to this Backus property, do you consider that a locomotive, passing in front of a factory so close as this is to the track of this proposed improvement or proposed structure—do you consider that a locomotive passing up opposite the open windows of a factory of that kind does no damage?

A. I consider that it does some damage.

Q. Your impression is that the damage is ten dollars a foot?

A. I so testified.

Q. What part of the building do you consider the ten dollars a foot is to, the lower or upper part?

(No answer.)

A JUROR: Did you say ten per cent.?

A. No, sir; the average in New York on the value of the property, of damages awarded, has been less than seven per cent.

Mr. BAKER: On the total value?

A. Yes, sir.

Judge CHIPMAN: What part of that property do you consider is damaged ten dollars a foot?

Objected to as immaterial.

A. I consider that it is all damaged.

Q. The whole of it?

A. Yes, sir.

Q. From the ground up to the angle of the roof?

A. I consider that that property is worth ten dollars a front foot less with that road here than without it.

Q. Would you not say that it is worth twelve dollars a foot less?

149 A. No, sir.

Q. Would you not say nine dollars a foot less?

A. No, sir.

Q. Ten dollars, and no more nor less?

A. No, sir.

Q. Suppose the mills were off there entirely and there was no factory?

A. Then I should consider its damages less—probably about five dollars a foot.

Q. Now, will you please tell the jury what property is worth a foot front down there?

A. $100.

Q. How do you know?

A. That is my judgment.

Q. How come you to have any judgment; how do you form any judgment?

A. Because I have some reason and some sense.

A JUROR: What is the value of the buildings and machinery?

Q. Do you know what the value of that plant is?

A. I am not familiar with that.

Q. Do you know what the vibration of locomotives, trains moving there, what effect that will have upon the plant?

A. I don't think that will cause any.

Q. Do you know anything about the character of the plant?

A. I have seen the buildings.

Q. But do you know anything about the delicacy of the machinery; do you know how expensive it is?

A. No, sir.

150 Q. Have you any idea of the difficulty of adjusting that machinery?

A. I don't know; I don't take that as a condition, because I don't think there will be a particle of jar there if the road is properly constructed.

Q. You say the value of the property is $100 a foot there?
A. I think so.
Q. I want you to explain to this jury how you, a stranger in this city, can come here and give any estimate of the value of the property, how you attempt to do it?
A. I have nothing to explain. That is my judgment of what the property is worth there.
Q. Do you think you have any judgment on that subject at all?
A. I do.
Q. Do you think you have any knowledge that will justify you in making a judgment?
A. You asked me to give my opinion, and I have given it.
Q. You are not giving your opinion. You are giving evidence as an expert here.
A. I am not giving my estimate of the value of the property there as an expert.
Q. You say you consider that property worth $100 a foot front?
A. Yes, sir.
Q. And on that basis you consider the damage $10 a foot?
A. Yes, sir.
Q. Now, do you know what any property has sold for in that neighborhood?
151 A. No, sir.
Q. Are you aware that property has sold immediately in that neighborhood for $400 a foot?
A. No, sir.
Q. You didn't inquire about that?
A. No, sir.
Q. Well, then, you judge of the value of the property by the looks of it, is that it?
A. Yes, sir.
Q. You judge the value of the Mabley property, by the Russell house there, to be about $400 a foot?
A. That is what I said; of course I don't know what the depth of the building is there.
Q. You gave your idea of the value of that property; say it is 100 feet deep?
A. I should say that is the value, but I don't know.
Q. What would you say if it was worth $3,000 a foot front there?
A. Then I should say it was worth that.
Q. Now, I will ask you, and I ask you, meaning to be entirely fair and polite to you as a young man, how is it that you can come from another city here, in a town entirely strange to you, and undertake to tell this jury the value of property here; what do you do it for?

Objected to on the ground that the witness does not undertake to do anything of the kind.

A. If I come out here and look at a piece of property, I should know whether it is worth ten cents or ten thousand dollars, somewheres near, and I have been down and looked at that property,

and my judgment is that it is worth $100 a foot. If it is worth more than $100 a foot, then the damages might be more; so if my judgment is not right the jury can take that into consideration.

152 Q. Do you know what the Fort Street front of that property is worth?

A. I do not.

Q. Do you know what property two blocks above there is worth?

A. I should not suppose it would vary much. It may be increased a little bit as you come up this way; I should presume it would.

Q. Do you know what the value and selling price of any property within five blocks of that place, in any direction, is?

A. I don't know the value of any property in Michigan.

Q. How long were you here before you fixed a value on that property?

A. One day.

Q. You did it in one day?

A. Yes, sir.

Q. And you have lived in New York only a little while, two and a half years?

A. Yes, sir.

A JUROR: Did you consult anybody on the value of property in this city?

A. I didn't.

Q. This is only your own judgment?

A. That is all.

Q. Have you had any experience in the real-estate business before?

A. No, sir.

Q. None at all?

A. No, sir. Of course I know the value of real estate in New York.

153 Mr. BAKER: You don't undertake to tell the value of property here?

A. No, sir; I say assuming that that property is worth $100 a foot front, I should say the damage is $10 a foot; if the property is worth $200 per foot front the damages would be more.

Judge CHIPMAN: You took it at ten per cent.?

A. No, sir, I don't definitely.

Q. Have you ever conducted a steam railway, that is, a passenger railway, aside from an elevated road?

A. I never conducted any.

Q. Have you been interested as president, stockholder, or anything of that kind in any of these great trunk lines?

A. No, sir.

Q. You never have had anything to do with them?

A. No, sir.

Q. Do you know anything about the machinery of running them, the manner in which they are run?

A. I don't know any more about it than what other people know.

Q. Do you know the weight of a large locomotive?

A. I know they vary from about 40 to 60 tons, ordinary locomotives.

Q. Do you know the weight of passenger cars?

A. I don't.

Q. Do you know the average number of cars in a train?

A. No, sir.

Q. Do you know the fact that there was also to be a freight depot here?

A. I don't understand there is to be any this side of Mr. Backus' property.

Q. Did you understand that there was to be a freight depot
154 on the land right up alongside of the passenger depot, on the new passenger depot grounds?

A. No, sir, I understand that there was by the original plan, but that has been abandoned.

Q. Suppose it is not abandoned?

A. Assuming there are going to be freight trains running by there, I should say it would increase the damages. Assuming they are going to use this for freight purposes, as well as passenger purposes, there would be so many more trains and heavier locomotives, that would increase the damages.

Q. Suppose there are a lot of switches right in around Mr. Backus' property?

A. More than shown by the plan?

Q. The plan shows a lot of switches there.

A. It only shows there are two tracks part way and three tracks the rest.

Q. And the kind of interlock there?

A. Yes, sir.

Q. I suppose they have got to have some switches?

A. I presume very likely.

Q. Suppose there are a lot of switches there?

A. I have taken that into consideration.

Q. How many trains do you allow for being switched there per day and night?

A. I don't allow any particular number of trains.

Q. How many cars do you allow for running over there day and night?

A. No particular number. I assume that the ordinary passenger traffic of a union station will be carried on.

Q. What is your idea of the ordinary passenger traffic of a union station?

155 A. In Detroit?

Q. Any place.

A. I should suppose there might be perhaps 15 or 20 trains in and out a day.

Q. Suppose there was 40, 50, 60 or 100 in and out a day?

A. That might make some difference in the damages.

Q. Would it make any difference?
A. Certainly.
Q. You think it would?
A. Yes, sir.
Q. How much difference?
A. If the traffic is doubled the damage might be raised a small percentage.
Q. Give us some idea, because we are very anxious to get your views upon the subject. About what percentage would you raise it, suppose instead of having 15 or 20 trains a day there were 100, what percentage would you give Mr. Backus?
A. I don't think a hundred is a number that is possible to suppose. I don't think there can be 100 trains arriving and departing from that depot.
Q. Do you know how many trains arrive and depart from the Michigan Central depot in a day?
A. No, sir.
Q. Do you know how many companies are going into this union depot?
A. I understand there are three or four—the Canadian Pacific, the Wabash, the Flint & Pere Marquette, and the Detroit, Lansing & Northern, I understand.
Q. And you think, then, that those people are all going into this great expense and improvement with no possibility of those
156 four companies having 100 passenger trains a day going in there?
A. I do, most assuredly.
Q. How many passenger trains a day do you think go into the Grand Central depot in New York?
A. I don't know.
Q. How many do you suppose go into the Grand Central depot in St. Louis.
A. I never was there.
Q. Have you any idea how many go into Chicago?
A. No, sir.
Q. You have no idea on the subject at all?
A. No, sir.
A JUROR: Then how come you to come here and say how much are the damages if you don't know the number of cars and trains coming in and out?
A. I have said I assumed from 10 to 15 passenger trains a day will arrive at and depart from this station.
Judge CHIPMAN: This firm you have been with so long, and the firm you were with when you first came here, were the attorneys of the Manhattan system of railways in New York?
A. Yes, sir.
Q. Of which Mr. Gould is the president?
A. Yes, sir.
Q. Mr. Gould is also president of the Wabash system here?
A. I don't know.
Q. You would be a little surprised to hear it, would you not?

A. I should not be surprised to hear anything of that kind.
157 Q. Well he is.

Mr. BAKER: I guess you are mistaken about that.

Redirect by Mr. BAKER:

Q. You don't pretend to fix real-estate values?
A. No, sir.
Q. You might say that you estimated the damages to this property upon the theory that that property down there was worth $100 a foot?
A. The land, yes, sir.
Q. You think that Mabley's property over here would be worth $400 a foot?
A. I think so.
Q. Could you tell us how you could be so far away on the value of that property and so close on the value of the property down there at Backus'?
A. I don't know, unless I have not a proper appreciation of the value of your retail business property.

Mr. DICKINSON: He is not near it in the value of the Backus property.
Mr. BAKER: We will show that property is not worth over $100 a foot, or about that.

Q. You have had this experience with the elevated roads in New York?
A. Yes, sir.
Q. And you tell us that the average damage in the city of New York that the property-owners collected, after they have had 15 years' experience with the road, does not exceed 7 per cent. of the total value of the property?
A. Yes, sir.
Q. And those roads have been in operation 15 years?
A. Yes, sir.
158 Q. So that the property-owners can come forward and prove every particle of damage that is done?
A. Yes, sir. That represents over 365 judgments and awards.
Q. That you have had to do with yourself?
A. Yes, sir, that I have kept the record and know about.
Q. Over 365 judgments and awards that you know about yourself?
A. Yes, sir.

Witness is shown photographs.

Q. These photographs show parts of the elevated road in New York?
A. Yes, sir.

Mr. BAKER: It is not necessary to identify the different streets, is it?

Mr. DICKINSON: The streets are all marked. I will take them without his testifying as to that.

WITNESS: They are all marked to be put in as exhibits there, I think, every one.

Mr. DICKINSON: We will consider them in evidence.

Mr. DICKINSON: You brought these photographs?

A. Yes, sir.

It is arranged that the jury shall go to examine the premises of Backus & Co., on Friday afternoon, June 12.

159 MONDAY, *June* 15, 1891—2 p. m.

Adjourned to next day.

TUESDAY, *June* 16, 1891—2 p. m.

Mr. Greiner, a juror, was still sick, but counsel said they would go on with the testimony, which could be transcribed and Mr. Greiner could read it.

Mr. BAKER: I introduced in evidence the map and survey of the Fort Street Union Depot Company, with the approval indorsed on it of the State railroad crossing board, and in that connection I desire to read in evidence the order entered by the board upon its record at Lansing.

Mr. DICKINSON: We will take an objection to that as entirely immaterial. You may go on and read it, subject to the objection.

Mr. Baker then reads the order, as follows:

"STATE OF MICHIGAN:

Before the board of railroad crossings.

In the Matter of the Approval of the FORT STREET UNION DEPOT COMPANY'S Proposed Route in the City of Detroit.

DETROIT, MICH., *Nov.* 8, 1889.

At a meeting of the board of railroad crossings, held at the Russell house, pursuant to adjournment,

Present: Hon. John T. Rich, commissioner of railroads; Hon. Gilbert R. Osmun, secretary of state; Hon. S. V. R. Trowbridge, attorney general, members composing the board.

In the matter of the application of the Fort Street Union Depot Company for the approval of the map of its proposed line of railroad tracks, between Twelfth and Third streets, in the city of
160 Detroit, county of Wayne, with a crossing of the several tracks of the Michigan Central railroad, in Woodbridge street, near the intersection of Eleventh street, said application now coming up for further hearing of the board, Mr. James F. Joy and Fred. A. Baker, duly appointed and authorized in such behalf, appeared as attorneys for the said The Fort Street Union Depot Company, and Mr. Ashley Pond and Henry Russel as attorneys for and in behalf of the said Michigan Central Railroad Company.

Whereupon the board, having listened to the arguments of the

counsel, and to the statement of the engineers employed by each of the said parties in interest respectively, and to the statements of all other parties appearing before the board and desiring to be heard, and being otherwise fully advised and informed, and having first considered all and singular the premises, on motion of Mr. Osmun, seconded by Mr. Trowbridge, the said map and the said line of railroad as designated and located thereon, were duly approved by the board, and the signature of such approval over the proper signatures of the members of the board duly indorsed on said map.

And it was further determined and ordered by the board with regard to the crossing of the tracks of the Michigan Central railroad in Woodbridge street near the intersection of Eleventh, and that the tracks of the said Fort Street Union Depot Company shall go above those of the Michigan Central railroad at an elevation of at least 18 feet in the clear between the upper surface of the head of the rails in the Michigan Central tracks and the under surface of the girders in the superstructure of the said union depot company's bridge.

And the said superstructure shall be so constructed on River
161 street as to provide a passageway for teams and foot travelers, and in accordance with plans and specifications to be first submitted to and approved by the commissioner of railroads.

The cost of the part of the superstructure for the passage of teams and foot travelers, and of the approaches thereto, shall be borne by the two companies in interest, in equal proportions, share and share alike.

JOHN T. RICH,
Chairman of the Board.

Attest: W. C. RANSOM,
Clerk of the Board."

Mr. BAKER: That shows the action of the State railroad crossing board in approving the map and survey of the Fort Street Union Depot Company, and that action was taken under section 17 of the general railroad law, which authorized the State railroad crossing board to determine the manner and the place where a new proposed railroad is to cross an old railroad. Some question arose as to the authority of the State railroad crossing board to enter up an order for a viaduct for teams and foot travelers, and subsequently the commissioner of railroads, in his separate individual capacity, granted an additional order, which is dated April 30, 1890, and I will read that order.

Mr. DICKINSON: I make the same objection, as immaterial.

Mr. Baker then read the additional order dated April 30, 1890, as follows:

"THE STATE OF MICHIGAN:

OFFICE OF THE COMMISSIONER OF RAILROADS.

To the Fort Street Union Depot Company and the Michigan Central Railroad Company:

Whereas, in the judgment of the undersigned commissioner of railroads in and for the said State of Michigan as aforesaid, the construction of the proposed viaduct of the said Fort Street Union Depot Company along the line of River street, in the city of Detroit, in the interest of the public safety, and that of the employés on your respective roads, will necessitate the construction of an overhead passageway for the use of teams and footmen at the crossing of the Michigan Central tracks in said River street near Tenth, therefore, by virtue of the authority in me vested, as commissioner of railroads as aforesaid, by the provisions of section 17 of act No. 79 of the Session Laws of 1873, and the several acts amendatory thereof, it is hereby ordered and directed that in the construction of the said Fort Street union depot viaduct along the line of River street, as proposed by the said company, the posts or supports of the said viaduct east of the Michigan Central tracks, upon the south side of said viaduct, shall be set so as to conform in alignment with those upon the south side of the viaduct and west of the Michigan Central tracks.

There shall be constructed upon the south side of said viaduct over the tracks of the said Michigan Central railroad a passageway for teams, to be not less than twenty-four feet in width, with the necessary approaches to the same, of not exceeding four per cent. grade, and the posts or supports of the said viaduct to be so
163 set as to afford to said — and convenient access from the street under the viaduct to said approaches at either end of the same.

There shall also be provided on the north side of said viaduct a sidewalk for the use of footmen over the tracks of the said Central railroad, to be reached by safe and convenient stairways from either side of tracks below. And such sidewalks shall be of such width as the ordinances of the city of Detroit shall require, and shall also be provided with safe and sufficient railings to insure the safety of people from falling from said sidewalk when passing along the same.

The plans for the said viaduct, with the said passageways, hereby ordered to be erected, will be submitted to the commissioner of railroads for his approval before the same shall be adopted, and the structure put in course of construction in accordance therewith.

Given under my hand and seal of the department at Lansing, this 30th day of April, A. D. 1890.

[SEAL.] JOHN T. RICH,
Commissioner of Railroads."

Mr. BAKER: It was in pursuance of those orders that I have just read that the Fort Street Union Depot Company submitted the plan (Exhibit 5) which I hold in my hand, which I have already offered

in evidence, and upon it is the indorsement of the commissioner of railroads that he approved the plan of construction set forth upon this diagram or map, which has been explained to you by Mr. Ellis, the engineer. This certificate indorsed of approval is dated April 30, 1890. In connection with that I desire to read in evidence the formal order entered upon the journal of the office by the commissioner of railroads.

164 Mr. DICKINSON: I make the same objection to this, as immaterial.

Mr. BAKER: This order was entered up the following August. I will read it.

Mr. Baker then read the order referred to, as follows:

"STATE OF MICHIGAN:

OFFICE OF THE COMMISSIONER OF RAILROADS,
LANSING, MICH., *August 5th*, 1890.

In the Matter of the Approval of the Plan for the Proposed Viaduct of the FORT STREET UNION DEPOT COMPANY, with Crossing of the Michigan Central Railroad Tracks in River Street, in the City of Detroit.

On the 8th day of November, A. D. 1889, the board of railroad crossings approved the map of the proposed route of the Fort Street Union Depot Company's approaches from the westerly line of the lands of the Detroit Union Railroad Depot and Station Company and (30) thirty feet northerly from the south line of lot 28, Loranger farm, south of Fort street, thence running northeasterly to the west line of Third street, in the city of Detroit, at the point designated on said map as the eastern terminal of the proposed route.

Said approval was conditioned for the erection of an overhead passageway or viaduct for the use of teams and footmen at the crossing of the Michigan Central Railroad tracks in River street, near the intersection of Eleventh, in said city; such structure to be erected at the joint and equal expense of the two companies in interest, after the approval thereof by the commissioner of railroads.

Subsequently the question of the authority of the board to
165 make such condition having been raised by the depot company on the 30th day of April A. D. 1890, the commissioner of railroads, acting under authority vested in him by the provisions of section 17, act No. 79, Session Laws of 1873, and the several acts amendatory thereof, issued his official order for the construction of the said overhead passageway, prescribing general details for such construction, conforming practically to the requirements of the order of the crossing board; the plan for the structure to be submitted to the commissioner of railroads for his approval before the same should be adopted and the construction thereof commenced in accordance therewith.

Conformably to the requirements of said order, the said depot company, having on or about the 25th ult. filed for my approval a plan of the proposed viaduct to be by the said depot company

erected, together with the overhead crossing for teams and footmen at the crossing of the tracks of the Michigan Central railroad in River street, and having on the 2d of August inst., at the offices of the Michigan Central Railroad Company, in the city of Detroit, proceeded to the hearing of the application for the approval of said plan of the said viaduct, at which hearing Henry Russel, general attorney and acting manager of the Michigan Central Railroad Company, appeared in its behalf, and Messrs. F. A. Baker, counsel, and Henry C. Potter, Charles M. Hayes and Charles M. Heald, directors of the Fort Street Union Depot Company, appeared in its behalf.

After hearing all parties in interest, and having duly considered the premises and all the facts connected therewith, I am of the opinion that the plan of the said viaduct and the overhead passageway of the tracks of the Michigan Central railroad in River street, near Eleventh, so submitted to me for approval, should be,
166 and the same are hereby, approved, and the said depot company is hereby authorized to proceed with the construction of said viaduct in accordance therewith. In verification of my approval, in addition to this record, I have caused the original plan so filed with me to be placed in the records of this office, with my original certificate of its approval indorsed thereon, and the same is to be considered a part of this my order of approval and the construction of the aforesaid viaduct and overhead passageway.

At the hearing of the application for the approval of the plan presented by the depot company, the Michigan Central Company presented a different or counter plan for the same structure from that offered by the depot company, and asked that the same might be substituted and approved in lieu thereof.

While this plan so proposed by the Michigan Central Company is open to no objection in itself, still, as the structure is to be erected by the depot company, and largely at its expense, and as the latter company has presented a plan that conforms to the order of the crossing board and the commissioner heretofore made herein, and which it prefers to the other, offered by the Michigan Central Company, the commissioner is of the opinion that he should not deny the application of the depot company for the approval of the same.

In the matter of closing River street at the approaches to the Michigan Central tracks by abutments of masonry on either side, which would result in a virtual closing of said street to the use of the public under the viaduct, I have decided not to make such requirements as a condition for the approval of the plan for the construction of the work. While not doubting the power of the
167 commissioner to make such order, I am of the opinion that the rights and interests of the Michigan Central Railroad Company will be in nowise prejudiced by leaving such action to be determined by the future conditions of the situation, the sufficiency of the overhead passageway for the uses of the public upon that thoroughfare, and popular and municipal sentiment when the advantages to parties in interest or necessity for such action, in view of the public safety, shall be more clearly ascertained.

The Michigan Central Railroad Company having complied at large expense with the order of this department in the construction of an overhead passageway over their tracks for the use of the public, clearly could not consistently be required to furnish additional protection at that exposed point, and it is not doubted that in the near future River street at the Michigan Central Railroad crossing will be ordered permanently closed without objection from any quarter.

JOHN T. RICH,
Commissioner of Railroads.

A true transcript from the record.

W. C. RANSOM,
Deputy Commissioner of Railroads."

JAMES F. JOY, sworn in behalf of petitioner.

Examined by Mr. BAKER:

Q. How long have you lived in Detroit?
A. I have lived in Detroit 56 years.
Q. What year did you come here?
A. 1836.
168 Q. That was a year or two before Michigan was admitted to the Union as a State?
A. Two years before.
Q. And you have been here ever since?
A. Yes, sir; that is, it has been my home here ever since.
Q. You have been away temporarily?
A. Yes, sir.
Q. Are you educated for the bar?
A. Yes, sir; I practiced law here a good many years.
Q. You practiced law here in an early day?
A. From 1836 up to 25 years, more or less, about that.
Q. When did you first become interested in the railroad business?
A. In 1846.
Q. What company were you first connected with?
A. The Michigan Central Railroad Company.
Q. In 1846, when you were first connected with that company, what kind of a railroad did they have, where did it run to, and how much of an enterprise was it?
A. In 1836, when the legislature sat, in 1836 I think it was, was when the five-million loan was authorized by the State, and they issued five millions bonds to be sold for the purpose of constructing three railroads, the Michigan Central, the Michigan Southern, and the Northern line from Port Huron; they succeeded in building the road from Detroit to Kalamazoo with a flat rail. They succeeded in constructing the Michigan Southern road from Monroe, I think, out perhaps as far as Hillsdale. The State had become bankrupt utterly; its bonds were not paid for, it had used its credit as long

as it could use it by issuing what we call in modern times
169 greenbacks, the notes of the State, to raise money on, until finally, in 1846, having failed to build their road further than Kalamazoo, and the road having nearly worn out as it was, they passed an act of the legislature to incorporate the Michigan Central Railroad Company and sell the Michigan Central road. That is the present act of incorporation under which the Michigan Central railroad acts.

Q. Was that the occasion of your first connection with that company?

A. Yes, sir; I was, during that winter, employed by the gentleman who came here, Mr. Brooks, who was trying to get up a company to purchase the road, and I was employed to superintend and aid in drawing the charter and getting it passed through the Michigan legislature that winter.

Q. Who was this Mr. Brooks?

A. The man who came out here as chief engineer to build the road after the company was organized. He was at that time superintendent of a railroad from Syracuse to Rochester, by the old route, as it was called, the Albany & Syracuse railroad.

Q. What kind of rails were used on the Michigan Central railroad at that time?

A. They were what we call flat rails, about half an inch thick, laid on the top of wooden stringers like that.

Q. Strap rails?

A. Yes, sir.

Q. Where was the depot at that time?

A. It was on the Campus Martius.

Q. On the site of the city hall?

A. I think it was right here; yes, sir.

Q. How long were you connected with the Michigan Central railroad after that?

170 A. All the time, either as counsel, or as an officer or president, up to the time when Mr. Vanderbilt bought the road.

Q. About when was that?

A. About 10 or 12 years ago.

Q. What positions did you hold on the Michigan Central—what were your official relations to the road?

A. I was first for a great many years its attorney and general counsel, having general charge of all its legal affairs, and a good deal of its business.

Q. That is, you were the lawyer that had charge of its legal affairs?

A. All its legal affairs; yes, sir.

Q. And then after that what were you?

A. After that I was a director in the road for some years, and after that I was director and counsel, and after that I was president of it—managed it.

Q. Was about all your time devoted to the interests of that company?

A. No, sir; while I was connected with that company I was connected with a good many other enterprises.

Q. Will you state what additional railroad experience you had in the meantime?

A. During all that time?

Q. Yes; I want to show your knowledge and experience as a railroad man, as preliminary to other questions.

A. I will show you how the railroads grew. When we got the Michigan Central built around to Chicago and while we were building it around, the Lake Shore & Michigan Southern was being built also around the lake shore from Toledo; when we got to Chicago the question was what connections they should
171 have beyond that. There had been what was called the Galena railroad, which was the Galena & Chicago road, intended to extend from Chicago to Galena.

Q. That was the place that was subsequently known as the home of General Grant?

A. Yes, sir, he lived at Galena. But the Illinois Central was also projected at that time, and was to be built from Cairo up to Chicago, and from Cairo up to Galena with a branch. I had been pretty well known as the attorney for the Michigan Central throughout the country in the course of quite a number of years, and when the Illinois Central came to Chicago they wanted to employ me to superintend their getting into Chicago, and also at Galena, and I was employed by that company for two or three years. While so employed the Michigan Central having been completed around to Chicago, there was a road projected—there was a little short road then called the Chicago & Aurora railroad, which was a branch of 13 miles of the Galena road running about 30 miles out of Chicago, running down to a town called Aurora. When the Illinois Central was projected it had a long branch, 200 miles long, and more, running up to Galena, that was half built. The Michigan Central—myself and Mr. Brooks were pretty much the Michigan Central—conceived it was important for us to get a connection with the branch, so as to do their business from Cairo, when they went into Chicago, as a feeder for the Michigan Central, and we planned what was called the Chicago & Aurora road, extending down to Mendota, where it connected with the Illinois, running up to Galena, 150 miles, 300 miles north of Cairo; having projected that road, it became necessary to have an amendment of its charter, and I
172 went to the Illinois legislature in 1852, perhaps, to get that charter amended; they had no general railroad laws then; I got the charter amended so as to extend it down to Galesburg and Burlington, in Iowa, and I went there——

Q. What became of that enterprise?

A. I got that charter through, and among other gentlemen whom I got to help me pass that charter was Abraham Lincoln, then living at Springfield.

Q. A practicing lawyer there?

A. Yes, sir, and whom I used to employ. We got that charter amended, and I raised the money—canvassed the State of Illinois

for it, and raised the money—and we undertook to build it, and did build it.

Q. What is that road known now as?

A. The Chicago, Burlington & Quincy.

Q. One of the largest railroads in the United States?

A. Yes, sir, quite as large as any other. It has grown like all other of those enterprises. We extended it to Quincy; we extended the Hannibal & St. Joe, and extended the Chicago & Burlington to Iowa, and it has been growing since I left it. When I became president of the Michigan Central railroad, at Kansas City, it had branched southward, and I built the Kansas City, Fort Scott & Gulf road to the Indian country; from Kansas City we built a road up to Omaha also. All of those things were done mainly by myself and Mr. Brooks. Mr. Brooks was living here. When I was made president of the Michigan Central road, it was the only road stretching across the country. The war had just ended, and, during the war and for some time before the war, there had been little done in building railroads. All these that I have told you about has been since the war. There had been little done in building railroads at that time, but it was evident that more railroads would
173 be built in this State. While I was president of the Michigan Central road, the road was undertaken from Kalamazoo up to Grand Rapids. The Detroit & Milwaukee had been built from here through to Grand Haven; that road was helped by the Michigan Central from Kalamazoo north. Then came the Grand River Valley road from Lansing to Grand Rapids. It was important to get a direction from Detroit to Grand Rapids as straight as we could get at that day. Therefore the Michigan Central people and myself—I happened to be circumstanced that I could command a good deal of money, was connected with men who had money in the East, and particularly those connected with the Michigan Central road, and I was enabled to enlist them in these various enterprises, and among them was the Grand River Valley, the Detroit, Lansing & Northern, the Detroit & Bay City, all of which were built by the men connected with the Michigan Central railroad. The Great Western in Canada was taken up by them, and they brought the New York Central in line, and with what strength we could get in Canada, we took that and built it. All these were done by the commencing of the Michigan Central, and to make feeders here to Detroit.

Q. All this was done while you were president of the Michigan Central?

A. While I was counsel and president. Then came the Wabash here, wanting to come here into this city, and we organized a company here principally of men in Detroit, to build what was called the Detroit & Butler road in its day, intended at the time to become a part of the Wabash, and which afterwards became a part of the Wabash; that was built from Detroit to Butler, there connected with the Eel River road, which was leased by the Wabash road
174 and belonged to it, and made by them a direct route to St. Louis, and a circuitous route to Chicago.

Q. In your early experience in Chicago did you have any depot problems?

A. Yes, sir.

Q. Can you give us any testimony as to the development of the railroad business in that respect?

A. We had the problem of the Illinois Central and the Michigan Central, which was a union depot of the two companies, in Chicago; and of the Chicago, Burlington & Quincy road, which I was at the head of, which had to establish its depot in Chicago, and we were a good deal connected, though we did not control the then depot of the Galena Company—it was a connection of the Michigan Central railroad. I have been familiar with Chicago from that time up, and with all the stations that have been established at Chicago. The first was the Illinois Central, the next was the Chicago & Galena, the next was the Chicago, Burlington & Quincy, and the others in their order, around the city; with three of those I had to do.

Q. Are nearly all those depots in Chicago union depots practically?

A. Yes, sir.

Q. A number of companies come into the same depot?

A. Yes, sir, several of them are union depots, and are such by their names and under the law, and the others are formed by three or four companies joining to pay the bills and expenses.

Q. In doing the freight business in Chicago, in a place where there is a large amount of cattle, sheep, horses, etc., brought to market, what was your early connection with that part of it?

175 A. I got up that company myself, organized it.

Q. State how the business was first done.

A. It was a union depot company. We first got an act of the legislature giving the right to organize a company; I have forgotten the name; it was to organize a union depot company for the handling of cattle, and the stock yards grew out of it.

Q. The Union stock yards?

A. Yes, sir, it is the Union Stockyards Company, so named by law. It cost us in the beginning—I got the money from officers connected with the various railroads, the stockholders of the railroad companies subscribed stock in it, and I think there was at first subscribed about $500,000.

Q. What was the necessity of having such a place?

A. Each company at that time had cattle yards. The Chicago & Northwestern, who succeeded the Galena, had its cattle yards on the northwest side; the Chicago, Burlington & Quincy had some cattle yards in the vicinity. The Illinois Central had some cattle yards in another direction. The result was, there being no connection between the companies, that cattle had to be driven through the city when they wanted to ship it. And when parties at Chicago wanted to buy cattle they had to go all around the city to buy them; there was no place where they were all brought together, and the result was the organization of the Union Stockyards Company, with authority by law to build the branches connected with each railroad to get to Chicago, and authorizing the building of large stock yards

there, which should be large enough to accommodate all the business which should go to Chicago, and that would connect with every road built to go to Chicago. We built those stock
176 yards there, we built branches from those to every road in the country, and the result was every other stock yard was discontinued, every railroad running into Chicago, running to those yards with its stock and cattle, and the cattle and hogs were congregated there, and when they wanted to ship them East, Eastern railroads went out there to ship them, and the cattlemen and hogmen went there to buy their cattle and hogs.

Q. It became the largest cattle market in the world?

A. By far the largest in the whole world probably, and has remained so ever since, and has been the thing which has done more, perhaps, than any one thing to build up Chicago.

Q. In the development of the railroad business and Michigan and the Northwest, can you give us any financial or physical reasons why a union depot company should exist?

A. The necessity of union depot companies in all cities now has grown out of the fact that no railroad company in any great city is rich enough to build a depot; it costs so much to get into Chicago that no one company is able to do it; the result is that the Illinois Central and Michigan Central first united, then the Chicago, Burlington & Quincy, and the Milwaukee & St. Paul and Chicago & Alton united in a passenger depot on the north side—the roads coming in from the north; and lately the Wisconsin Central road coming in from Lake Superior, and roads running from the east around to connect with them have formed a union depot, and the expense is so enormous to get into a great city that no one company can do it, and always, wherever they do get into great cities now, it is by a union of two or more companies, and making a union depot.

For instance, in this city, here is the Flint & Pere Marquette
177 has no depot grounds here, no station; the Detroit, Lansing & Northern has no station; the Canadian Pacific has no station here at all; the Canadian Pacific comes from the east; the Flint & Pere Marquette Company runs all over this State north, clear up across the State over to Marquette; the Detroit, Lansing & Northern runs west and north and up through the State, pretty well up towards Mackinaw, spreads most all over the State; but neither of those companies is rich enough or could raise money enough to come into the city of Detroit and build this union depot, neither of them, to save their souls, could raise money enough and get into this city on a separate basis.

Q. You were connected with the old union depot company at the foot of Twelfth street?

A. Yes, sir.

Q. What road is using that depot at present?

A. The Wabash.

Q. The Wabash has a terminus here that comes in from Butler, Indiana?

A. Yes, sir, it is the Butler road, as we call it; the Butler road was consolidated with the Wabash, and that is its station grounds.

I will tell you the history of that. When the Butler road was organized there was no connection with the Southwest here by which there could be a free and easy connection with the south-western country. The Wabash desired to come to Detroit. They telegraphed me to ask if I would allow myself to be elected into the directors of the Wabash road. I telegraphed that I would not, that I was getting out of railroads and did not care to be complicated with them, and that I could not do it. Then I got a letter from
178 Mr. Gould, I guess, saying that they wanted to build that road up to Detroit if they could do it, and they wanted me to go in their board to help them. I told them that if that was their object, if I could be of any service, I would come in, and they elected me to their board with that view. After I was in their board, I met with them to discuss that question, and the Wabash then was not rich enough. It was not a rich company. It had been bankrupt once or twice before, but still the men connected with it, some of them, were rich. I went to New York and discussed it with them, to see how much money they would raise, and how much we could raise here in Detroit. Three or four of them there said they would contribute, take stock, but only three or four of them. I consulted with friends of mine here, and I could get up a corporation that would raise something more than half of the money required. We joined together, and with what I could get in New York from the men connected with the Wabash, and with an agreement on their part when it was done to consolidate the road with the Wabash, so as to give us some credit, and what I could raise in Boston, we raised money enough to build that road, but it was with the agreement, however, that they should have some place in Detroit where they might do business, and that I should provide it.

Q. State what you did to provide that accommodation for them?

A. First I made an agreement with the Grand Trunk road by which the trains should run around the city and come in what is now the Grand Trunk depot. The Grand Trunk owned a road from the junction up here. We built the Wabash first up to the junction so as to connect with the Grand Trunk, and under a contract with the Grand Trunk and the Grand Haven & Milwaukee road, I got
179 the right to run their trains around to the Detroit & Milwaukee grounds and do their business there, and I supposed I had complied with my promise to get a depot ground for the Wabash people. When they began to run their trains around there, they found that depot ground occupied by the Lake Shore & Michigan Southern, and at that time also by the Flint & Pere Marquette, I think, but at all events by the Grand Haven & Milwaukee, and by the Lake Shore & Michigan Southern, and when they began to run there they found that that company was crowded in their depot grounds, that they could not let their trains run upon the grounds; they had to stop them at the horn out there, where the Wabash obtained three or four acres, where they had to make a turn, and they call it the horn. They had to stop their trains there, and when the ground was free down below, the Grand Haven Company would go there with a switch-engine and take

them in, and take them back to that ground. It was found so inconvenient that it was impossible for the Wabash to do their business there. Then the question was, What should be done? They had a road extending from here to St. Louis, with no place to do business. I consulted also with my friends who had helped me to build the Butler road, stated the case, and I said to them, "Here is the Wabash now; we have got here, and it is not worth anything to us; we cannot do business here; we cannot go on the Michigan Central ground, that is so crowded, and they would not admit us anyhow, because it is a rival road. What shall be done?" I consulted with the Flint & Pere Marquette people, and with the Detroit, Lansing & Northern people, and with the Grand Trunk people at that time, who were running down to the junction, and did not own the Great Western at that time. They gave me en-
180 couragement to say they would join us in an enterprise to establish a new union depot, that is, the old depot grounds down there; they substantially agreed to join us there. The Grand Trunk wanted a place very much, the Lansing and the Milwaukee wanted a place very much; and upon the hopes and with the encouragement they gave us, we undertook to acquire those grounds down there and have a union depot ground where we could bring those four companies together.

Q. What connection did the Wabash have with that?

A. Wait a moment. Before that was done, I consulted with the Wabash people, told them what we could do, and they made an agreement with me that they would use a part of those grounds anyhow if we obtained them. I had their written agreement, familiar to you, growing out of the lawsuits we had. The Grand Trunk also, and the Flint & Pere Marquette, and the Lansing, substantially agreed to come in, although there was no agreement reduced to writing, but upon the faith that they would come there, we undertook the work.

Q. Who organized the company?

A. I did myself.

Q. Who were your principal stockholders?

A. Out here, Chris. Buhl, Allan Shelden, Gen. Alger, M. S. Smith, and Mr. George W. Balch.

Q. Were they all Detroit gentlemen?

A. Yes, sir.

Q. All interested in Detroit?

A. Yes, sir; and it was largely the interest in Detroit which we had which induced us to undertake it; I would not have undertaken it without that. Well, we went along and bought the property and advanced the money, bought the old depot grounds
181 down there. There was then about 20 acres of land, but it had the right on the river. In that state of things and just then, the Grand Trunk railroad bought the Great Western railroad.

Q. The Great Western was a road running from Windsor to London and beyond?

A. From here to Niagara Falls.

Mr. DICKINSON: That was in 1886?

A. I don't remember when that was. They bought that road earlier than that.

Mr. BAKER: You organized a depot company with the expectation that all these roads would come in there?

A. Yes, sir; after we had organized it, and after we had got into it, and after we had made a contract with the Wabash, and where we could not back out and had to go there, the Grand Trunk bought the Great Western road.

Q. What change did that make in their policy?

A. The Great Western road owned the Detroit & Milwaukee.

Q. That is a road running through Michigan?

A. Yes, sir; when they bought that road then they owned that depot ground up there, and they made up their minds they would run there, and they broke faith with us down here, and they would not come there. The result was we were pretty badly laid out. The Lansing road and the Flint & Pere Marquette road said, "It will be too heavy a thing for us to undertake to go down there; we cannot do it." The result was that they stayed with the Michigan Central for the time being, inconvenient as it was. In the meantime, to carry out our contract with the Wabash, and get that into the city and where it could do business, we went along and filled up the depot grounds, built the elevator which we had agreed
182 to build, built them a freight-house, built them a small passenger-house—the old plan having failed—and acquired the right of way out to Delray to the Wabash road, so as to connect with that; and from that time they came up to the depot grounds and used those grounds.

Q. You have had a small passenger-house there since then?

A. Yes, sir; a little temporary house, not expecting to remain there, but to do the little business that was done there with the Wabash alone.

Q. You can state any reasons that you have, that you have learned by experience or otherwise, why it is not a suitable location for a passenger-house at that point.

A. It is too far out; it is three-quarters of a mile, nearly a mile, when you go down to the passenger-house there—further than the Michigan Central. Passengers going into the country, going to competing points, will take the depot that is nearest them. The result was the passenger business of the Wabash done there has been very little, simply because it was so far out and inconvenient. Half the time there will not be an omnibus to take them up to the city; they will be employed in other depots. The Chicago business is limited, because the Michigan Central can do business to Chicago and have a depot right in the city here, so when a passenger comes from Chicago and knows where he is going to land in the city of Detroit, and he comes here at midnight, in the one case he is a mile further away than he is in the other. There may be an omnibus down there and there may not; they both come in about the same time, the Michigan Central with a great load of passengers and the Wabash with a small one. The result is that being down there in

that way, with a passenger-house so far beyond the Michigan
183 Central, it does business at a great disadvantage, and it cannot get the business, except by, perhaps, when they were at liberty to do it, cutting rates or something of that sort.

Q. You speak of the Wabash road that competes with the Michigan Central to Chicago. How is it with the Flint & Pere Marquette and the Detroit, Lansing & Northern; do you think they could do a successful passenger business from the foot of Twelfth street?

A. No, sir; not at all; no more than the Wabash can, nor so well even, for the Wabash does have a large tract of country for which it has better facilities and conveniences than the Michigan Central; for instance, passengers wanting to go to St. Louis, a man can go by the Wabash quicker by a good many hours than by going around by Chicago, and they will suffer some inconveniences to cut that off; but to put the Lansing road down there, and the Flint & Pere Marquette road down there—and the Flint & Perre Marquette road is in competition with the Michigan Central road at Saginaw, all through the country in the north; the Lansing is in competition with the Michigan Central at Lansing, Grand Rapids and all the country north; and the result is that if they cannot get a convenient depot in this city they cannot do a passenger business here. It is thus a necessity that brings the companies together. Now, when it came to be established that the Canadian Pacific was to be built here, and there were four companies would unite together to pay the expense of all this great work, then the Flint & Pere Marquette and Lansing said "Well, if you have your company made up again as before, four companies in there, we will join you."

184 Q. State the circumstances under which the Canadian Pacific were led to come here.

A. I had to exert myself a good deal to get the Canadian Pacific to come here. Four years ago, I guess it was, Sir George Stephens, who was then at the head of that road, before it was built across the country up north, wrote a letter to me asking me to come to Montreal; he said if I would he would have his train at St. Thomas down here to take me through—a special train. I told him I would come. I went down there. At St. Thomas I found a special car waiting for me with Mr. Van Horn on board.

Q. Who is Mr. Van Horn—an American or an Englishman?

A. The man who succeeded Sir George Stephens as president of that company. He is now president.

Q. What kind of a railroad man was he?

A. A first-rate man, brought up over here in Illinois. I first knew him at Kansas City. He was afterwards superintendent of a division of the Milwaukee & St. Paul, where I knew him, and afterwards I found him down at Montreal, general manager of the Canadian Pacific. He was on board, and I went down to Montreal. St. Thomas is about 100 miles from Detroit, running through to St. Paul. They wanted to talk with me, apparently, about their road through the Northwest. Sir George Stephens was a man fresh in the railroad business. He wanted to talk with me about whether they should have separate corporations in their road, one for the

West and one for the East. I saw by the map that it was very easy for St. Paul to build a road up into that country, to tap that road. I said to him, "Mr. Stephens, if you want to build a road for Canada and for Canada alone, and
185 to carry your business there, you had better have it one corporation, because if the corporations are separate, the western corporation will work with Michigan corporations and you may lose a good deal of business, which you might maintain and keep with one corporation." After talking about that and various other things, I said, "You have got a road from Montreal to St. Thomas." He said, "Yes." I said, "It is a very good road." He said, "Yes." I said, "What are your plans about that road; you are not going to stop at St. Thomas always?" He said, "We have not got any plans definitely fixed, but if there were a road from Detroit to Chicago, as well as from Detroit to St. Louis, and we could get into Detroit, get connected with them so as to do business well, I think we might extend that road to Detroit." I said, "Well, Sir George, if you extend that road to Detroit, I think I can guarantee to you that we will have a road from Chicago to Detroit better than we have got now." He wanted to know how, and I showed him our map, what we had already built; showed him our entrance into Chicago, which we had already acquired, and that it would be only 150 miles of country road to build, with no station grounds to build at all at either end, and that I thought we could make the strength enough to build it; and that if they would agree to build their road to Detroit, I would agree to get a road from Chicago to Detroit—Detroit to Chicago. I said to him, "Sir George Stephens, if you will build that road to Detroit, I will tell you what else you will have to do." He said, "What?" I said, "Your road runs from Detroit in the direction of Niagara Falls, until you get within 40 or 50 miles of the Falls; you will have to build a road straight to the Falls, so as to make a
186 through route to New York." It seemed it was the first it had struck his mind. I said to him, "I think it can be done if you come to Detroit; you cannot help building that if you come to Detroit; neither can we help getting a line to Chicago if you come to Detroit, and it will make a valuable line, especially in Canada, and in the West for us." He didn't say he would, but they did make provisions for it, but they intended to let it remain until we built the road to Chicago. Two years ago, I went down to see him, and I said to him, "Sir George, I don't see that you are doing anything to your road to Detroit." He said, "We have planned to build it, but we are waiting for you." I said, "You cannot wait for me, there is some difficulty at Chicago about our entrance to Chicago; the Grand Trunk is making some difficulty; the Wabash is a bankrupt road, as you know, and at present I am not in a position to undertake it, but we are reorganizing the Wabash, and shall, undoubtedly, succeed in getting it reorganized, and when we get there I shall be in a position to unite with it, but in the meantime we have a road to Chicago that we can use, and comfortably use;" it was the Baltimore & Ohio, we had been using for passen-

gers, and further around for freight; "so that we can give a very fair route to Chicago as it is, but not as good as we could if we built; you must build your road now." I showed him the necessity; "we have a route there to St. Louis, we will have a Chicago route and all; but do not wait for that." He called in Mr. Van Horn, and I discussed it with him, and I said to him, "I do not know of any case in this world where the expenditure necessary to build a 100 miles of road will give us so much value to all the rest of the line as it will to build it now into Detroit; you have got several hundred miles from there to Montreal, you
187 have got a connection with all New England; we can open to you a heavy business from St. Louis and a good freight business from Chicago anyhow at once; it will pay you twice over, all the money you can put into that road, by the benefit to the rest of your line." He called in Mr. Van Horn, and he said, "Upon full discussion, you are right, I think, Mr. Joy. We will have a meeting of our board next Tuesday, and I will bring this thing up, and I will tell them what you say, and I will have a resolution passed one way or the other, and I will telegraph you if they pass the resolution to build that road at once; I will telegraph you at once." I came home, and on Tuesday morning, I think, I got a telegram from Sir George Stephens, saying all right, they would build the road.

Q. It has been in operation now some months?

A. Yes, sir.

Q. And they have terminal facilities?

A. Their trains cross the river and come to the old depot grounds. It is a great inconvenience, so far as their local passengers are concerned, but they are there. Now, that company and the Wabash Company, and the Flint & Pere Marquette Company and the Lansing Company are without any proper passenger station in the city.

Q. Where have the Detroit, Lansing & Northern and the Flint & Pere Marquette been doing business the last 8 or 10 years?

A. Down at the Michigan Central road, the Flint & Pere Marquette are doing business; I made the arrangement with them when I was president of that road; I made an arrangement by which they should turn off when they got to the junction, 18 miles out here, that they should come in on the Michigan Central, and they have been running there ever since; and I made the
188 same arrangement with the Lansing; but the Michigan Central is so crowded with business that it is impossible to give them the accommodations they want, and the state of feeling between them is so great that they cannot work together with peace and comfort, and they have got to get out.

Q. What does that arise from?

A. From the fact that they are competitors. All the business between Grand Rapids and the east is competed for by the Michigan Central and the Lansing; all the business at Bay City and all the business at Saginaw is competed for by the Michigan Central and the Flint & Pere Marquette.

Q. The Michigan Central has a line that runs to Bay City and the Saginaws?

A. Yes, sir.

Q. And a branch from Vassar to Saginaw?

A. Yes, sir.

Q. And the Flint & Pere Marquette runs to the same places?

A. Yes, sir. And the result is constant ill feeling and competition, besides the necessity they are under to have a depot ground more convenient to the city, and to act freely, so that they are willing to meet their share of the expenses of this depot ground down here. That is what has brought this about. It is brought about by the most absolute public necessity that has ever existed in the world.

Q. What are the relations of the stockholders of the Fort Street Union Depot Company to these four railroad companies?

A. One-quarter of the stock is owned by men connected with the Flint & Pere Marquette road, one-quarter of the stock is
189 owned by men connected with the Canadian Pacific road, one-quarter is owned by men connected with the Lansing road, one-quarter is owned by three or four gentlemen here, the Wabash being at that time poor and not fully reorganized. When this company was organized there were three or four gentlemen here who agreed to join me and advance the money necessary to secure the Wabash its entrance here into the city, and we are doing it. One-quarter, therefore, belongs to us, but with the understanding and agreement that the Wabash shall be one of the lessees of this ground and this depot, on equal terms with the others.

Q. Who are those gentlemen who are associated with you?

A. Chris. Buhl, Allan Shelden and myself, Senator McMillan and Mrs. Newberry. It was John S. Newberry, but he died—no, McMillan signed for Mrs. Newberry when Mr. Newberry died. I may be mistaken; McMillan was one of the parties down on the old ground, and Newberry also.

Q. They are substantially the same stockholders that were in the old union depot company?

A. Yes, sir.

Q. And I suppose your connection with it is to protect the interest of that company and in that way the interest of the Wabash?

A. We were in this position on the old grounds: Half of our grounds were not leased, half was leased to the Wabash; if these new companies came in here they would want that ground down there. We were therefore interested to that extent in getting them in; it gives them a good place for their freight business, and
190 it gives them up here a good place for their passenger business, and those things, together with the interest we had in the prosperity of this city, and all of them had that, made us unite together to make up the Wabash share.

Q. The Wabash was in financial straits and unable to advance the money?

A. They could not do it.

Q. And these stockholders of the old union depot company are doing it for them in that way?

A. Yes, sir.

Q. As to their quarter?

A. Yes, sir. Purely and simply for that. We want the Wabash to have as good a place in the city as any of the rest of them.

Q. The Fort Street Union Depot Company appear to have located their grounds on the corner of Third street and Fort street west?

A. Yes, sir.

Q. By the act under which the depot company is incorporated, the company is required in its articles to locate its grounds, and the articles do locate it: and then they are required to make a map and survey of the grounds and route. Will you go on and state the reasons that actuated the board of directors, the officers of this company, in selecting that location, and I ask you that as a man of a very large railroad experience?

A. It is not my railroad experience alone. One of the things the Canadian Pacific said, when discussing the building of their road through to here was: "You have not got any good place in Detroit for passenger business, Mr. Joy." I said: "That is true, but if you
build your road there, the Flint & Pere Marquette and the
191 Lansing will join us, and we shall get strength enough to acquire a place where passenger business can be done; we cannot do it alone, but if you build your road there, so that we can build up a passenger business for St. Louis and a passenger business for Chicago, we can get strength enough to get a ground there." Mr. Van Horn says: "I will come down there and look it over with you." And he came here, and Mr. Crapo, who lives at New Bedford, Mass., the president of the Flint & Pere Marquette road, came here; Mr. Thayer, of Boston, who is the president of the Lansing road, came here. I got them all here; I took them down and showed them the old depot ground there; I showed Mr. Thayer the 20 acres of land which we could lease them down there; he came here alone; I showed him where, in my judgment, the best place for a passenger ground in the city was, and that was at this point where we subsequently located it. Mr. Van Horn and Mr. Crapo came here separately from Mr. Thayer. Mr. Thayer came here alone. I took them both down there to look at that ground. They said: "Well, yes, this is a good place; it is the place exactly for passenger business, but how are we going to get there?" I said: "Well, there is some difficulty about that, but what ought to be done I have never known to fail of being done; what ought to be done we can do somehow." There was a talk; we discussed coming right along up Fort street.

Q. Just south of Fort street?

A. Yes, sir.

Q. Through the private property?

A. Yes, sir. In that case we should have to break off from the
old depot ground, down below Twelfth street, and go between
192 Scotten's two buildings on Twelfth street, and come up to the front on Fort street, and then run up, but that would

stop every highway there was there; I mean that we should run across every highway south of Fort street, and we should have to shut up every one of them; we should have to build them up to have the grade high enough, having crossed the Michigan Central 18 feet high, and being compelled to come up here on Fort street, where it was a good deal higher, we would have to build those roads up so as to cross them at grade; we could not go high enough to go under; we would have to cross them so as to destroy the roads probably. Then the question came up whether we could run through the middle of those grounds, and the difficulties were so great that that was found impossible; we would have to either build up along as we went there through the middle of those grounds, cutting them right off, or else go down to the grade, which we could not do, because we would have to go down deep. The question was, whether we could come down by the Michigan Central on the River road; we discussed that, but we had got to go over the Michigan Central so high that we could not get down to those grounds on any grade that we could use. Therefore, the one possible place where we could get was where we go now. We found we could not get there; there was an enormous amount of property on Fort street that would have to be destroyed if we went that way.

Q. If you went on the private property on River street and Fort street, you would have to go through that entire private property?

A. Yes, sir, from Twelfth street, clear up. I could not get means to do that. All these companies could not furnish money
193 enough to do it. The question was, what we should do. Mr. Van Horn, who is a very experienced railroad man, who has built an entrance into Montreal on the Canadian Pacific road, coming into the city on arches, coming up almost clear to the Windsor hotel, which stands up on the top of the hill; they come on arches for a couple of miles out over the streets, and over the buildings in fact, built on stone arches, costing an enormous amount of money; but they considered it important enough for their road to have that; in fact, he said he could not afford to have a second-class station in any great city—if he could not have as good a station as any other company in any great city, it was not worth while to go in there. When we went over the ground, he said, "The only place where you can get through, Mr. Joy, I think, within any cost that will come within our means, is to go across the River road." That was his suggestion, to come there first. We discussed that question in connection with the others, and we made up our minds, all of us, including Mr. Thayer, Mr. Crapo and the Wabash people, and the men connected with the Flint & Pere Marquette—Crapo, Thayer, Van Horn—we all made up our minds that that was the best route we could take, that it would injure property the least to come that way, that it would, as they thought, not cost such an amount of money that they could not afford to do it, and they thought by that way we could get through. A question arose about the Michigan Central, whether we could get any land of theirs, and we made up our mind we could not.

Q. Why?

A. For two reasons. In the first place the Michigan Central has been hostile to us and the Wabash ever since we began to talk of coming to Detroit, and we have met nothing but hostility and enmity from them.

194 Q. They have been hostile to you ever since you ceased to be president of it?

A. No, sir; not since I ceased to be president, but ever since I took measures to get the Wabash road into this city they were hostile to that enterprise, fought it in every way they could, by injunction after injunction. Then they were hostile to the old union depot company, fought that in every way they could before the legislature when we were getting a charter, and in every possible way; and when this started they were more hostile, and the result was we could not do anything with them.

Q. You could not do anything with them by voluntary agreement?

A. By any agreement whatever at all, not even to use this street.

Q. It has been suggested here that you ought to have laid out this line through Michigan Central yards; will you give the reasons why you didn't do that?

A. There are two reasons. If the Michigan Central grounds were not occupied at all, and they were open so that we could have laid our route through there, it is possible we might have run through those grounds, if it was not for the damage it might do to our ground below. We could not go through the middle of our own grounds below; if we did that we could not make use of it by a depot ground to be jointly used by all these companies, it would cut it right in two, and we could not use our own grounds that way without destroying them practically. As it is we can make those grounds join to the union depot grounds for all these companies, and we can make a very fine ground of it; but if we ran another road though the middle of it, it would destroy the value of

195 our own grounds, so that we could not use them. If we went through the middle of the Michigan Central, it would destroy the Michigan Central also—they could not use theirs. Therefore, if we had a law authorizing that we could not have done it, it would destroy both grounds practically for public use. Then, in addition to that, there is no law whatever under which one railroad company can take the grounds of another company by condemnation. There was a case in Massachusetts where two roads came into the city of Boston side by side, the Boston & Eastern road the main road, and the Vixburg road. The business of those companies had become so large that the Eastern road could not get the ground they wanted—I think it was the Eastern road; they had not depot ground enough, and they could not get them on one side at all, because there was an important highway and the public could not give it; on the other side the other company could enlarge their grounds without any difficulty. They would not let the Eastern Company, if that was the company, and I think it was, have any of their grounds voluntarily, because they said they wanted them all;

but the other company said, "You can enlarge on the other side of your road without any difficulty." "Well, but we don't want to be driven to that," the other company said. Finally they went before the legislature and asked for the privilege of condemning a certain portion of the grounds belonging to the other railroad company. It was discussed in the legislature before a committee. They made up their minds that the public necessities required that some of those depot grounds should be transferred to the other company, and that the other company should acquire additional depot grounds on the other side of its station, and they recommended the
196 legislature to that effect, and they passed an act authorizing the condemnation of the grounds of the other railroad company. That is the only case I know of that kind.

Mr. DICKINSON: They were authorized, and did condemn that depot ground?

A. They did, but under a special act of the legislature authorizing them to condemn that particular ground.

Mr. BAKER: Has the legislature of Michigan ever passed any such statute?

A. No, sir; they passed a statute prohibiting our using the grounds of another company.

Q. You say you were a member of the bar for a number of years, and the attorney and the president of the Michigan Railroad Company, and connected with all these different railroad enterprises, and you say you know of no law by which you could condemn a right of way across that property?

A. There has never been any law by which it could be done, and there is not now.

Q. You would be a little surprised if Mr. Don M. Dickinson could point out such a law on the books?

A. I don't think it is possible for him to do it. I don't think it could be done.

Q. As a railroad man, what have you to say as to the practicability of building an elevated railroad along River street, so as to accommodate the business of these companies for the transaction of a passenger business at the corner of Third street and Fort street west?

A. From Twelfth street up?

Q. Yes.

A. I don't think there is any difficulty at all.

197 Q. What can you say as to the feasibility and practicability of the plan?

A. It is perfectly feasible and practicable.

Q. Is there any objection to it?

A. I don't think there is any, any more than there would be to building anywhere else, nor a quarter as much. The Michigan Central objected to it on one side, and we condemn the right all along there. Other people objected to it, and the object is to get money.

Q. In the development of railroad business, will you state whether

or not the resort to an elevated road is a modern development or something that is obsolete?

A. No, sir; it has just begun. For instance, in the city of Louisville, the Louisville & Nashville road, which is now a great corporation, down South there, comes into the city of Louisville right along the levee down to its station ground up on the level of a main street, like our Fort street here; that is the high street and the chief street of the city; they come up along on an elevated road, for a further distance than we do, just about as high as we do, but their whole station ground stands on iron pillars, as well as their railroad, it is built on iron pillars there, because their ground falls off and they could not use it in any other way, so that they built that depot ground, bringing it up to a level with their business street, like Fort street here, built up to the level on one side, standing on pillars on the further side; the whole of it is on an elevated road just like this exactly. At St. Louis there is an elevated road being built in that city to connect the roads together, much like this. At Jersey City and for about 12 miles out of Jersey City, and running through its main street, the Pennsylvania Railroad Company
198 are building an elevated road; perhaps it is not so long as 12 miles, but it is a good long distance, and they run through the main street of Jersey City several miles to the river, and they build their elevated road, and as their business is across the river, and they have to go on boats, they build their station-house high, so that their passengers can step from their station onto the boat.

Q. The Pennsylvania road did go into Jersey City on the surface?

A. They were able to do that, and they are running now on the surface; I don't think their elevated road is done yet.

Q. But they cross a great many streets at grade?

A. Fifty or a hundred, I think.

Q. And the result was it was dangerous to passenger travel on the railroad and to people on the highway?

A. They made up their minds it was cheaper to build their elevated roads and let the streets be under than it was to be subject to the inconveniences and damages from running through the city on grade.

Q. That elevated road is in process of construction now?

A. Yes, sir; it has been going on for some years.

Q. This elevated road on the wharf, on the river at St. Louis, is now being constructed?

A. Yes, sir.

Q. Did you ever see the elevated road through the city of Newburg, on the Hudson?

A. No, sir; I never was there.

Q. The West Shore road out of New York is a new railroad?

A. Yes, sir; it has been opened within the last three or four years.

Q. You have seen the elevated road through Rochester or Syracuse, I think it is?

199 A. They have raised the road through Rochester, but they have built that up to run through the street there still.

Q. But there is an elevated road through one of those towns?

A. It is through Rochester. It used to go on the grade; they have raised it up so that all the streets can run under the crossing.

Q. So that in the development of the railroad business, this is a movement or a tendency that is quite recent?

A. It is recent, but it becomes necessary in a great many cities absolutely.

Q. That is, it is a necessity in cities where there is a large population and a large number of highways to be crossed?

A. Yes, sir; a good deal better to do it, a great deal.

Q. You were in Europe last summer?

A. Yes, sir.

Q. Do they resort to any such thing there in Paris or London?

A. In the city of London they do not build exactly as we do here in this street. In the city of London there are two or three railroads come in, for instance, at the same depot, and they have a depot one above another, and the roads come in right over one another and cross one another, and they build the arches so high that they run over the houses of London. I never have examined them sufficiently carefully to say just how they were built. I have been there and have seen one arch running over another and over the houses, so that you can look into the chimneys. That was a cheaper way to build than to run at grade, a good deal.

Q. What about Paris?

A. In Paris I don't know of any elevated road. Paris is a more elevated city than London, and I think the roads in

200 Paris come in at grade; they do not come so far into the city; in London they come clear to the middle of the city; in Paris it was so large a city and so expensive getting in, that they had to come in at grade. Therefore they cannot get so far into the city as they do in other places, but they get a pretty good distance into the city; they have the streets built overhead.

Q. Over the railroads?

A. Yes, sir.

Q. So the effort is in railroad construction at the present time to avoid crossings at grades?

A. Yes, sir. That they do, so far as the roads I saw in Paris are concerned; the highways are carried over; the roads are carried over on pillars, just the same as those we put up here.

Q. In London they have an underground railroad?

A. Yes, sir, running all around London; but that is not built on pillars.

Q. I see they are going to build one, a double-decker, in Broadway, New York?

A. They are talking about it; but the importance of getting into any large city is so great that in London all the roads go into the center of the city; they go over one another and to the same depot.

Q. Have they grade crossings as we have at Michigan and other avenues here?

A. I don't think there is a grade crossing of a highway in a city in all England.

Mr. DICKINSON: There is no doubt about that?

A. I don't think there is one.

Mr. BAKER: Will you state whether in the development of railroad construction in this city, there is a tendency now to avoid these grade crossings?

201 A. Yes sir; they are going to be an awful nuisance in this city. There is a good deal of discussion about avoiding them on Woodward avenue.

Q. That is going on now?

A. Yes, sir; and that will continue to be agitated more and more every year until some result is arrived at, and so it will with all these grade crossings. They are an immense nuisance, particularly in the business part of the city.

Q. The controversy on Woodward avenue is to find out which will go over and which will go under at present?

A. Yes, sir. In the city of New York, the New York & Harlem, which had the entrance into that city over the New York Central, and the New York & New Haven, used to go at grade and cross the streets at grade; perhaps it was ten years or more ago; so many people were killed at grade there that the city took it up; every year there used to be a good many people killed, and the city took it up with the railroads. The question was how the difficulty could be avoided. Finally when Mr. Vanderbilt got possession of the road, as he did, after he had it for a while, they made this agreement with the city; it was disastrous to both the railroad company and the city; the city agreed to pay $3,000,000 towards the expense of changing that road so that it should not cross any street at grade. The city paid $3,000,000 and the railroad company paid the rest, and the road was changed; some parts, where it went over the street at grade, it was raised, so that the streets now run under; where it runs through the hills, and some part of it was tunneled, but the result of it is that from Harlem down they run into the city without going across a street at grade; and the city paid $3,000,000 and the railroad paid the rest. How they will get along with it in this city I don't know.

202 Q. In the line that is adopted along River street by the Fort Street Union Depot Company, are there any crossings at grade?

A. Not one.

Q. Are there any crossings at grade in the union depot grounds themselves?

A. There — two streets in the union depot grounds, parts of which will have to be discontinued, and that has always been regarded as a necessity.

Q. And in all the streets up to Twelfth street those are the only two?

A. Yes, sir.

Q. And those are where the depot business will be, and the trains will go and let off the passengers?

A. Yes, sir.

Q. And all the other crossings at Sixth, Seventh, Eighth, Ninth, Tenth, Twelfth, are all overhead crossings?

A. Yes, sir; all overhead, interfering with no street.

Q. From your experience with railroads, will you state whether there will be any practical difficulty in traffic going right on along River street the same after this structure is built as before?

A. The best illustration that I can tell you of is this: I was in New York the other day, and I had to go to several places downtown, and as I had to go to several places down in the lower part of the city, it was more convenient for me to take a carriage than to go on the elevated road, so I took a carriage to drive down to the lower part of the city. We got down until we came to the jam in Broadway; and the jam in Broadway from carriages and teams extends a good deal further up than when I knew the city many years ago; it is a bigger jam. I could not get down Broadway with
203 any convenience. I told my driver to drive out to the side street, where the elevated road was, to see if he could not get down there. I found the jam there just the same under that road; it spans the whole street just as we do. I said: "Well, get into the line, and see if we cannot get along," and so he got on one side and went along with them, while they were going along on the other side, and we got along. There was a crowd of carriages and teams going along there. He was compelled to go slow on account of the teams, and the railway trains were passing overhead, and all without any difficulty in the world; no man's horse was frightened, no man or horse paid any attention to the trains above; and that was just about as high as this road is here, and built with the pillars on the curbs of the streets all the way along, so that the whole street was open.

Q. How often was a train going overhead there?

A. Constantly; I could not say exactly; dozens were going while we were there.

Q. It has been stated here, one every minute and ten seconds.

A. I should think that; dozens went over while we were there for a few minutes.

Q. Didn't your team run away?

A. The horses didn't seem to know trains were going overhead at all. And so it will be here. Wherever there is an elevated road spanning a street, the street is used just as freely as if it was not there.

Q. Do the street cars run under that, too?

A. They did, but not where I was driving; but when you get further up on Sixth avenue, the railway cars go right on under the railroad, and teams and carriages also. The street there is a good deal wider.

204 Q. From your observation and knowledge of railroads, and your experience of men, would you say there would be

any difficulty in transacting the business that is done along River street under this elevated road?

A. Not the slightest in the world. It is done everywhere where elevated roads are.

Q. And River street is not a driving street, where ladies and gentlemen drive for pleasure?

A. No, sir; that would be destroyed by the Michigan Central crossing down there. No one would ever go there for that purpose.

Q. The Michigan Central has got a number of tracks across that street?

A. They have a dozen or fourteen tracks, and occupy it all the time.

Q. Switching backwards and forwards there?

A. Yes, sir.

Q. But the business done on the river front is a freight business, a heavy business?

A. Yes, sir, entirely.

Q. Entirely a heavy business?

A. If anybody wants to go there with their teams, I don't think there would be the slightest difficulty in going along that road, any more than in New York.

Q. But it is a heavy business, and the horses are draft horses and that sort of traffic, they are more sluggish horses?

A. Yes, sir.

Q. What effect did the elevated road in New York have on the light in your carriage?

A. It was a good deal lighter than this room is; a good deal lighter than this room with those windows up.

205 Q. You know how this structure is to be built along River street?

A. Yes, sir.

Q. Do you think it would have any effect upon the light on Mr. Backus' premises?

A. I don't think it would have a particle, any more than you might cut 40 feet out yonder five or six feet wide, 40 feet from these windows; it would not obstruct the light at all here (pointing to court-room).

Q. Could you give us any illustration of why the light would not be affected?

A. It would be a good deal like taking out both sides of this room and leaving pillars like those to support the roof, and opening the roof here in two or three places the whole length of it, so that the sun could shine down in here. I think the street road down yonder, with one side entirely open, and 40 feet on the other side entirely open, would be as light under that road as this room would be with both sides taken out, and pillars standing in here, one 30 feet apart, and pillars on that side 30 feet apart, with the sides entirely open for the light to come in, with one-fourth of this roof entirely open, so that the sun could shine down.

Q. It is difficult to believe that that would have any perceptible effect upon the light?

A. It would not have any perceptible effect, so far as light is concerned. I am speaking of under the road now. So far as Mr. Backus is concerned, I do not think it would have any effect at all; it is 40 feet from him, and it is like a ribbon stretching 40 feet away.

Q. And this obstruction, except early in the morning, would not throw a shadow on his premises?

A. No, sir. If the sun got up an hour and a half high
206 there would be no shadow there. The sun would be shining right on him.

Q. Have you familiarized yourself with the amount of the traffic that is done by these four different roads at the present time?

A. You mean the number of trains that pass over them?

Q. Yes.

A. Yes, sir.

Q. Will you give us the amount of business that is transacted by each of them, the number of trains that they run, and about how many cars in each train?

A. I don't believe I can tell you the number of cars in each train.

Q. Tell us how many passenger trains and how many freight trains each road operates at the present time?

A. I don't think I can tell you how many passenger trains they run. I can tell you how many trains they run. The Flint & Pere Marquette runs six trains.

Q. Each way?

A. No, sir; both ways—six in all.

Mr. DICKINSON: Passenger and freight?

A. I don't think they run any freight; that is my impression, but I may be wrong about that; but I have the impression that the Michigan Central haul their freight trains in from the junction.

Mr. BAKER: We will prove that by somebody else. You understand they run altogether six trains?

A. Yes, sir. The Detroit, Lansing & Northern runs ten trains; the Wabash runs ten trains; the Canadian Pacific runs two passengers, and they have some freight, will have some freight, not up here, but on the lower road, but the trains run; Flint & Pere
207 Marquette, six; Detroit, Lansing & Northern, ten; Wabash, ten; Canadian Pacific, two, and then I have got four freight trains here (referring to memorandum).

Q. They must be passenger trains you are talking about, in the first place?

A. Very well; there are only two freight trains. Thirty-two trains is all they run there now.

Q. Those are passenger trains?

A. No, sir; it includes all the trains running now.

Q. Four of those are freight trains?

A. Yes, sir.

Q. This depot that is to be at the corner of Third street and Fort

street west, right on the corner down there, is to be a passenger-house?

A. Yes, sir.

Q. Enough to accommodate these four roads and any other road that may desire to come in?

A. Yes, sir.

Q. What freight accommodations are to be furnished on those same grounds, if any?

A. On the Congress Street front, after taking off all the grounds needed for passengers, about half the lot there on the Congress Street front will be used probably by the Flint & Pere Marquette and the Lansing road for a city freight-house, doing business with merchants here, taking their packages out and bringing packages in from the country.

Q. Is the Wabash to use that?

A. No, sir.

Q. Is the Canadian Pacific to use that?

A. No, sir.

Q. Their business is still to be transacted at the foot of Twelfth street?

208 A. Yes, sir.

Q. Is there an elevator at the foot of Twelfth street, where the grain of all these four roads will be handled?

A. Yes, sir; it is on the ground down there—a large elevator down there.

Q. There are no conveniences up here for the construction of an elevator?

A. No, sir; no heavy freight will ever run up here; the grain and lumber and cattle of the country, and all heavy freight that comes into this city over any of those roads, will all be done down yonder on Twelfth street.

Q. So that all the traffic that will come over the elevated road will be the passenger traffic and the city package business of two of the roads?

A. That is all.

Q. What do you mean by that package business, city business?

A. For instance, a merchant sells a box of dry goods or a barrel of sugar, or sells anything that he has in his store, which he wants to send to his customer in the country. It comes in barrels, or boxes, or packages, and for the Lansing and Flint & Pere Marquette roads it will go there.

Q. Are those roads that run into the interior of Michigan where the merchants do business in the city of Detroit?

A. Yes, sir; and that kind of business will be done there.

Q. And I suppose the same kind of package business, where it comes in from the country, will come there?

A. Yes, sir.

Q. But the grain, and coal, and cattle, and lumber, and heavy freight business will all be done below?

A. Yes, sir; not a car-load will come there.

209 Q. Will this small depot upon these grounds, for this city package business, be of any utility to the merchants of this city?

A. It will save them, perhaps, a quarter cartage every time.

Q. It will be more convenient for them?

A. Yes, sir; it will save them hauling a mile or a mile and a half, and save the time and expense of a mile and a half.

Q. Can you tell us, as a railroad man, about what would be the average rate per hour that the locomotives would travel along the elevated road?

A. I estimate about ten miles; I think that would be as fast as they would ever travel.

Q. Some might go a little faster and some slower, I suppose?

A. Rarely ever faster than that.

Q. Have you made any estimate of how long it would take a train to go in front of Mr. Backus', or the locomotive, I mean?

A. Traveling at the rate of ten miles an hour, it would take a locomotive passing his ground (238 feet) 17 seconds.

Q. Traveling ten miles an hour it would go by these premises in 17 seconds?

A. Yes, sir.

Q. Suppose the traffic on that elevated road should remain as it is now, how much time would it take every 24 hours—how long would a locomotive be in front of the property of Mr. Backus every 24 hours?

A. Nine and a half minutes a day—24 hours.

Q. I suppose it is fair to presume that the Canadian Pacific, at any rate, will put on some trains when these accommodations are furnished?

210 A. Yes, sir; there are 32 trains now that might come there; allowing that there are two freight trains for the Flint & Pere Marquette and the Lansing, two each, one in and out, there would be 32 trains as things are now. It is possible in time that might be doubled, the number of trains, possibly it might be trebled. If it were doubled, twice as many trains, it would take eighteen minutes for all the locomotives passing Backus' grounds—32 trains nine and a half minutes, 64 trains, if there were so many, would occupy about 18 minutes.

Mr. DICKINSON: For the locomotive?

A. Yes, sir, I speak of the locomotive only.

Mr. BAKER: Would double the number of trains be a fair estimate for the next five or ten years?

A. I should not think there would be so many as that in five or ten years; at the end of ten years there might.

Q. Have you made an estimate of the amount of time a hundred trains would take, for the locomotives?

A. Sixty-four trains would be 18 minutes; if there were twice 64 trains, that would be a little more than a 100; take 100 trains, it would be about half an hour, 28 minutes.

Q. So that if the business increased so that there was 100 trains

a day, a locomotive would be in front of this property about half an hour out of the 24?

A. Yes, sir.

Q. To what extent would the presence of a locomotive in operation on the elevated road in front of that property injure the property, or the use of it; how would it affect the property, in your judgment?

A. As I said before, when this case was before the jury before, I didn't think it would be much damage to Mr. Backus; how
211 much, or how little, in figures, I would not like to state, but I don't think it is a serious damage, and I don't think it is a serious damage to anybody there to have a road spanning the highway, leaving the highway perfectly open, except there is a post once in 35 feet; a post once in 35 feet before a man's land forever is some damage; any one of you can judge how much that will be; we have not considered a telegraph pole any great damage to the adjacent lot; the standing of a pillar in front of a man's lot, if he wanted to rebuild, build some kind of a building there where this post would go right in the middle in front of the building, it might be some damage.

Q. That is if he had a doorway there?

A. Yes, sir, it might be some damage; or if he wanted to back up a team right straight to the doorway, it might be some damage, but no large damage; I cannot conceive myself what other damage there is there. The danger from fire, as modern engines are built, amounts to nothing; I think that will be proved here; and anybody who is familiar with modern engines, and how they are used, I think they will know it. The damage to light, as I have shown you, amounts in my judgment to nothing; others may differ from me on that.

Q. What will be the damage from soot and cinders?

A. Soot and cinders, as modern engines are constructed, there would be some little small cinders such as get into your eyes when you are on passenger trains.

Q. As a railroad man, do you understand that a locomotive can be constructed and operated so that very little smoke and cinders escape from it?

A. Yes, sir; they are so constructed that with the fire-box closed no smoke and cinders will come out at all; but that is not
212 the way engines are generally run; that is the way in which they are run when they come into cities and when they run by buildings, and where sometimes in the country they run over combustible structures like wooden bridges, then they shut up the fire-box; that prevents a draft, and that prevents sparks from coming out.

Q. Do you understand a locomotive can be operated any considerable distance with the fire-box closed?

A. Yes, sir; two or three miles; it depends a little on the ground.

Q. So that, in your judgment, it would be practicable to operate

this piece of elevated road along this street without having the fire-boxes open?

A. Entirely so; but there is no danger from fire, I don't think, with the fire-boxes all open. There would be some smoke with the fire-boxes all open, but from sparks, I think, none which would be dangerous. The fire-boxes of a locomotive are so built now that the sparks of any considerable size never get out of the chimney; they are deposited in the fore part of the locomotive, and when that fore part of deposit gets filled, at some place on the road they open it and drop them out, but with the sparks of any size, which are liable to carry heat or fire, they are all deposited there; the smaller ones, such as you get in your eyes traveling in a train, such as pass out of the small spaces of the network of a locomotive, are thrown up into the air, but they are little bits of hot coals, no flame about them, and they get cooled before they get any distance and before they drop on the ground.

Q. And the higher a locomotive is the safer it is?

A. Ordinarily so; yes, sir.

Q. That is, in falling, whatever life there is in those cinders goes out?

213 A. A cinder which is thrown out of a locomotive now is so small that it will be cooled before it goes 30 or 40 feet in any direction.

Q. And with the draft, with the present arrangements, they are thrown into the air with a great deal of force?

A. Yes, sir; and before they drop down to the level of the locomotive they are gone out.

Q. Do you think, from your knowledge of railroads and your knowledge of the property of Mr. Backus, that the fire risk will be increased there?

A. I don't think it would a particle.

Q. Have you looked into the matter of this recent ordinance in regard to smoke?

A. Yes, sir; I have got it here (producing it).

Q. I suppose you expect to operate your road subject to the ordinances of this city?

A. We have to do it. Our men who operate them would be sent to the house of correction if they didn't.

Q. That ordinance, as I remember it, provides that you shall not emit any smoke or cinders?

A. Shall I read it?

Q. Yes, if my brethren have no objection.

Mr. Dickinson says he has no objection, and Mr. Joy hands the ordinance to Mr. Baker, who reads it aloud as follows:

"SECTION 1. The emission from any chimney or smokestack within the city of dense smoke or smoke containing soot or other substance in sufficient quantity to permit the deposit of such soot or other substance on any surface within the corporate limits of the city, shall be deemed and is hereby declared a public nuisance.

SECTION 2. Any owner, agent, lessee or manager of any
214 building, boat, locomotive or structure in the city of Detroit who shall cause or permit dense smoke or smoke containing soot or other substance as above to be emitted from such structure or from any other place, which said soot or other substance shall damage the property or injure the health of any person, or shall especially annoy the public, shall on complaint of any person so damaged or injured as aforesaid, or on the complaint of any citizen or officer of the city in case of especial annoyance, be liable for each any every such offense to a fine of not less than $10 or more than $100, or to imprisonment in the house of correction for not less than ten or more than thirty days, or both such fine and imprisonment in the discretion of the court, provided that the provisions of this ordinance shall not apply to a place used exclusively as and for a residence or steamboat."

Q. I suppose it has been customary upon roads in this city to use bituminous coal?

A. Yes, sir.

Q. Have you had any consultation with any of the officers of these roads with a view of complying with that ordinance, and for that purpose to change the coal that will be used?

A. When I saw that ordinance sustained by a decision of the supreme court as a valid law——

Q. Our supreme court has recently sustained that, as you understand?

A. Yes, sir, they have declared it to be a valid ordinance. When I saw that I called the attention immediately of Mr. Heald, of the Lansing road, and of some others to it. I have not an answer from some of the others, but I saw Mr. Heald, the general manager of the Lansing road, yesterday. He said of course they would
215 have to comply with the ordinance, and they would have to introduce locomotives that would burn either coke or hard anthracite coal.

Q. Would there be any practical difficulty in doing that?

A. None at all, except they would have special engines here to run the trains from Delray up to depot grounds and back again, taking off the locomotives which would bring the trains to Delray, and putting on a locomotive which would run back and forth with trains to that point.

Q. Is not this true, that practically the only difference between using bituminous coal and anthracite coal is a matter of about $2 a ton?

A. It is about that. The result of that ordinance will be the use of a different kind of locomotive; that is all.

Q. In managing the trains and business of the union depot company, in the management of the trains of these four different railroads, would there be any practical difficulty in having locomotives designed for the use of anthracite coal or coke, so that you could bring the trains, the cars, in over this elevated road with such engines?

A. No difficulty at all. It would be a little bit inconvenient only to take a locomotive off down at Delray and hitch on one of the locomotives which would belong to the depot company for doing that business; they would burn hard coal or coke, and they would haul the train out to Delray and there let the regular locomotive take it, and haul the trains in in the same way. That is what they would have to do under that ordinance.

Q. And your attention has been called to the necessity of doing that by this recent decision of the Supreme Court?

A. I showed it immediately to the manager of the Lansing road. The others I have not been able to get at yet. He said they
216 will have to do that and be compelled to do it, and glad to have it, because it will have a tendency to clear away a great deal of black smoke in the city, which comes out of a great many chimneys here, which ought not to be.

Q. With the road operated in that way, operated properly, with the dampers closed along this trestle-work in front of the property of Mr. Backus and the other property along the street there, would the use of the adjoining premises be in your judgment seriously affected by the presence of the road?

A. I don't think it would at all.

Q. I suppose in your time the character of the property down there has changed materially?

A. Yes, sir.

Q. What used to be along the river years ago when Judge Chipman was a boy?

A. When I first knew it, many pleasant residences were along there, looking out onto the river. There is an old house now standing out there which was once quite a fashionable residence. It is all going to decay now. There was nothing between it and the river, and all the other houses fronting on the river were very pleasant. That is all passed by. Then it became a kind of business street and remained so until the Michigan Central business increased to such an extent that they found themselves under the necessity, as they say, of encroaching on that street, until they have got 13 or 14 tracks across it, practically breaking the street in two. From that time the property has gone to decay all along there.

Q. Why did the Michigan Central go down there; why didn't they stay here on the site of the city hall?

A. When it was here it was owned by the State, and the
217 reason it was placed here was because at that day every farmer in the country who had a barrel of flour to sell brought it to Detroit.

Q. Brought it in on wagons?

A. Yes, sir, and he sold it to the men who had warehouses on the dock; the dock was lined with warehouses from one end of the city to the other; in the winter they used to be filled with grain, with flour, with everything that a farmer had to sell, and in the spring that used to go off in the boats; there was no road on the other side; every teamster in the city made money by hauling the flour from here down to the warehouses. Every teamster was interested in

keeping it here; every warehouseman was interested in keeping it here; they got it located here; they fought for it here. When there was a good deal of a move to take it away, they had influence enough to get a railroad built right down Woodbridge street, right clear down to the river front; it was built by old Mr. Palmer, the father of Senator Tom Palmer, but it never could be used; a locomotive running down there would be apt to run off into the river; they had no means of running that freight down there, and they had no means, and after a year or two it was taken up. Well, when the Michigan Central was organized——

Q. How was that organized? You say the State owned this railroad, and tried to run the railroad, and they got bankrupt?

A. Yes, sir; they became utterly bankrupt, and wanted to sell.

Q. Did you have anything to do with selling that road?

A. Yes, sir.

Q. Just explain that.

A. When that charter of the company came to be formed
218 and discussed between us and the legislature, this question of terminus came up; every warehouseman and every teamster in the city was against any change; every farmer who lived in the country said it cost too much to reach Detroit, and they wanted to reach the river; therefore, they said, if we sell you this railroad there must be a clause in that charter which must provide that you must go to the river at some point in the city of Detroit, not further than 6,000 feet away from the foot of Woodbridge street. They put that in for the purpose of saving the expense of transferring their flour and grain from wagons and teams into warehouses and then onto boats. It would go down there, and go from a warehouse or elevator onto the boat, when navigation was open; when navigation was closed it would go right in the warehouses; there would be no expense for teaming or warehousing; that would be free; it was the necessities of the farmers in the country compelled that.

Q. So the members from along the line of the Michigan Central forced that in?

A. Yes, sir; because that was of immense importance to them; it saved them on an average, including teaming and storage during the winter, easily $1 a barrel on the flour.

Q. How much ground did they get down there?

A. We bought the ground from Third street down to the east side of Gov. Woodbridge's farm, the easterly line of his farm; it was a distance of perhaps not more than one-half of what the Michigan Central has got now in length; the road ran across the water in front of Gov. Woodbridge's farm on piles, it didn't go by the front of his farm; we thought down west of the farm would be all we would ever want, and they ran the road down there by his farm
and then turned off to go through the country; it might
219 have been one-half the length of the ground which they have got there now; I think not more than that.

Q. Did they acquire any additional ground while you were president?

A. Yes, sir; they acquired most of it when I was president. The Michigan Central business had become so large that it was impossible to do it on those grounds, utterly impossible when I was president; the next 150 feet I bought, and then the next 100 feet perhaps, I cannot tell just exactly how much there was, but a considerable portion of it was condemned by the Lansing, after the present company came in, the lots which adjoin Twelfth street now, 50 foot there perhaps, I don't think any more, but there might be 50 feet there that the present managers obtained; all the rest of it I obtained.

Q. Will you state whether that was necessary for the transaction of the business of that company?

A. At that time we had only these yards here and it had become impossible to do the business. In those yards were the shops, their blacksmith shops and locomotive and repairing shops were all in the yards, their car-repairing shops were all in the yard, and the repairing was done there; but the business had become so great that I was compelled to remove those shops to the junction here; the engine shops were put out at Jackson by the order of the board; that was where the two branches of the road came together, and they thought that was the proper place for the engine-houses; but they had all to be taken out of this yard; but while I was there the business increased so rapidly that the yard was not then sufficient, and I was compelled to acquire additional ground, and I acquired 50 feet on Twelfth street, I think, and Mr. Ledyard
220 bought the rest. The business has doubled and trebled since that, and the consequence is those yards won't do their business; they are crowded all the time, and they cannot half do their business, and the result is that they have been compelled to acquire out at the junction perhaps 100 acres of land on which they have perhaps 100 tracks stretching for three-quarters of a mile in length, where they make up and distribute their trains; but still these yards down here are so crowded that they have laid their tracks all along there; we had 150 feet right of way.

Q. It is practically one railroad from there to West Detroit?

A. Yes, sir; and they make Woodbridge street a part of their yard, and clear out.

Q. Is all that property down there in actual use by them?

A. Every inch of it.

Q. Used daily?

A. All the time.

Q. Is it necessary for them?

A. I think every inch is necessary, and if they could get more they would get it, and because they cannot get it there they are compelled to go out.

Q. Their use of River street, as a part of their railroad yard, was a part of the controversy between these two companies?

A. Yes, sir; I don't think they have a right to use a street as a yard anywhere.

Q. That was the position you took before the State railroad crossing board?

A. Yes, sir.

Q. Just describe the difference between a railroad yard and a railroad.

221 A. A yard is a place where the trains are made up and where they are distributed, and where all the switching for the making up and distributing of trains is done; a yard is for that purpose; that is what they call it a yard for, for their cars and their locomotives, and when they distribute their trains they have their switches in their yards, or should have, and do it all there. The yards of the Michigan Central, with all the grounds they have, have become too small, and they cannot do it there. Therefore the next resort they resorted to was to extend their yard out across Woodbridge street just as wide as they could extend it, by putting all those tracks down there, and they do a large part of their business out there now across that street, and that is what has destroyed that street, and it ought not to be; no street nor the property in the vicinity of any street like that should be destroyed by any such work as that.

Q. About how much land has the old union depot got at the foot of Twelfth street?

A. Now, about 40 acres.

Q. About how much of that is made land?

A. Something more than 20 acres of it.

Q. About half of it?

A. Yes, sir.

Q. I suppose, on the Michigan Central property, there is a large amount of made land?

A. The whole of it.

Q. The margin of the river originally came up to River street?

A. Yes, sir; that was located in what was originally the river.

Q. That is, the river washed the highway there?

A. Yes, sir, all along there; there was nothing between the ground and the river at all.

222 Q. Is there any more ground at the foot of Twelfth street, on the 20 acres of natural land and the 20 acres of made land, than is necessary to transact the freight business of these four railroad companies?

A. No, sir; there is not enough to transact their business. We have to do it now out at the yards of the Wabash at Delray. We have there 20 acres of land on which they do largely the making up and distribution of their trains, as they will have to do it all by and by, and all these companies will have to acquire land outside, because in the yard proper, including the grain which is to be handled there and the coal which is to be handled and distributed there and teamed out, and other things which will come there, and the switching necessary to be done there, we will have to occupy all that ground as the Michigan Central is doing, and we will have to go out like the Michigan Central and get land for this business.

Q. You designed to use the 40 acres as a freight yard?

A. Yes, sir.

Q. Where trains can be loaded and unloaded?

A. Yes, sir; and it will come to be as necessary to use every inch of that ground as the Michigan Central is today, as business grows; that is inevitable.

Q. Will the two and a half blocks of land at the corner of Third street and Fort street west be any more than is reasonably necessary for a passenger-house and a small freight-house?

A. No, sir; we could not get along with less.

Q. How long will the small passenger-house be?

A. The building will be about 25 feet from Third street, on the west side of Third street, so as to leave an open space between
223 it and the street; then the main building will be on the block between Third and Fourth streets; but there will be a long building for handling baggage, for express business, and for other business connected with a railroad business—perhaps a restaurant, which will stretch down into the next block, I don't remember just how far, but it will go into the next block perhaps 40 or 50 feet.

Q. So that that will have to be built right across Fourth street?

A. Yes, sir; it will go down into that block.

Q. I suppose you have examined these plans and know whether they are practicable and sensible for what they are for?

A. We have got the best that all our experience has been able to give us.

Q. I suppose you intend to have all the modern conveniences of a first-class depot there?

A. We mean to have a good depot there, which will accommodate the people of the city and the country and everybody that wants to do business with these roads.

Q. What would you say as to the location being one that will accommodate the public of this city?

A. I think it is the best one that can be found; it comes to the center of the city where the hotels will be and must be, near where the post-office is, and near the business portion. I cannot imagine any more convenient place in any city than this for a passenger building.

Q. Of course you have in view the change that will take place in this vicinity by the construction of the new post-office?

A. Yes, sir.

Q. So that the depot, with reference to future hotels and business part of this city, will be particularly advantageous?

224 A. That is the object. It is for this: A man comes from the country along the Flint & Pere Marquette road or the Lansing road, with his wife and children, the whole family, perhaps; he has got to go to some hotel; he does not want to ride a mile and a half or two miles to get there; it is convenient to bring him right into the city; if he is alone he can take his grip-sack and walk to his hotel; if he is with his wife and children and family, and he wants to go to a hotel, he has but a little way to go, and whether it rains or blows or snows, or anything of that sort, he is not subject to a long passage on a dark night to get to his hotel, it is but a short distance; that is for the convenience of every man in the country

who comes to the city, and for every man who comes with his wife and children, and for every man who goes with his wife and children to a watering place, like Mackinaw; he does not want to go or come a long distance on a stormy night; therefore it is for the interest of the city, and for the interest of the country and everybody, to have a passenger depot, which has got to be used for a thousand years, perhaps, for a hundred generations, convenient for the people of each generation; and you cannot estimate the value of a depot at all as a public convenience, to everybody that wants to do business with the city, to come to a city or to go from a city, because it is to last perhaps forever, and to be a convenience or inconvenience to every generation that comes; and therefore it should be in the best place that can be found.

Q. In your opinion, would it be practicable to build a railroad to connect these grounds with the old union depot grounds, by constructing a road through the private property—through Mr. Backus' property and through the Peninsular stove works' property?

225 A. I could not get strength enough to do it. I don't think it would be expedient, anyhow, to do it. It would cost more than the railroad companies could afford; we could not get money enough to do it, and it would be an unnecessary destruction of property.

Q. I suppose you have a pretty good idea of what that property is worth in there?

A. I think I have.

Q. You have lived on Fort street down toward that property a good many years?

A. Thirty-odd years.

Q. And you have been familiar with the value of real estate in the vicinity of the Michigan Central depot ever since you were connected with the road?

A. Yes, sir.

Q. Ever since 1846?

A. Yes, sir.

Q. I suppose you have bought considerable property in that vicinity?

A. Yes, sir.

Q. What is the situation of the property on the new union depot grounds themselves, with reference to their acquisition by the company—the Fort Street West union depot grounds?

A. They have bought it all.

Q. Bought it or condemned it?

A. Bought it or condemned it. I mean we have acquired the title.

Q. You have acquired the title to two and a half blocks?

A. Yes, sir. You spoke about the necessity for that; I will explain. Now, a yard for a passenger train has to be long

226 enough for a whole train of cars coming in, and a little longer, because sometimes you want to go out, and to have two or three trains occupy the yard at the same time; when you take off from the front there what you want for a passenger-house, a long pas-

senger train would stretch the whole length of that yard; it is only about 1,000 feet; it ought to be a good deal longer; with 1,000 feet we can get along; I don't think we can get in that vicinity any more land; so that the three blocks which we acquired there is no longer than we want for a single passenger train, but there will be four companies in there, and they will spread out so that there will be four tracks, so that the four can occupy the ground at the same time, and it can be used for more companies, in and out, because they don't stay there all the time; but you must have a certain length and width of ground and the 1,000 feet that we have got there is as little as we could get along with. I don't know of any company in any city where there is any less. I know they could not get along, where there was any considerable business, with any less.

Q. To what extent has the company acquired the property from those grounds down to River street?

A. They have acquired pretty near all the ground; had to buy them all, down to Eighth street.

Q. That is, the right of way through that property, through the private property, down to Eighth street, at the corner on River street, has been acquired?

A. Yes, sir.

Q. To what extent has the company acquired the right of way along River street?

A. With the exception of this case and two others, the match company and the stove company, pretty much all of them.

227 Q. The Michigan Central owns all the property on the south side of the street, and a portion of it on the north side?

A. Yes, sir; we have acquired the right of way from them on both sides.

Q. By condemnation proceedings?

A. Yes, sir.

Q. Have you acquired the right of way through the property owned by Mr. A. D. Boynton and a man of the name of Boutel?

A. We have acquired from Boynton—I think we have acquired all that down there with one exception; I think there is a piece of property belonging to an estate which was sold at auction here, and a Mr. Barbour bought it.

Q. I will take these up in their order. Here is the first property in front of which this elevated road is to be constructed; at the west end of this street, River street, is the property of Mr. Boynton?

A. That we have acquired.

Q. Do you remember how much a foot was paid for that?

A. I think we paid $20 a foot for that.

Q. That was by voluntary arrangement?

A. Yes, sir.

Q. The elevated road does not get fully into the street in front of that property?

A. No, sir.

Q. The next piece of property is that of Catherine Harpfer; that has been acquired by condemnation proceedings?

A. Yes, sir.

Q. And the next piece of property is that of Mr. and Mrs. Ruhlman; that was condemned?

228 A. The same way.

Mr. BAKER: That is property that is situated on the north side of the street, like Mr. Backus'. I am commencing at the further end, this side of Twelfth street. We have acquired the right of way in front of that property. Boynton has some sort of a little factory there. Catherine Harpfer has a residence there. Mr. and Mrs. Ruhlman have residences. We have acquired the right of way in front of it to build the elevated road in front of it, just as we want to acquire of Mr. Backus. Under the law a common council can authorize a railroad to be built in a street, but the company must condemn a right of way as against the abutting property-owner, or buy it; they can buy the right of way or they can condem it to have the right to run an elevated road in the street, the owners retaining the ownership of the property. The next property on this map is the property of John Wymaster, at Howell, who died recently?

A. That is not settled yet.

Q. You made a bargain with a Mr. Bennett for it?

A. Yes, sir.

Q. And that is in process of adjustment?

A. Yes, sir.

Q. The next property is that of Margaret Specht, now known as Margaret Ruchlin?

A. That was taken by condemnation; I think they gave us a deed afterwards.

Q. Most of these, after the jury rendered their awards, they give a deed and take their money?

A. Yes, sir.

Q. The next property is that of Barbara Baxter, now owned by James A. Randall?

229 A. We bought that; we paid $40 a foot to go in front of that property.

Q. The next property is that of Margaret Specht, acquired by condemnation?

A. Yes, sir.

Q. The next is that of Louis J. Specht, acquired by condemnation?

A. Yes, sir.

Q. And the next property is that of Barbara Steadley, acquired by condemnation?

A. Yes, sir.

Q. Those people have all accepted an award?

A. Yes, sir, and all been paid.

Q. And the right of way deeded to the company?

A. Yes, sir.

Mr. BAKER: That is, it is all acquired from the commencement in the street at the west end up — the property of Mr. Backus; they have clear to the property of Mary Specht, which is a small frame

building right on the Michigan Central property; that has not been acquired, but the case has gone over until next fall, under an arrangement with the counsel of Mrs. Specht (Mr. Conely), who is going to Europe, and it is in the same position as the Peninsular stove works. The next property is the Michigan Central crossing, which has been acquired by condemnation proceedings, and in addition to that there is 166 feet on the corner of Tenth street, where the flour shed is, with a track in there, and it is used as a place for distributing flour. There is 166 feet of that; that has been acquired?

WITNESS: That has been acquired.

Mr. BAKER: The Michigan Central condemnation involves
230 some other things, upon which we will introduce evidence in full. Then, crossing Tenth street, you will remember, gentlemen of the jury, there was a saloon on the corner of Tenth street, kept by a man named Frank Hildebrand, and next to that is property that belongs to Mr. Barker, one of Barker Bros., the furniture men; and the next piece of property is 25 feet, belonging to George C. Wetherbee, the woodenware merchant; and the next piece, 100 feet, belongs to George Kunze. The company has acquired the right to build an elevated road in front of all that property?

A. Yes, sir.

Mr. BAKER: I may state in this connection that this same property has been purchased by the Peninsular Stove Company since at figures which will be given in evidence here, as bearing upon the value of this property. The next property is the property of the Peninsular Stove Company, which has a frontage on the street of 298 and $\frac{47}{100}$ feet, within a foot and a half of 300 feet; in that case a stipulation has been signed between counsel, Mr. Edwin F. Conely representing that company, by which they consent that the road be built, that the superstructure be put up there, and that the damages be assessed afterwards, next fall some time.

Mr. DICKINSON: To this we object, and protest against it, and we take an exception.

Mr. BAKER: Certainly. That is, as far as the necessity is concerned, we have practically acquired it. They have agreed that we go on and do the work, and it will be put up there, and then we will find out what the damage is; they will know more about it, and it will be a plainer case, and they are willing to have it that way, at any rate, and their lawyer is going to Europe in the meantime. The next property is the property of Faxon, Williams
231 & Faxon, the Union mills; the right to construct it in front of that mill, which is a large flouring mill with the most improved machinery in it, has been acquired by the verdict of a jury in that case, in which the defendant was represented by Mr. Don M. Dickinson.

Mr. DICKINSON: Will you state the amount and their frontage?

A. The amount, including the injury to their business, for 140 feet, was assessed at $21,250, made up mostly of injury to their busi-

ness as flour-makers. The next property is the property of the Diamond Match Co., and that company is now represented by Mr. Dickinson, and it has been in process of adjustment, but has not been adjusted, and we may possibly have to try the case.

Mr. DICKINSON: To this we object and take an exception.

Mr. BAKER: The next property, and the only remaining parcel of property on the street, is the property of George H. Hammond, who has a meat-refrigerator building there in which he stores beef; the right has been acquired to build the road in front of that property. They go right close to that building in making the curve to get off the street.

WITNESS: We paid him and got a deed from him.

Q. As you have already stated, you have acquired the right of way clear up to the ground?

A. Yes, sir.

Q. And you have got all the ground?

A. Yes, sir.

Q. And the contract has been let for the construction of the building?

A. Yes, sir, and the work is going on.

232 Q. When does that contract provide that the work shall be done?

Objected to as incompetent, and an exception taken.

A. We expect to use the ground this fall; the whole building will not be done, but we expect to use it this fall of all of these companies.

Q. Are you engaged in the active work of constructing this elevated road?

Objected to as incompetent, and an exception taken.

A. All the work is in contract and in progress.

Q. When do you expect to have it done?

Objected to as incompetent, and an exception taken.

A. The elevated road we expect to be finished in September; we do not expect the passenger grounds to be finished quite so soon, but we expect in October to use the whole, although the building won't be done, but we will have enough generally to accommodate the passengers for the time being, and we expect to use it this winter.

Q. I would like to know whether the company has gone on raising the money and paying it out to complete this work just as soon as it can be done in a proper business-like way?

Objected to as incompetent, and an exception taken.

A. Yes, sir, just as soon as it can be.

Q. And each of these four companies, with the exception of the Wabash, is furnishing one-quarter of the money?

A. Yes, sir.

Q. And yourself and your associates in Detroit here are furnishing the Wabash's share?

A. Yes, sir.

Q. From your knowledge of the Backus property, the situ-
233 ation down there upon that street of all the property along there, can you tell us what the Backus property, adjacent to the Michigan Central railroad there, with just a small lot between it, on the street, and the Michigan Central and the spur of the Michigan Central running right down alongside of it, is worth; what is the market value of that property, supposing it was vacant property, the land itself, per foot front on River street?

A. It would be worth about $150 a foot for that front, half way back to Fort street.

Q. What would the Fort Street front be worth?

A. I don't think the Fort Street front would be worth quite so much as it would be down there.

Q. What is the property worth just west of it, between there and Twelfth street?

A. All the property west of it, until you get down to the corner, would be worth $80 to $100 a foot. $100 would be a high price for it, and $80 would not be a very low one.

Q. What do you base those estimates upon?

A. Actual sales and my knowledge of it for a good many years.

Q. Your estimate is based upon sales that have actually taken place down there?

A. Yes, sir, principally. I have had negotiations for almost all of it; a great many of them have been to me to sell it; I know what they have asked for it; I have attended auction sales and bid for some where there were several competitors; some of it I know to have been sold, and know what it sold for, and, taking it altogether, the prices that have been asked and the sales, it would be from $80 to $100; no higher than $100, anyway, and possibly not lower than $80.

234 Q. Why do you put Mr. Backus' property at $50 a foot higher?

A. Because it is convenient to the Michigan Central road and it may be used for manufacturing purposes a little better than the rest.

Q. Why does that make it more valuable?

A. There is a railroad to it.

Q. I thought a railroad damaged the property?

A. I think you will find everywhere in this city that manufacturers are going right around the railroads.

Q. You mean to say that his property is worth something more because he has side-track facilities with the Michigan Central?

A. I think it is worth one-half more on that account; it would be worth $100 without that, and it would be worth $150 with it. I think Mr. Backus went there because the railroad was here, as any other manufacturer would.

Q. Have you had any experience, or have you got any knowledge

as to the value of property this side of the Michigan Central crossing?

A. Yes, sir; this side of the Michigan Central crossing the property is worth a little more, because it is a little nearer to the city, and you can get to it from the city without going across the Michigan Central tracks; it is, therefore, worth a little more.

Q. That is, property this side of there, which can be reached without going across the Michigan Central crossing there, on the north side of River street, is a little more valuable?

A. Yes, sir.

Q. Have you had any experience in negotiating the sale of property along there?

235 A. I have bought property all along there.

Q. So you know what it is worth?

A. Yes, sir.

Q. About what is that worth per foot front along there, say at the corner of Tenth street?

A. For 125 feet there I paid $13,000.

Q. A trifle over $100 a foot.

A. Yes, sir; running back, however, deeper than this property below on the other side; that has got no buildings on it.

Q. Vacant property?

A. Yes, sir. I bought property that had buildings on it, but the only vacant property I bought was that 125 feet, and I bought that for $13,000.

Adjourned to Wednesday, June 17, 1891, 2 p. m.

WEDNESDAY, *June* 17, 1891—2 p. m.

Direct examination of JAMES F. JOY continued by Mr. BAKER:

Q. The Wabash road had a terminus at Toledo?

A. Yes, sir.

Q. Before the Butler road was built?

A. Yes, sir.

Q. The construction of the Butler road gave the Wabash two termini at the east end of their road, one here and one in Toledo?

A. Now it does; yes, sir.

Q. Where does the Wabash road run; what part of the country does it pass through?

A. It runs from Detroit to Toledo and St. Louis; it runs from St. Louis to Kansas City, on the Missouri river; from there

236 it runs with a branch, leaving it this side of there, running up to Omaha, on the Missouri river. It runs also to Chicago, both from St. Louis and from Detroit. I will state a little more definitely the history of our connection with the Wabash here. There was a project which came before the board of trade here and the people of Detroit, to build a road from Detroit to Hillsdale and a little west of Hillsdale, connecting there with a road coming down from the Jackson Valley, which had also been promoted by the Michigan Central Company, running down to Fort Wayne, the

object being to reach the Wabash in that direction. It was an irregular route, but that was the object of it, and that road was built, but it was premature. When it was built the road at Jackson was managed by a man at Jackson, in the interest of Jackson, and they found it could not make the needed connections to reach the Wabash road in that direction, and the result was that the Detroit & Hillsdale road failed and was sold, and it fell into the hands of the Vanderbilts; the Lake Shore bought it. That defeated the project which people here had of connecting with the Wabash at that day; but before that failure was thoroughly made, and they found they could not make use of that road to run here, connecting with the Wabash, the people here, at the head of whom was Chris. Buhl (perhaps I also was interested in it) and others, undertook to build the Eel River road. So having failed to use the Fort Wayne road and Jackson road, they thought they would have a road of their own. They built that, but [illegible] failure of the road at this end broke up that. The result of it was, the Eel River road was built from Butler down to Logansport,
237 connecting there with the Wabash road. There had been planned also what was called the Chicago & Canada Southern road, and that road failed also, but they had built from Trenton down here 72 miles, in the direction of the Butler road, where the Butler road was afterwards built. We tried to buy that 72 miles; but before that road went into the hands of receivers, Mr. Dillon, of New York, was the president of it. The Eel River road was built up to Butler, and it was about 30 miles from the termination of that road over to Butler. That road built there would give us a very good connection with the Wabash road. If it were necessary the 14 or 15 miles between Trenton up here could be built. We tried to buy that road—no, first Mr. Dillon agreed to be at a joint expense with us to put in the 30 miles. They agreed to furnish their share, and we agreed to furnish ours, but in a few days after that was done Mr. Dillon notified Mr. Buhl, who was then at the head of it, that Mr. Vanderbilt had bought the majority of the bonds of that road, and would ultimately get control of it, and he could not carry out his agreement; so that was broken up. Then we tried to negotiate directly with Mr. Vanderbilt. He foreclosed his mortgage and got control of that property. It was no use to him in the world, but it would be a good connection between Detroit and the Wabash road, almost as direct as the Butler is now; there may have been a mile difference, perhaps. At the request of parties of the Eel River road, I took up the negotiation with Mr. Vanderbilt, whom I knew very well; and it had cost him $750,000, as he said. I asked him if he would make a proposition to sell it to us for that, so that we could make a connection with the Eel River road. He didn't say that he would or that he would not,
238 but it became pretty important that we should act, and we did not want to build this road from here to Butler if it were not necessary. Finally I telegraphed Mr. Vanderbilt, who was at Saratoga, saying to him that we would give him $750,000 for that road, and wishing him to make a reply. He made a reply back

to me, saying the proposition was worthy of consideration; but instead of *of* letting us take it, he took my telegram to the Lake Shore road, the board of which was then in session at that place, and showed it to them, and he says, "Now, if you want to buy this road to keep it out of the hands of these people at Detroit, you shall have it at the same price," and they accepted his proposition, and they bought that road. So we were let out again. Then there was no alternative in the world to get connection with the Wabash except to build the Butler road. That is the history of the beginning of the Butler road.

Q. What was the object of making the connection with the Wabash?

A. To bring the business here, to open a communication with a large section of the country, reaching west as far as Kansas City and Omaha. It runs through the best section of the United States, probably, and we wanted to bring here as much of the business as we could, as much as fair competition would enable us to do.

Q. Is the country that the Wabash runs through a desirable country to connect with this city?

A. The Wabash runs through, perhaps, for the extent of it, the most fertile country there is in the United States.

Q. It runs right through the corn belt?

A. Yes, sir, and runs through Indiana and Michigan in the wheat belt, and Missouri in the wheat belt as well as corn belt, and
239 is, to take the extent of it, tributary to one road, perhaps the most productive section of the United States.

Q. The building of that road necessitated the construction of an elevator at the old depot grounds?

A. Yes, sir.

Q. There is a large amount of wheat and oats and corn handled there?

A. I think during the season, and during the time that road has been running, except perhaps the last year, when the crop was short, the Wabash has brought into this city as much grain as all the other roads together.

Q. That is, you have handled as much down there as has been handled by all the other roads?

A. Yes, sir.

Q. This line up to Toledo, does not that make Toledo a competing point for this business?

A. Yes, sir.

Q. In fact, Toledo is a competing point for Western business, and also for Michigan business, is it not?

A. I will tell you how that is. The Lake Shore road is a strong corporation now, perhaps the strongest in the United States. The Lake Shore has built its road from Toledo up to Lansing—Battle Creek, Lansing; it has built a road from Toledo up to Grand Rapids, right up northwest of this city; the Toledo & Ann Arbor has been built from Toledo straight up, clear up through Michigan, and may go as far as Mackinaw. Those roads are spread all over west of us, and the cities are competing with us, and the roads are

competing with us. What we get now in Michigan we have to fight for as against competition, not only southwest, but all over our own State. Therefore, it is that the utmost accommodation
240 should be given for business in every possible way, because the cities are competitors, as well as business men and railroads are competitors with it.

Q. And in the strife the successful one will be the one that has the most advantages and the most convenient facilities for doing business?

A. Yes, sir.

Q. The Grand Trunk has a line that runs through from Chicago to Port Huron?

A. Yes, sir.

Q. And the Flint & Pere Marquette has a line that runs from Port Huron over to Saginaw?

A. Yes, sir, an outlet at Port Huron.

Q. And a large amount of business is done that way?

A. I presume so, but I have not definite knowledge of that, but the Flint & Pere Marquette runs that way; the Grand Trunk runs through the Northwest and Southwest, and Detroit has got to fight for what it has got, and should the business accommodations be poor, it is at a disadvantage; it should have the business accommodations which it is possible to give for the business.

Q. Do you think the present enterprise, the construction of this depot, and the maintenance of a first-class freight yard at the foot of Twelfth street would increase the advantages of the city of Detroit?

A. It is one of the elements that will give great advantage to the city, both for passengers and such freight as the city wants to deal in.

Q. But with a passenger-house on the corner of Third street, and a small freight-house for the accommodation of two of the roads, it is also proposed to operate the old union depot ground for heavy freight?

A. Yes, sir.

241 Q. So that there is only about one-half of those grounds used now?

A. That is all now; there will be more next year.

Q. And these new companies, the Flint & Pere Marquette, the Detroit, Lansing & Northern and the Canadian Pacific, come to those old grounds partly because they can get good freight facilities?

A. They come up to the new ground for passenger facilities and for the city package business, and they come to the old ground for facilities for freight business.

Q. Can you tell us whether or not they would be willing to come to those old grounds and go out of their present quarters if the new union depot was not constructed?

A. They would not come there if they were not driven out of their old quarters.

Q. That is a part of the inducement that brings them—the proposed new union depot?

A. Yes, sir; that gives them facilities for passengers equal to any other, and down yonder freight facilities equal to any other, but the passenger is very important for those roads; they do a large passenger business, and will reach all parts of the State almost.

Q. You own some property, or the title is in your name, on the corner of Twelfth street and the River road?

A. Yes, sir.

Q. How many feet front has that on the River road?

A. Seventy-two feet front.

Q. And how much on Fort street?

A. Seventy-two, the same width.

Q. Does it extend the whole length of Twelfth street?

A. Yes, sir, 300 and odd feet, 310, or '20 or '30.

242 Q. Will you state the circumstances under which you acquired that property and what it was acquired for?

A. We employed Daniel Scotten to buy that property. Scotten employed a man named Eli Barkume. I don't think Mr. Barkume managed it very well, but perhaps he did the best he could. He went down there and let everybody down there who owned property know that he wanted to buy that property. They said they didn't want to sell. He said, "I want to buy, and I must have it. What will you take for it?" Under those circumstances they put on a good round price. He came to me and told me what he was doing, and he told me, under the circumstances, the least he could get it for was $27,000 for the whole of it, bought of several parties. He had not made a trade for any, but he told me what he had been doing and how he had got the offer; he had found it very difficult to get it and could not get it until he got them all together and let them know that he wanted the whole 72 feet. We wanted that property, not for the property itself, but so as to be able to put 12 or 15 feet of it into Twelfth street; that was a street leading down to the old freight and passenger grounds, and as we had them then we would want a wider street than the present narrow one, and I said to him, "If you cannot do any better, although it is a great deal more than it is worth, we will have to take it, because we cannot widen that street without —;" and we took it at the price they had offered it at.

Q. Was it situated so that you could condemn it under the power of eminent domain?

A. No, sir, we had to get it by voluntary purchase and had to pay whatever they asked.

Q. Do you regard the price you paid for that as any fair criterion of the value of the adjoining property?

243 A. I do not. I am sure that we paid a good deal more than it was worth, because the necessity existed and we could not get it without paying it. If he had taken time and bought one at a time without letting the others know that he wanted it, he might have got it for a reasonable price, but he went to them all and said, "What will you take for that property; we want that property;" and they asked more than it was worth, I think.

Q. Is there anything more you wish to state on your direct examination?

A. I don't think of anything.

Q. One of the jurymen inquires in regard to the question whether any more roads from Toledo will use this depot? Will you state what you know about the Pennsylvania Central or the Hocking Valley, or any of those roads coming here?

A. I cannot tell you certainly about that. The Pennsylvania Central road a little more than a year ago had an agent here looking over those old grounds down there, and he stated he would like to lease them—didn't state it to me, but stated it to Mr. Ellis, I think, some party connected with us; whether they really meant that or not I don't know; but I said to him, "Those cannot be leased to them there, because they are leased to the Flint & Pere Marquette and the Lansing roads; if they want to come to this city they can come to this passenger-house, and they can use those grounds I have no doubt, but they will have to make an arrangement with those parties down there now. They can make an arrangement with the Wabash to use part of this ground, I know." How much there was in that I don't know, but I went to Philadelphia to see Mr. Roberts, the president of the company, to ask
244 him about it, and to learn whether he wanted to come here. Mr. Roberts is a very cautious, deliberate, conservative man; he said to me, "Mr. Joy, we have considered that question; we would like to come to Detroit, but we have come to no resolution, and I cannot say any more than that to you now." So that was left in that way. Now there have been other parties within the last year to me to know whether a road from Toledo could find access to this depot, and I said, "Yes, any road from there out can;" and he wanted to know on what terms; but I said, "When you are prepared to come, and it is certain to be built, come to me and I will do what I can for you." That is the way that stands.

Q. There are two roads to Toledo from this city now?

A. Yes, sir.

Q. Both controlled by the Vanderbilts?

A. Yes, sir. The Butler road never would have been built if we could have made any arrangement whatever for the Wabash to use one of those tracks to come to the city of Detriot. They negotiated with Mr. Vanderbilt to see if they could get the use of one of those lines, but he would make no proposition and no terms, and we could not get from Toledo over either of those roads. Then the Wabash came to me to see if we could not get the Butler road built.

Q. So that from a railroad standpoint, as a railroad man, you can say to the jury that as far as the use of one of those tracks are concerned, it is not practicable to obtain it?

A. I know that. I know we could not then; I don't imagine anybody can now. I think the roads between here and Toledo are the best pieces of property Mr. Vanderbilt has got. I don't think the New York Central or the Lake Shore or the Michigan

245 Central, any of them, earn as much clear profit as the roads between here and Toledo—on their cost.

Q. So that if the Pennsylvania Central or the Hocking Valley, any of those Ohio roads, want to come up here, it will have to be by an independent line?

A. Beyond all doubt.

Q. And if they obtain the proper depot facilities here, it would have to be independent of the Michigan Central?

A. Beyond all doubt.

Q. And in all human pro-ability, independent of the Grand Trunk?

A. Oh, yes. That is upon the other side.

Q. The Wabash is a competitor of the Grand Trunk?

A. Yes, sir.

Q. You refer in your testimony to the route to Chicago. As I understand it now, you go some little distance out of the way?

A. Twenty-five miles around to go to Chicago.

Q. What has been done, if anything, since the Canadian Pacific desired to come up and make a connection in that way and get into Chicago; what has been done, if anything, to shorten that route?

A. The survey of the route has been made complete, and some portion of the right of way has been obtained, and I anticipate that the road will be built and completed before the Centennial Exhibition comes.

Q. Where will the loop line or connection be made?

A. It will leave the Butler road about 100 miles out of here.

Q. At a place called Montpelier?

A. Yes, sir, and run from there straight to Chicago, almost in a straight line; it makes the shortest line from here to Chicago.

246 Q. How will that route compare with the Michigan Central route, in distance?

A. It is about 15 to 17 miles shorter.

Q. What sort of depot facilities will you have in Chicago as compared with the Michigan Central?

A. Just as good.

Q. What depot in Chicago does the Wabash come into?

A. The union depot, where there are six great companies come now.

Q. The Dearborn Street depot?

A. Yes, sir.

Q. And with this line built from Montpelier you will have 15 to 17 miles shorter than the Michigan Central?

A. Yes, sir.

Q. How will your depot facilities here in Detroit compare with the Michigan Central—I mean the new union depot here?

A. We will just be as well situated.

Q. A little better?

A. I think a little better.

Q. It will be a little better when the new post-office is constructed?

A. Just as well for freight and a little better for passengers; and

we will have a road running through a new country, with local business to be brought here, all the way to Chicago.

Q. You have been connected with the Wabash since they have run this line to Chicago. Will you state whether or not, with the passenger-house located at the foot of Twelfth street, the Wabash has been able to secure any considerable portion of the passenger traffic from here to Chicago?

A. They have secured some considerable, but nothing
247 compared with what they would if they had other facilities, and had their road built through.

Q. Is it not a fact that business men in Detroit who desire to go to Chicago almost always go to the Michigan Central?

A. The large majority of them do. They can save a mile of traveling in an omnibus; they go there in preference to the Wabash.

Q. They go there because it is more convenient?

A. Yes, sir; because it is closer.

Cross-examination by Mr. DICKINSON:

Q. You have spent parts of two sessions in telling the jury of various negotiations by which Detroit is benefited by railroads coming here, some of which have been successful and some of which have failed. You have shown the connections that have been made by the Wabash. You have shown the connections that have been given to the Canadian Pacific, and the western connections by that route. You have shown our relations with Chicago and the west. Now, will you please tell the jury what all that has to do with the choice of a route up River street from Twelfth street?

A. You mean as between two routes?

Q. Yes; what has that to do with it?

A. Not very much as to the mere choice between two routes.

Q. Mr. Backus has never contended, and you have heard in my openings twice that he admitted the union depot was a great thing for Detroit?

A. I didn't have the pleasure of hearing your last opening.
248 Q. But you know that Mr. Backus has never contended that the union depot you are projecting was not a good thing for Detroit?

A. I never heard him say so.

Q. He has never objected that your connections here are not good things for Detroit and for him and for every one?

A. I have never heard it.

Q. You were present at another trial by Mr. Backus?

A. Yes.

Q. You never heard him make any point against the union depot?

A. I don't know that I have.

Q. In testimony or otherwise?

A. I don't know that I ever did.

Q. And so far as the connections west or south or north are con-

cerned, it has nothing to do with, has it, in and of itself, the selection of a route up River street?

A. With regard to the different routes to reach it I don't think it has. With regard to the importance of the depot I think it has a great deal to do with it.

Q. Has it anything to do, in the other aspect of the case, in case the jury shall reach it, as to what amount of damages Backus should have—if we reach that point, has it anything to do with that?

A. Not much.

Q. You don't pretend that, however great the public improvement may be, one dollar of damage can be done a private citizen who pays his taxes, or that his property can be depreciated at all, without compensation, under the constitution of the State?

A. No, sir.

249 Q. So that it really has nothing to do with the amount of damages Backus would suffer—all these great connections, or however great the necessity?

A. No, sir; all those things are said to show the importance of this depot. The necessity is one of the things to be passed upon by the jury.

Q. But that has nothing to do with the question of compensating a man for what damages he has received?

A. No, sir.

Mr. BAKER: That is a question of argument.

Mr. DICKINSON: Let me continue without interruption. I allowed you to go on in a wild way without interrupting you, and I wish to be allowed to examine this witness without interruption.

Mr. BAKER: I except to your statement that I went on in a wild way.

Q. You are a pretty positive man in your statements, are you not?

A. Generally I am. I have pretty clear ideas, and I express them positively.

Q. You are certain?

A. Yes, when my mind is clearly made up.

Q. You have reviewed your testimony since you were here?

A. No, sir.

Q. Let me understand you now for one thing. If I understood you correctly yesterday, when you said that the reason, one reason, why the route could not run up the Michigan Central, was because it had destroyed your old union depot grounds?

A. One reason. We could not go through the middle of it.

250 Q. (Producing map.) The route as you have already laid it out is correctly shown there?

A. Yes, sir.

Q. It runs along the old union depot ground on the margin?

A. Yes, sir.

Q. Up to Twelfth street?

A. Yes, sir.

Q. This is shown on this map?

A. Yes, sir.

Q. Will you please explain how you would have to run through the old depot grounds if you took the margin of the Michigan Central and ran up there?

A. We should not if we took the margin. We should not gain anything in that.

Q. You would not lose anything, would you?

A. What I meant is this: Here are the old depot grounds; here we come here; if we were to go the shortest route we would go through the Michigan Central grounds and come there (pointing to map).

Q. But on this route at Twelfth street, as at present laid out, if you took the margin of the Michigan Central, you would not have to change the route to Twelfth street at all, would you?

A. No, sir—but for a short straight route, we would have to run through the middle of both.

Q. But you have not a short straight route?

A. No, sir.

Q. And you have now run along the margin of your old depot grounds and run up to Twelfth street?

A. Yes, sir.

Q. Now, do you not, by the route you have taken, going into
251 River street, make an absolute deflection from the north of your direct route, from what it would be if you ran along the margin of the Michigan Central property?

A. Yes, sir.

Q. Then the route along the margin of the Michigan Central would be the most direct route?

A. No, sir; it would not be any more direct. We would have to make a turn one end or the other.

Q. But you do that now?

A. But we have more turn to make now. We have to get up here (pointing to map). If we ran along on the Michigan Central grounds we would have to make a shorter turn here (pointing).

Q. We will leave that to the jury. Would you, if you had taken the margin of the Michigan Central ground, on your route as now laid out, and your route is on the north of the old depot grounds here at Twelfth street, would you have to change your route and your old grounds at all?

A. No, sir; we might not change.

Mr. DICKINSON (showing map to jury): I wish the jury to see the route here that Mr. Joy said would ruin the property there.

WITNESS: If we went straight across the grounds, that was the point I took.

Mr. DICKINSON: This is the old depot grounds; this is the route of the union depot and the approach of the union depot now, on the north side along River street; they enter River street, and go through River street up here until they make the turn; the Michigan Central grounds are here.

Mr. BAKER: I object to Mr. Dickinson testifying.

Mr. DICKINSON: Anybody can see that you can make a
252 direct line along the margin of the Michigan Central, and nobody would pretend to ask for another route.

Mr. BAKER: I object to Mr. Dickinson testifying in this way. Is that the route that you contend for along the margin?

No response.

Mr. DICKINSON: You don't think that there will be any danger of any damage by cinders to Backus?

A. I don't think there will.

Q. No damage by smoke?

A. I don't think there will.

Q. No damage by obstruction to light?

A. I don't consider it so.

Q. No damage except by the posts in front?

A. They are some damage to him, but there is no serious damage, in my judgment, beyond that. I have said I had not considered it much damage to Mr. Backus.

Q. There wouldn't be any more damage, then, would there, if the elevated road ran down Griswold street or Woodward avenue; none from smoke, none from obstruction of light, none from the ordinary uses of an elevated road like this; it would not hurt property to come down Woodward avenue?

A. I did not say it would not hurt property, but I think the property up there is not so valuable; it would be a larger damage in proportion to the value of the property.

Q. But would there be any damage except from the posts, if it came down Woodward avenue?

A. I don't think it would be a great damage there; I don't think it is a very large damage to property in New York, where the street railroads run.

Q. You think it makes a fair comparison with the street
253 cars in New York using the elevated road, and this road with the cars that run over it, sometimes pulling passenger trains 1,000 feet long, as you said yesterday; you think it is a fair element to compare that structure here with the structures in New York?

A. I do think it is a fair comparison. It is the same kind of road, run in the same way, only the cars are not quite so heavy; but they carry ten thousand times more passengers than this will, and they are running every minute or two.

Q. Your union depot is built so as to accommodate, for passengers, the Pennsylvania road, if it comes here?

A. Yes, sir, if it desires to come.

Q. The Pennsylvania is probably one of the greatest trunk lines in this country?

A. That portion would not be here.

Q. But it would be a part of the Pennsylvania system?

A. Yes, sir, if it is built here.

Q. And the Delaware & Lackawanna asked you to come here?

A. No, sir.

Q. Could either of those roads get into Detroit if you opposed it?

A. They would never come here.

Q. And the Pennsylvania road?

A. They may come here.

Q. With your present system of depot grounds and transit road, could they?

A. They could.

Q. Didn't you say on the other trial that they could not if you opposed them?

A. I don't think so; because the Pennsylvania is strong enough to do anything, in my judgment.

254 Q. It could condemn its own right of way?

A. Yes, sir; but a new road coming into a city to condemn would not be strong enough, but the Pennsylvania is strong enough to do anything which it is willing to undertake to do, I think.

Q. Will you tell the jury whether you said that the Pennsylvania could not get in here if you opposed them?

A. I don't think I said so.

Q. Let me see if I cannot find the testimony. (Mr. Dickinson looks over testimony taken at last trial.) I will look for it when there is an intermission; it is the testimony on the last trial I am asking about. I will come back to it afterwards. You have stated that in New York the elevated road does not frighten horses?

A. So far as my observation goes.

Q. In New York, in the business part of the town, horses are perfectly familiar with the elevated roads, are they not?

A. I presume so.

Q. They all pass more or less under them?

A. Yes, sir; I have seen them thousands of times, and never saw one frightened.

Q. That is because they have become familiar with them?

A. Very likely. They must pass under them frequently.

Q. Do you think that such horses would be in Detroit; that in the dealings with people down on the River road, all horses in Detroit would be so familiar with it that a man that went down there—a customer of Mr. Backus—his team would be so familiar with the elevated road as not to be frightened?

A. I don't think it would be in the slightest degree frightened in the world.

255 Q. But as to whether horses are frightened or not depends upon whether they are accustomed to the elevated roads?

A. No, sir; but there might be such a thing as a very skittish horse.

Q. But it has something to do with the frightening of horses—whether they are accustomed to it?

A. As a general rule, horses that travel over such a street as that are not frightened.

Q. The horses that travel under the elevated roads in New York are familiar with them?

A. I presume so.

Q. Who are your board of directors of the Fort Street Union Depot Company?

A. William W. Crapo is one, Mr. Shaughnessy is another, Mr.

Hayes of the Wabash is another, Doctor Potter of the Flint & Pere Marquette is another, and Mr. Heald is another.

Q. Where does Mr. Heald live?

A. In Grand Rapids.

Q. Is there any Detroit director?

A. No, sir.

Q. Are you a director?

A. No, sir.

Q. What official relation do you bear to the company?

A. Officially, I am the treasurer.

Q. But not on the board?

A. No, sir; I didn't care to be on the board, and declined to take the position.

Q. You have given the history of some of the pieces of real estate below Backus, between there and the entry on Twelfth street,
256 below this road. Will you state to the jury what is the first case for condemnation you tried; in this matter of condemning River street, what was the first case you commenced?

A. Mr. Baker can tell you that better than I can.

Q. Was it not the Backus case?

A. Mr. Baker can tell you. I cannot tell the first case that was commenced.

Q. Do you know which was the first one you attended on this condemnation along River street?

A. I cannot remember that. Mr. Baker has the files and papers. Which was the first?

Mr. DICKINSON: Will you admit it was the Backus case?

Mr. BAKER: No, sir; the first case we commenced was the Michigan Central; we tried the Michigan Central case.

Mr. DICKINSON: But of the property-owners?

Mr. BAKER: As to the property-owners, we commenced a large number of them and settled some of them. The first case we tried may have been the Backus case. We commenced them all about the same time.

Q. But you tried the Backus case before, didn't you?

A. It has been before a jury before.

Q. And you remember that Mr. Backus on the first trial, for it was the first case of any case along the River Street road, took the position that you should go up the margin of the Michigan Central?

A. I don't remember that. The position was taken that we should go across the Michigan Central grounds.

Q. Did you hear Mr. Mulliken's testimony?

A. I did. He testified that the shortest route was along the Michigan Central grounds, if I remember; that would be straight through the middle of our grounds, and straight through the middle of theirs.

257 Q. Oh, no; Mr. Mulliken said you should come right on that margin.

A. No, sir; Mr. Mulliken said the shortest route was across the Michigan Central grounds.

Q. Of course, the margin is across the Michigan Central grounds.

A. No, sir; and if you take that route it is not the shortest.

Q. I never heard of any other route until you suggested it yesterday.

A. The whole testimony has been to go across the Michigan Central grounds; that is the way I remember it, and I think I am right, and I am very positive when I think I am right.

Q. I don't think you stayed to hear any opening or argument of mine in the Backus case.

A. I didn't have the pleasure of hearing your opening. Your closing argument I did hear all the way through.

Q. Do you remember that I pointed out to the jury that these buildings were of no account, on the margin?

A. I don't remember that. I know the Michigan Central have testified in the other cases that they intended to build freight-houses along there.

Q. You have stated that an elevated road has been built by the Louisville & Nashville road into Louisville?

A. The Louisville & Nashville into Louisville—I won't say it is that, but I think it is that road—that an elevated road is built there, and I think built by that company, but I am not certain whether it is that company built it or not; but the elevated road I have seen.

Q. There is no doubt that there is an elevated road there.

258 Did you understand when you gave that testimony that there is any objection to an elevated road especially?

A. There?

Q. Anywhere?

A. I know the people are trying to get damages for building them.

Q. You know you are bound to pay damages for building them?

A. Yes, sir.

Q. As you pay damages for building a surface road?

A. Yes, sir, as the jury think we should pay.

Q. Do you understand that an elevated road is especially objected to as an elevated road?

A. I don't know that; I never inquired about that.

Q. Do you know that the Louisville & Nashville road did build an elevated road and occupied two blocks of street in building it?

A. That I don't know.

Q. Where did you see the elevated road?

A. Along the levee, in front of the buildings there.

Q. You don't say there is an elevated road right in the city of Louisville?

A. That is in the city of Louisville.

Q. But in the body of the city?

A. It does not run through the body of the city, but close to the front of the buildings along the levee.

Q. For two blocks does it not run along a street in the city of Louisville, in making the approach?

A. That I cannot tell you; I didn't go down there.

Q. You have testified in regard to it. Don't you know so far as it runs across two blocks in the margin of the street there,
259 as it approaches the elevated road, along the levee, they have the council's permission to do it; did you know that?

A. I didn't know it.

Q. Did you know that they paid for the property on both sides of the road what it was worth in the market, before they could do it?

A. I didn't know it.

Q. You also said about the building of the Jersey City road?

A. Yes, sir.

Q. By the Pennsylvania?

A. Yes, sir.

Q. The Pennsylvania have been into Jersey City at grade for many years?

A. Yes, sir.

Q. How many years?

A. They have been there and done their business ever since the Pennsylvania acquired its line to New York.

Q. When Jersey City was a comparative village?

A. It was quite a town then.

Q. And they acquired the same route; they acquired the route to the North river, didn't they?

A. They bought the road that owned that route; when they bought that they owned the route to the North river.

Q. Have they done anything more in building the elevated road than to use their own right of way and to make it an elevated road instead of grade?

A. They occupy the same route.

Q. Where their tracks lay at grade before?

A. Yes, sir.

Q. Tracks along the streets—they have elevated their tracks?

260 A. Yes, sir, right on the same route.

Q. They owned the right of way?

A. I don't know whether they have condemned property or not.

Q. They acquired it about 50 years ago?

A. I don't know that; they have been there a good many years; whether they paid any damages by reason of elevating the road I don't know.

Q. Was there not along the entire route of the Pennsylvania road, in Jersey City, along the elevated road, as it was along the old route on grade, a public highway on each side uncovered by the elevated road?

A. I don't know about that.

Q. You have been over there from Washington, time and time again?

A. Hundreds of times.

Q. Don't you know that on each side of the old road as it came through there, there was a public highway, uncovered by anything?

A. I think there was by the old road; it ran along the middle of the street, and I think there might be a highway on each side of it; but I think the elevated road spans the street, and I think it leaves the street under the elevated road.

Q. You won't swear to that—that there is not an open road on each side of that elevated road?

A. I won't swear to it.

Q. When were you there last; have you been there since the elevated road was there?

A. It is not finished.

Q. Oh, yes; I was over it.

A. I have not been there since it was done, if it is done.

261 Q. But you do remember that when you were there, that on each side of the railroad tracks, switches and everything, there was a broad highway for teams and sidewalk for passengers?

A. I don't know anything about the switches, but I think the road ran along in the middle of the street, and I think there was a passageway for teams on each side of it.

Q. You acquired the old depot grounds under another organization, didn't you?

A. No, sir; we bought them before the organization was made.

Q. But they went into the hands of the Detroit Depot Company?

A. Yes, sir; another company.

Q. Then you condemned the approach all the way down for your transit road?

A. Yes, sir; part of it.

Q. And that transit road runs about four miles away, to Delray?

A. Something about that.

Q. Did your Detroit Union Depot Company form an organization under the laws of the State to acquire and build a passenger depot upon those grounds?

A. Upon the grounds they have acquired on Third street.

Q. But did the old union depot company form an organization to build a passenger depot?

A. They formed an organization to acquire station grounds, and to build such buildings as may be required.

Q. Did you form an organization under the union depot passenger depot act?

A. Yes, sir.

262 Q. How much of a passenger depot did you put up on the old grounds?

A. A very small one, because the three companies who failed to come there defaulted and would not come; and there was nothing but the Wabash there and we put up a small passenger-house, which we considered a temporary one, until other companies would come there, and their necessities made a large one necessary.

Q. If, without injury to your union depot grounds, maintaining your present route across there for your bridge to the Fort Street

union depot, and understanding it now that you could acquire the margin of the Michigan Central, and come up the margin of the Michigan Central, would it be a proper route?

A. If we could acquire the grounds of the Michigan Central, and enough for two or three tracks we want there, we could build on their grounds undoubtedly.

Q. If you could acquire the same amount of ground that you have taken on River street along the margin of the Michigan Central, would it not be a good route?

A. I have no doubt it would.

Q. You spoke yesterday of having some hostility to the Michigan Central?

A. No, sir; they have been hostile to these enterprises.

Q. Mr. Baker asked you if they had not been hostile since you went out of the presidency.

A. I think the hostility has grown up from the time we wanted to bring the Wabash into the city. Before that time I think the Michigan Central was entirely friendly to me.

Q. You remember, some three weeks ago, I made an argument before the legislative joint committee in Representative hall, Lansing?

263 A. I was there.

Q. Insisting upon the Michigan Central paying local taxes?

A. I heard you there.

Q. Who replied to me in behalf of the Michigan Central?

A. I did.

Q. I appeared there for the city of Detroit and made an argument of taxing them, their large railroad holdings?

A. Yes, sir.

Q. And you replied for the Michigan Central?

A. I did.

Q. There is no particular hostility then?

A. I told you there was no hostility on my part toward the Michigan Central.

Q. Who was associated with you?

A. Mr. Pond was there, but I was not associated with him.

Q. The present general counsel of the Michigan Central?

A. I was a mere volunteer there. I had to do with the organization of the Michigan Central. I made the contract between the Michigan Central and the State and knew the motive which governed them, and knew its whole history; it had been largely under my care. I went out to the legislature without the remotest idea of saying anything upon that or any other subject, but I went in to hear your argument, and I cannot sit still when a contract which I made, and which at the time it was made was of the utmost importance to the State, and which the State pledged its solemn honor it would carry out—I could not sit still when the legislature sought to evade that contract, and I had to get up and give the whole history of it to the legislature. I did it, not because I care for

264 Mr. Vanderbilt—I don't care a farthing for him—but I have no hostility to him nor to the Michigan Central road, but

when injustice is sought to be done by the legislature or any other party, I thought it was my duty to defend it.

Q. You heard my speech there?

A. Yes, sir.

Q. Didn't I say the property acquired outside of the charter, and was not covered by the charter, could be taxed?

A. That is so.

Q. Do you think it is injustice, where the State has no contract?

A. I think it is an unjust thing to pass an act repealing an act that should not be repealed.

Q. Did you hear the argument?

A. Yes, sir.

Q. Didn't I insist that the charter didn't cover the after-acquired real estate?

A. That is another point.

Q. Did I not insist that the charter was binding on the State?

A. You insisted that the company might accept the charter.

Q. They might accept it if they chose?

A. But you argued for passing it, and that would lead to litigation, and they would have to go through the courts to get a decision that the act would be void; in the meantime the credit of the Michigan Central would be injured in all the markets of the world, and it would be the most injurious thing in the world, and I could not sit by and see it done.

Q. What did you go out there for?

265 A. To look on; I knew the question was coming up before that committee, and I wanted to see what they would say all round.

Q. At all events, you were not particularly hostile to the Michigan Central or to the general counsel on that occasion?

A. I was not hostile to him at all; I am not; but I tell you they have no right to get in my way, and when I have to defend our enterprises against them, I have to meet them as I can, but as to having hostility to them, I will defend them before the legislature or anywhere else as quick as I would any other friend of mine. I look upon the Michigan Central as a sort of pet of mine; I was at its birth and have been familiar with it ever since, and I could not help defending it.

Q. I will ask you whether your administration of the Michigan Central's affairs, including the building of the new feeding roads, has not been entirely vindicated by events, although you were very strongly censured at the time?

A. I cannot tell you about that, but I know everything was sanctioned by the board of directors when it was done.

Q. But you know there was cavil and censure about it at the time?

A. Yes, sir.

Q. And events have fully vindicated your judgment?

A. That may be so and it may not. I remember one of the directors at one time in conversation with me, after the panic, at which time there was some fault found with the building of those

roads—he was not a man of that sort, though, but I saw him down here one evening, and he said, "The Michigan Central's affairs look pretty bad, Mr. Joy." I said, "That is all true." Mr. Van-
266 derbilt was buying the stock at that very time at from 30 to 40 cents on the dollar; and he says, "It is all owing to that damned Joy." Whether I have been vindicated or not, that is another thing.

Q. I know you have. I will testify to that myself.

A. I did the business, and under the circumstances I had to take the consequences.

Q. When you came to condemn, although the Backus was the first trial except the Michigan Central, when you came to condemn the rights of the Michigan Central on River street, you must come up from the union depot to your passenger depot; when you elected to condemn the rights of the Michigan Central and came along River street, the Michigan Central did not urge the question of necessity very much, did they?

A. They argued the case in every possible form. They brought up the question of necessity; it was before commissioners, and Mr. Pond and Mr. Russell raised the question of necessity, and assumed that they were going to win on that question. Mr. Hecker, who was the chairman of commissioners, and the other commissioners said, "Mr. Pond, we don't want to hear you on that question; as to the necessity of this thing we are satisfied."

Q. That is the union depot?

A. Yes, sir, "and it is going along this street;" they took the ground that they had a right to bring up the question of route; it was on the question of route and necessity too, the necessity of that route. Mr. Hecker said to him, "I don't want to hear you on that question; we are satisfied of the necessity of this thing; we are satisfied that it is going there, and that it ought to go there, and we won't hear that question; we are satisfied of the necessity of the thing, and we are satisfied of the necessity of the route."

267 Q. They were satisfied of the necessity of the route much better than by going along their grounds?

A. There was no possibility of going there.

Q. Did you ever ask the Michigan Central to give you entrance and not take any public street?

A. No, sir; we knew perfectly what the answer would be to that.

Q. You knew they would fight you?

A. I knew they would, of course.

Q. And charge you all they could get out of you to come up there?

A. Yes, sir, it is their nature.

Q. Did the commissioners allow the Michigan Central anything for the property they took for a public causeway for teams, of their property?

A. Down at the corner, you mean?

Q. No; I mean for taking the causeway for teams on the Michigan Central grounds.

A. I don't understand what you mean by that.

Q. You know there is to be a viaduct for teams along the south side of the elevated road structure, according to the plans. Did the commissioners before whom the matter was tried, allow the Michigan Central anything for the viaduct for teams, for the ground taken for the viaduct for teams?

A. They didn't; I don't suppose we could have taken it at all.

Q. They expressly said they didn't find anything for it?

A. I know it; we didn't ask for it.

Q. But the commissioner of railroads ordered it taken?

A. But not in that proceeding, and the commissioner I take it could not grant power to do it.

268 Mr. BAKER: The Michigan Central was ordered to do it as much as the depot company.

Q. The Fort Street union depot will accommodate all the passenger trains of these four roads, won't it?

A. I think it will.

Q. And will also accommodate on the same grounds the freight trains of two roads, the Detroit, Lansing & Northern and the Flint & Pere Marquette.

A. Not on the same ground, with the passengers.

Q. On the grounds you have acquired for your Fort Street union depot; it is on a part of the same ground?

A. Yes, sir.

Q. It would do that, and you think they will be fully accommodated there?

A. It will be a close fit, I think.

Q. How can you take in the Pennsylvania road then?

A. When I speak of a close fit, I mean for length.

Q. But you can accommodate them?

A. Oh, we can take them in there.

Q. And you can accommodate the Pennsylvania?

A. I think we could, and another company besides.

Q. And have an abundance of room?

A. I think we could so far as passengers are concerned.

Q. And how many acres are there in that piece that you have acquired for a depot?

A. I think there are about five acres.

Q. Including the freight part?

A. I think five acres. I must explain that position: When I say that we could accommodate other passengers coming there, when you have a passenger ground for any railroad company, you have to have 1,000 feet long at least, you have to have tracks for that
269 company, even one company; now a passenger train comes in and runs out, it does not stay on the passenger grounds half an hour at any time, and while it is going out another may be coming in, and the same track which you are compelled to acquire for one, or two or three companies, on the same ground, which you must have to do their business, you can do the business of twenty, simply because one will come in for half an hour or 15 minutes, and go out, and they may come in and go out every 15 minutes in

the day, and on those sort of grounds we can accommodate a good many.

Q. There is no doubt about that at all. You spoke yesterday of the elevated-station grounds in London. I suppose you have been at the Charing Cross station, the Victoria station and the Ludgate Hill station?

A. Yes, sir.

Q. They are passenger depots mainly, with hotels?

A. Yes, sir.

Q. How many acres are occupied by those depots in the city of London—Charing Cross, for instance?

A. I don't know. I never measured them, but where they come in at Ludgate Hill they have considerable grounds, but their freight business is generally outside.

Q. But there is not over five acres at Charing Cross?

A. I don't know that.

Q. At Ludgate Hill how much, according to your estimate?

A. I should think there was more than that, but I never measured it.

Q. Have you been to Victoria station?

A. Yes, sir.

Q. How much was occupied?

A. They have all the grounds they want for their business, but I don't know how much.

270 Q. When the Michigan Central acquired its grounds below here, how much of a city was there down there at Third street?

A. There was nothing there.

Q. They went from about here?

A. Right from this spot.

Q. And the city had not gone down that far then?

A. The city had not gone down on the river that far; a little before that General Cass had sold his front to a parcel of gentlemen who wanted to make a speculation; they filled in the river front on the Cass farm; I said yesterday that where the Michigan Central grounds were was all river; it was not all river quite when they went there, but that part of the ground that was on the Cass farm had been partially filled by these gentlemen, but it was all in the river where they filled.

Q. Where was the old depot in the city of New York, which is now at Forty-second street?

A. It was a migratory depot. When I first knew it, it was on Chambers street.

Q. Then it retired to Thirty-fourth street, didn't it?

A. It retired northward; to what street I don't now remember.

Q. Then it retired to one other place before it went to Forty-second?

A. I think it did.

Q. And it retired before the approach of the business and population, didn't it?

A. Well, no, I don't think that was the object of its retirement.

Q. But it did retire as population went up?

271 A. It did retire, but it retired because it united finally with the New York & Harlem road, which was an old road which was built into New York before New York was built up.

Q. Why did it have to go there to unite; why not have an elevated road down in New York?

A. They went up there because they could get grounds at the time.

Q. Have they not more grounds at Chambers street than they have here?

A. I could not tell you that, but they went up there because they could get four companies to unite to form a union depot; the New York & New Haven and the Boston & Albany came in there; all the roads to Boston came in there; the New York & Harlem and the Hudson river came there, and they got together strength enough to come in those grounds.

Q. They all come in that side of the island?

A. Yes, sir.

Q. You don't know of a railroad that crosses the city of New York from the North river?

A. There is no occasion for one. They cannot get there?

Q. They do cross the island, don't they?

A. Street railways do. They run across the Harlem river in New York and run across the north side of it.

Q. But they get down on the east side of New York?

A. The New York Central runs down on both sides; runs its passenger trains across above the *the* Harlem river and comes down in this passenger-house; it runs its freight trains down the other side of the city, clear down to St. John's park.

Q. But it does not come across the city anywhere?

A. No, sir; it crosses above the city.

272 Q. How many acres does the union depot of New York occupy?

A. I cannot tell you; but it occupies a good many acres.

Q. About how much?

A. I could not tell you.

Q. Six and a quarter acres?

A. I should say it was more than that. They have bought an addition all along one side of it, to build a new passenger-house.

Q. But that is included in the six and a quarter acres?

A. I don't know how much.

Q. Would you say it is over six acres?

A. I should say it was, but it is a guess. I should say it was considerably more than six acres of land there, by a rough guess, but I don't know, I never measured it.

Q. You have spoken of the Chicago, Burlington & Quincy; that comes into Chicago with several other roads, does it not?

A. Yes, sir.

Q. What is the name of the depot that it enters?

A. I don't believe I can give you the name of the depot. It is on the west side of the river. It is occupied by the Alton Com-

pany, the Chicago, Burlington & Quincy, and the Chicago, Milwaukee & St. Paul.

Q. Is it the Canal Street depot?

A. It may be. It is a union depot.

Q. How many acres are occupied by that union depot?

A. I should think about what we occupy here.

Q. About five acres?

A. About that.

Q. And all those roads come in there?

A. Yes, sir.

273 Q. How far is the freight business done from the Central depot in New York, the union depot, the Forty-second Street depot?

A. It is clear down on the other side of it—on the river.

Q. How far is the freight business done from the Canal Street depot for the Chicago, Burlington & Quincy?

A. I should think it was a mile.

Q. The Canal Street depot is down in the flat, below the level of the city?

A. Yes, sir.

Q. Where does the Wabash go in in the city—where six other roads and the Wabash come? Is it into the Dearborn Street depot?

A. Yes, sir.

Q. How many acres are occupied by that?

A. A good many acres.

Q. Dearborn street, for the passenger-house—the passenger union depot?

A. For the passenger-house it may not be any more than here.

Q. Where do they do their freight business?

A. Further south, just about as far south of the passenger-house as the old depot here would be from this passenger-house here.

Q. Do you know how many trains come into the New York Central depot?

A. I don't.

Q. Is it 238 or 240; would that be out of the way, per day?

A. I could not tell you.

Q. How many come into the Dearborn Street depot?

A. I don't know.

274 Q. Would 140 be out of the way?

A. I should not think it would, but I don't know.

Q. And the Canal Street depot—how many trains, 195?

A. I could not say.

Q. Are you familiar with the depot at St. Louis?

A. Perfectly.

Q. You know that all the roads use that union depot?

A. Yes, sir.

Q. How many acres are occupied by that—for that union depot?

A. I have no knowledge of it.

Q. About 12?

A. I could not tell you.

Q. 240 trains a day?

A. I could not say. They have grounds to accommodate the trains well—to do the business.

Q. Would you say about 12 acres?

A. I could not tell. I have been there to take the train a good many times, but I could not tell you.

Q. They don't pretend to do their freight business in that place?

A. No, sir.

Q. How about the Minneapolis depot?

A. I never was there.

Q. Omaha?

A. I have been there.

Q. Can you give us an idea of the amount of acreage at Omaha, new city as that is?

A. I could not say.

Q. Would you say it was to exceed six acres?

A. I could not tell you; I never measured it.

Q. Are you familiar with Kansas City?

275 A. Yes, sir; I bought the union depot grounds there.

Q. About how many acres are used for the union depot grounds there?

A. I don't now remember. It is 30 years ago since I bought them. I bought a pretty good tract of land there, but I don't remember how much; and quite a number of trains come upon it.

Q. About the acreage of the Michigan Central here; it is about 30 acres down here on this space between Third street and Twelfth street.

A. That includes freight and passengers; say 38 to 40 down here, 100 out yonder, and 150 feet wide out here, that they use for a yard.

Q. They used this yard for freight business, down here on the river?

A. For such freight as they have to do there.

Q. They do use it for freight business and passenger business as well?

A. Yes, sir.

Q. How much has the Grand Trunk?

A. I have never measured it.

Q. 23 acres?

A. I don't know; I cannot give you an estimate. I never looked at it with a view of estimating it.

Q. And the old depot ground down here, according to the present holding, is about 40 acres?

A. About 40 acres?

Q. About how many trains come in on the Michigan Central here?

A. I don't know.

Q. Is 68 out of the way?

A. I could not tell you anything about that; I have not counted them.

276 Q. How much did they use to be?

A. I don't know; I cannot remember.

Q. How many trains come in and out on the Wabash; how many did you say yesterday?

A. I cannot tell you that without looking at my paper; I made a memorandum of those.

The witness refers to his memorandum and says:

A. There are 10 trains on the Wabash.

Q. You don't know how many on the Grank Trunk?

A. No, sir.

Q. Do you know the amount of acreage of the union depot at Indianapolis?

A. I don't. I have been through it over and over again, but I cannot tell you how many acres they have got.

Q. In your estimate that you have put before the jury of the number of engines, of the number of trains that would pass with locomotives, you have not given the time that it would take a train to pass, of a thousand feet long, as you have stated, for the cars?

A. It would take each car in that train so many more minutes.

Q. You have a switch in front of Mr. Backus' property?

A. Yes, sir.

Q. Have you taken into consideration the length of time that the engines would be upon the switches?

A. That would not make a difference. The switches are merely for trains to run through; there will be no switching there.

Q. With switches there, would you be entitled to switch?

A. We are entitled to switch——

277 Q. You are entitled to have your trains stand on the elevated road?

A. No, sir; they would not stand there.

Q. Where do you get the prohibition against a train standing on your own right of way, or a switch-engine or a locomotive?

A. There is a difference between a right of way and a yard. In our own yard we can stand our own engines and cars as we have a mind to; but on the ground obtained for the right of way of a railroad, we cannot allow them to stand if the adjacent owner objects.

Q. Where do you get your rule for that?

A. In the decisions of the courts.

Q. Name one.

A. The Pennsylvania Central road, in a case at Camden, N. J.; I cannot tell you the volume. I have got the brief in my office, which I can furnish to you; and two cases in New Jersey where they laid their station across a highway.

Q. At grade?

A. Yes, sir. Another case in Vermont, where they brought up the point, that what is obtained for a right of way cannot be used for a yard if adjoining proprietors object.

Q. Those were cases at grade, where they obstructed the streets, were they not, all of them?

A. Certainly.

Q. Do you know of any rule that prevents your standing on your right of way, in the country, in transacting business?

A. These were decisions in the country.

Q. I mean in the country, away from any road?

A. Oh, where there was no road, and nobody objects to it, you can take a license, of course.

278 Q. You have a right to stand on this switch, have you not, when trains pass?

A. They would not stand there.

Q. But you have a right to wait for anothor train and then back up and go ahead on the switch?

A. I don't think they would.

Q. Have you not the right—is there anything in the law anywhere to prevent your standing on the elevated road?

A. On the right of way?

Q. Yes.

A. Yes, we could not do it.

Q. Name the law.

A. I have given you three cases. It does not make any difference whether it is on an elevated road—the right we get under the law.

Q. Did you take into consideration, in your estimate, the probability or the possibility of the Pennsylvania road or any other roads coming here?

A. Estimate of what?

Q. Of the number of locomotives that would pass?

A. No, sir; I speak of those that now pass. Then on my supposition that if there were twice as many, and then if there were four times as many, how much it would be; and that would include all that would ever run there, and more, too.

Q. You acknowledge that the true rule in estimating is what the maximum would be?

A. What the maximum would be in 100 years would not be right now.

Q. But a reasonable time ahead, to take the maximum?

A. There is no doubt about that.

Q. Are you acquainted with the laws of light?

279 A. I am 80 years old, and I have traveled in light and darkness a good many times.

Q. Have you studied the law of light at all?

A. When I was a boy I studied what they called philosophy—light and other things.

Q. Have you looked at it since you were a boy?

A. I have read occasionally since that time.

Q. Let me ask you this question: Whether it is not an axiom of the law of light that the light is graduated by the degree of obstruction to your view of the horizon of the sky—of the atmosphere?

A. That is a little broader question than perhaps I can answer.

Q. Have you ever studied it? Is it not an axiom of the law of light that your light is graduated by your own view, by your sight of the atmosphere?

A. I cannot get so much light out that way than I can this way (illustrating).

Q. Now here is a pretty broad space here; suppose there is a

building 40 feet away from here, so that you cannot see the horizon at all; does it obstruct the light?

A. If it was so high that it stood between my eyes and the atmosphere, it would obstruct the light somewhat.

Q. Is it not true that as your vision of the atmosphere is obstructed, a shadow is cast?

A. The shadow is cast if the sun is the other side of it.

Q. Suppose a day like this, when there is no sun.

A. There would not be much shadow.

Q. Let me illustrate. (Counsel takes two law books.) Suppose that is a window, and suppose a building is here?

A. If it stood there it would obstruct it.

Q. If you stood so that you could not see out of the window?

280 A. It would obstruct it.

Q. How would the light be, if obstructed at all—how would the degree of darkness be, as between a point near the window and back in the room; would the darkness be greater or less as you retreated from the window?

A. I don't think it would make much difference; if you put that 40 feet off away from the window, and the window was 40 feet away, and the space as wide as five feet placed in front of the window 40 feet away, I don't think it would affect it very much, but it would some; if you wanted to look straight through that into the street, you could not see it.

Q. Have you been in the streets of New York where there is obstruction, where the elevated road is in New York, say on Water street?

A. I don't remember Water street particularly.

Q. Don't you know that will not differ, except at the hour of high noon, when the sun shines down in the street; that they burn gas in their front windows, and in the front part of the stores along there?

A. They burn gas in their office generally, where there is a narrow street, with high buildings on both sides; in the lower story they have to use gas in their offices.

Q. Do they do that because of the elevated road?

A. No, sir, they do it on any street.

Q. And the elevated road has not affected it some?

A. I would not say it has not affected it some, but they do it on any street there.

Q. They have to burn their gas in the back part of the store anyway?

A. Yes, sir; that is generally where their offices are. A

281 store in the city, on a wide street, which has no window in the rear, the street 125 feet wide in front of it, they will have an office in the back of it, and they keep gas burning there.

Q. This elevated structure is to have a causeway on one side fo teams, besides the elevated structure?

A. That remains to be seen.

Q. It is on the plan?

A. Not on this plan here.

Q. But it is contemplated so?
A. That would depend upon the Michigan Central.
Q. But it is contemplated?
A. It may be done.
Q. And on the other side you have got to have a footway, on the north side?
A. Yes, sir.
Q. How wide is that to be?
A. I don't remember.
Q. A foot passenger is not going to jump from tie to tie; that is going to be a solid walk for foot passengers?
A. I don't know about that. You have had the engineer of the plan here; I am not the planner of it.
Q. Then you put on top of that structure a train. Don't you think that it will obstruct the light to some extent?
A. A train would be perhaps a minute passing there; it would be 40 feet away, and I don't think it would obstruct the light very much passing there; it would not obstruct it anything like as much as a high building on the other side of the street, which the Michigan Central has a perfect right to build there.
Q. Do you know the original purpose of putting streets in cities, besides the matter of locomotion and passage?
A. Public convenience.
282 Q. Do you know what consideration enters into the width of the streets?
A. In some cities they provide that no buildings on streets of a certain width shall be over a certain number of feet. The object of that is as to danger of fire; the building may be so high that a stream of water would not reach it from the fire-engines.
Q. Has light for houses anything to do with the putting of streets in cities?
A. The wider a street is the lighter it will be. Everybody here lays out streets to sell his lots.
Q. You are familiar with Paris?
A. Yes, sir.
Q. Do you know anything about the building of the boulevards by Baron Haussman?
A. I have been through them.
Q. You are interested in French literature, I understand?
A. Yes, sir.
Q. Have you read Baron Haussman's argument in favor of boulevards?
A. I don't think I have.
Q. To widen the street and clear it of obstruction?
A. I don't think I have. He laid the Boulevard Haussman by cutting right straight through.
Q. But he made a large number of other boulevards by widening the streets and cutting down the blocks?
A. I could not tell you about that.
Q. Was not one of the objects of that to give light?
A. Not so much to give light. Baron Haussman and the Em-

peror Napoleon knew perfectly well that Paris is largely
283 supported by the large number of people who go there to enjoy that city, and they wanted to make it as pleasant a place as they could make it.

Q. But I want to know whether you have read the reasons, and whether one reason was not to give light in the houses?

A. I have not read the argument of Baron Haussman.

Q. And you think you can put a structure like this, and over which you propose to run four great lines of railroad, under which you put solid pans to catch the cinders, and spanning the entire roadway of the street—you think you can put up such a structure as that without obstructing the *the* light of the adjoining buildings?

A. I didn't say that. I said to some extent it would obstruct it; but it is forty feet away.

Q. Part of his building is within ten or nine feet—of Backus?

A. But there are no windows in it.

Q. The dust-room?

A. Yes, sir.

Q. But has he not a perfect right to enlarge his mill and build it up to the line?

A. Undoubtedly.

Q. Build it all up to the line?

A. Undoubtedly. So has the party on the other side the right to build high buildings on the other side.

Q. Are you familiar with the deal between the Detroit, Lansing & Northern and the Michigan Central by which the freight sheds were acquired on River street? Were you familiar with the deal by which the Michigan Central bought the front of the property there when the Michigan Central bought them of the Detroit, Lansing & Northern?

A. As far as those sheds were concerned, I had nothing to do with the deal.

284 Q. Do you know anything about how much a foot they paid for it, for 200 feet?

A. They didn't buy the lands where these sheds were; they bought 160 feet—150 feet of the Lansing road, running through from River street to the river; there was 160 feet; I owned it once; I sold it to the Michigan Central.

Q. Just tell the situation; between what streets it is.

A. It is just below the Michigan Central, and part of the course of the Michigan Central as it now is is on it; it is just below the Michigan Central tracks, except that they ran over one corner, I think; that is 50 feet wide, I think; the tract of land they bought I forget how wide it was; it is on River street, fronts on River street, but I sold it to the Michigan Central for $50,000; that was pretty soon after the war; there is 10 feet more which is reserved for a sewer under it, so that there is, in the whole, 60 feet, with a solid sewer under it, and whoever buys it has the right to use the land above it, subject to the right of the city to repair that sewer when it gets out of order, as it does occasionally. That property has been

sold by the Lansing road to the Michigan Central road, and that is all that has been sold. Their freight sheds are not on it.

Q. For how much?

A. I think $80,000; running through about 300 feet to the river, with a river front and a front on River street.

Q. Does that run through to the Michigan Central?

A. It was put into the Michigan Central grounds by the Lansing Company; it goes right straight across what is now the Michigan Central grounds, from River street to the river.

Q. How much front on River street?

A. I forget the frontage. I should have to look at a deed
285 to tell you the frontage. I can tell you tomorrow; I forget now.

Q. When you bought on the corner of Twelfth street you wanted about 12 feet to add onto Twelfth street for the use of the railroad?

A. Twelve or 15 feet; not for the use of the railroad but to give a wide, spacious street as an approach.

Q. And for the 72 feet you paid $27,000.

A. About $27,000.

Q. And how far back does it run?

A. Seventy-two feet back from Twelfth street; it runs from River road to Fort street, includes the front on Fort street, the front on River road and the front on Twelfth street; it is something more than 300 feet from one street to the other, there.

Q. You think you paid too much, do you?

A. I know I did. I have done that a good many times in my life, when I must have a piece of property and cannot get it without paying what the party asks for it.

Q. You know that in the rear of the Backus property, except for the small front that he has for an office, on built-up ground there, you know that his property runs against the stone wall of the Michigan Central?

A. I think it runs against the Michigan Central part way.

Q. Their stone wall?

A. Part way.

Q. The stove works, that have been spoken of here, have just as much front on Fort street as they have on River street?

A. I think now it is about the same.

Q. They have an access to Fort street on a level with the street?

286 A. Yes, sir.

Q. On all the great stove-works property?

A. Yes, sir.

Q. And they can use that for shipment, if they please?

A. Yes, sir.

Q. Their storehouse is along Fort street?

A. Yes, sir.

Q. Do you know the situation of the Backus plant, including his lumber yard?

A. I know of the situation of his mill, and I know the situation of his lumber yard.

Q. And of his storehouse on Fort street?
A. Yes, sir.
Q. He has a large property there on Fort street as a storehouse?
A. Yes, sir.
Q. With his mill, manufacturing various kinds of material, situated at this point, in front of which you wish to condemn?
A. Yes, sir.
Q. Then another part of the same plant is the seven acres down on the river—the docks?
A. Yes, sir.
Q. You know that he ships or takes his raw material from his docks and from the storehouse—the rough lumber—to his mill?
A. Yes, sir.
Q. Do you know the amount of business he does in a year?
A. I don't.
Q. Have you ever been through his storehouse to see his manufactured articles?
287 A. No, sir. I have looked at it as I went by; that is all.
Q. That is quite a large piece of property on the north side of Fort street?
A. Yes, sir.
Q. And his other piece of property on the river there is about seven acres?
A. It may be so.
Q. And his mill, which is between the two on River street, on which you condemn, is how many acres?
A. I don't know.
Q. You know this is all one plant and one business?
A. I know he is working them together.

Mr. Dickinson states that he wants to ask the witness something about what he testified on the other trial, but he will do it after the direct examination. Mr. Baker thereupon asked the following question:

By Mr. BAKER:

Q. In locating this line along River street, did you have occasion to consider the legal question, whether you could condemn a right of way through or along the margin of the property of the Michigan Central?
A. We did.

Mr. Dickinson then says that he has found the testimony of the witness on the other trial, and will resume his cross-examination.

By Mr. DICKINSON:

Q. Please state whether you testified this on the other trial. I am not going to impeach you, but to refresh your memory. I am going to show that you didn't think the Pennsylvania road could get in if you opposed; that is what you said. Your testimony reads as follows: "Q. With the Michigan Central occupying the

place it does, with your union depot extending forty acres
288 below, or the distance it is, and with your line of depot running four miles out from the end of your depot ground, what way do you think the Pennsylvania road would take to get in here and get depot facilities, if you opposed it? A. I cannot tell you; I don't think they could get in here if we opposed it."

A. I didn't think I said that, but I will not deny it if you have got that down there. The motive of it is this: No railroad company will build into a city where it will cost more to build than the business which it will get in that city will pay the interest on. Now, the Pennsylvania road would get some business in this city if it were built; if it were built here it would be of some importance to this city, but the Pennsylvania Central railroad coming here alone and trying to get into the business part of this city, as close in as we are, it would cost the Pennsylvania Central a vast deal more than it would pay to come into the city of Detroit; therefore they could not get here. That is what I mean by that. Whether we opposed them or not would have nothing to do with it; if we opposed their coming into these depots here, perhaps they could not get in here. But I never said we should oppose them there, but if we opposed them, would not allow them to come there, then they could not afford to come here, and they could not get here, because it would cost them too much money. That is all I mean by that, and I say the same today; but I told the Pennsylvania road if they would come here they would have free access to this depot, and I went to Philadelphia on purpose to tell them so.

Q. You have made some statements to which I wish to call your attention. What time did you organize your original union depot company?

289 A. I cannot tell you exactly, but some time about 1880 or 1881.

Q. 1881?

A. Yes, sir.

Q. Was the legislature in session?

A. I cannot remember. The legislature was in session when they passed the bill.

Q. Did you draw this act that I will read to you (referring to act in Howell's Statutes)?

A. No, sir; I didn't draw it.

Q. You thought you did on the former trial?

A. I didn't.

Q. You said you thought you did on the former trial?

A. I don't think I said so.

Q. Do you know the act I propose to read?

A. I suppose it is the union depot act.

Q. Oh, no; this is the one you said you thought you did draw in 1881: "When any part of the land of any railroad company of this State in or adjacent to its depot grounds is not in actual use for depot o · other purposes pertaining to the operation of a railroad, and such land is not needed by such railroad company, for the purpose of depot or other terminal facilities, it shall be lawful for any

other company organized as aforesaid, needing such land for the purpose of a depot in terminal facilities, to acquire the same in the same manner as may now be done for such purposes by individuals, the question of actual use and of necessity, for the aforesaid purposes by the company so owning and not using said land, shall be determined, in addition to the other questions, as provided by law in cases of condemnation of land for the purposes aforesaid, and the same proceedings in all respects as near as may be shall
290 be had for the purposes aforesaid, as now provided by law where land is acquired for such purposes by individuals."

A. I think it possible that I did draw that act. I have drawn so many of them that I don't remember them all.

Q. That is in 1881. The question of whether a part of the Michigan Central grounds which would be needed for your company, the question being upon whether it is actually used or needed by the Michigan Central Company, and you say it is all actually used and needed for the Michigan Central Company?

A. Yes, sir.

Q. Before whom did you provide that the question whether they did actually use or need it should be tried, in that act. Read the act and see before whom you proposed to have the trial?

A. I don't care about reading it. If it is actually used no tribunal could try it.

Q. What did you mean by this, then: "The question of actual use for the aforesaid purposes by said railroad company so owning and not using said land shall be determined, in addition to the other questions, as provided by law in the condemnation of lands for the purposes aforesaid, and the same proceedings in all respects as near as may be, shall be had for the aforesaid purposes as now provided by law where land is acquired for such purposes by individuals"?

A. I suppose when I drew that law I could not imagine, to save my soul, that anybody would ever ask that a question should be tried whether the Michigan Central would be using its depot grounds.

Q. Why did you put into this act that the question of actual use or not should go before a jury?

A. It is perfectly absurd to ask that about the Michigan Central.

291 Q. But who is to decide that question?

A. You or I could decide that.

Q. Did you provide for a tribunal? You swear to law here.

A. I do swear to law.

Q. What tribunal did you provide in that act should pass upon that question?

A. You or I could decide that. I suppose I drew that bill, but I don't now remember, but supposing I did, it was drawn with reference to existing circumstances——

Q. I want you to answer the question; what tribunal was to pass upon the actual use or need of the Michigan Central property?

A. It is not a question of need. They have got to pass upon the question of use.

Q. Who pass upon it?

A. A jury of course might if there was any question, but that was drawn with this view; I had once a controversy of that sort; sometimes a company owns a great deal of land that they don't use nor won't use, but they don't want another company to have it.

Mr. BAKER: That law supposes a case where there is a dispute about it.

A. Yes, sir, and where there is a large tract of land which one company owns and which it does not want to use itself, but which it does not want another company to have. Suppose the Michigan Central owned all this land we have down there for the old depot ground, and were not using it at all, and we were going there for a depot ground, and that was not in use, I could then get a jury and impanel them to condemn that property and ascertain whether
292 it was necessary for the Michigan Central Company to use it for the future?

Q. If it was not in use?

A. Yes, sir; but if it was in use like the Michigan Central grounds, no man would be fool enough to ask any questions of that sort?

By Mr. DICKINSON: But do you not provide that a jury shall pass upon the question of whether it is needed by the Michigan Central?

A. The law tells that.

Q. And the question of need goes to a jury, just as you condemn the other proceedings against individuals?

A. It is not a question of need, but of the actual use of it.

Q. And that question goes before a jury; you never took any proceedings against the Michigan Central?

A. No, sir.

Q. You say they have 36 acres of land down there?

A. Yes, sir.

Q. Right here in this city?

A. Yes, sir, but they have not got as much as they need.

Q. But they have got some ten times more than your union depot with four roads?

A. Not for a passenger-house. Passengers do not require but a small space. We have got for the same purpose down there forty acres, down below.

Q. And you have shown, for every other city that you have testified about, that they do their freight business outside of their union depot?

A. Not entirely outside of their passenger union depot, but they have freight union depots in the city, and they have freight yards outside, because they cannot afford to own enough in the city.
293 Q. Of course they cannot. I will shake hands with you on that. Now suppose that you built an elevated road. You have shown, I think, by your engineer, that a switch running up River street on the north side, that to these factories, the Union mills and the stove works, could be operated with a train of cars

and a locomotive of the largest kind, with perfect freedom under your elevated road—is that not so?

A. I have not said anything about that.

Q. Mr. Ellis said that, and you think it can be?

A. I think it can be if the public will allow it to be done.

Q. You think it can be operated under an elevated road perfectly well?

A. Yes, sir.

Q. What do you think a jury would say as to the Michigan Central, if you offered to build an elevated road along that margin, where you could operate a line under the railroad track, if the Michigan Central told a jury they needed that?

A. The question in the first place would be whether the Michigan Central is actually using its land; if it is actually in use, you cannot take it under that law. An-body could decide that, as you see it is in actual use.

Q. But if such a question came up, do you not provide there that that question shall be decided like every other one, by a jury? You know what it would be; you know what the jury would say?

A. Yes, sir, we know that the Michigan Central is occupying every inch of that ground; and when that would come before the jury, the jury could not help saying that they did.

294 Mr. BAKER: I desire to put the question right to you here, Mr. Dickinson, whether upon your honor as a lawyer, as counsel in this case, you claim that we could condemn a right of way across the Michigan Central?

Mr. DICKINSON: I have not the slightest doubt of it; I think it should be done, and you can get every disinterested man in this town to tell you so.

Mr. BAKER: You cannot; and I put the question to you now, whether you are going to insist upon any such thing, so that I can bring it to the attention of the court?

Mr. DICKINSON: I have insisted upon it from the beginning. I have insisted upon it since January, 1891. Your statement is mere buncombe.

Mr. BAKER: There is no buncombe about it. We claim that under that act we could not condemn a right of way across the Michigan Central property. There is no reputable lawyer in the State would say so.

Mr. DICKINSON: You will find all the reputable lawyers will say so.

Mr. BAKER: You cannot bring one here to go upon the stand and say that you could do it, under that statute.

Mr. DICKINSON: I think we could bring them.

By a JUROR: What is the height of a freight car?

A. I should say it would be ten feet. I could not say exactly.

Q. On the south side there, to have one of those pillars start from the south side of River street, and to extend into the Michigan Central yard, for your freight cars, could they not back up on that structure just as well?

A. Not as well. They might if we built to span only one track, but the difficulty about that in addition, would be this: The Michigan Central claim they are going to build freight-houses on the front of their ground.

295 Q. But independent of what they pretend, the question is whether you can back up cars up onto that structure?

A. They could not very well; they would have to curve to get in.

Q. River street is perfectly straight.

A. I understand that, but if you look at the Michigan Central yard you will see their track has to curve.

Q. Not on River street. It is perfectly straight alongside the fence.

A. They have to get in there by a curve.

Q. But it is a perfectly straight line.

A. When you get this side of it it is occupied by freight.

Q. What is the width of a freight car?

A. You have to have about 13 feet; if you have two tracks they have to occupy 13 feet for one car, and then the other one 13 feet.

Q. Then they could back out onto that structure, which is to be 35 feet; they could easily, taking the base of the span, back up abreast?

No answer.

Mr. DICKINSON: Have you not stated yourself, Mr. Joy, that in London they run in three stories of cars, right over each *over*, into depots?

A. One railroad company runs over another, and high enough to span it, but not lengthwise; they come into the city; one train comes in one direction and another in another, one crosses another so high up that it cannot interfere with the one below, but there is no two roads run along above another so that the trains run along lengthwise of the road, right above another, that I ever saw.

Mr. BAKER: I want to make one statement to the jury here. Mr. Dickinson may have thought that when I said that no

296 reputable lawyer in the city would sustain him in his position, that I was personal. I did not mean to say that Mr. Dickinson was not a reputable lawyer. Mr. Dickinson stands very high in the profession, but he is very enthusiastic, and my proposition is that you cannot bring a reputable lawyer from the Detroit bar who will claim that we can condemn a right of way through the Michigan Central Railroad property as it is now situated, unless the Michigan Central railroad would consent to it, which they will not. That is the proposition that I make to this jury.

A JUROR: One thing we will have to have settled before we get to our deliberations, and that is whether there is a law which could do so or not.

Mr. BAKER: In regard to that, our supreme court has decided, in an opinion by Judge Campbell, that you (the jury) are the judges of the law and the fact, but that you can take the advice of the circuit judge if you desire to, so that we will ask you, as they make such a point as that, to call in the circuit judge and take his advice and judgment as to what the law is upon that subject.

A JUROR: On that point we shall need him.

Mr. BAKER: And I am perfectly willing to leave it to the circuit judge to decide, and if you agree with me that you would like his opinion, you can get it.

Mr. DICKINSON: I am sure I don't know what the opinion of the circuit judge would be.

Mr. BAKER: Neither do I, but I am willing to leave it to him.

Mr. DICKINSON: I do know that Mr. Baker rather insisted upon having a circuit judge give an opinion to a jury before, and that I insisted that the jury were the judges of the law and the
297 facts, that a jury can read plain English, that the constitution did not contemplate that this jury should need any direction, because it is a tribunal of itself and can make up its mind, if it can read the English language, and if it takes advice, the supreme court of the State have held that the circuit judge has no power over you to give you a direction; if you take advice you do as you like, the jury is not to be charged.

Mr. BAKER: That is a subject that we will bring up here hereafter, and I would not have much doubt, after you look the whole thing over, as to how you would decide it yourselves.

A JUROR: We will have to look up the law ourselves.

Mr. DICKINSON: There is the plain English of the law.

Mr. BAKER: When he says there is the plain English of the law, there is no strength and no truth in his position whatever, and he cannot even make an argument to sustain his theory of it.

Redirect examination by Mr. BAKER:

Q. You were counsel for the Michigan Central a great many years?

A. Yes, sir.

Q. And you have been familiar with railroad legislation in this State all that time?

A. Yes, sir.

Q. If you had the power to condemn a right of way across the Michigan Central Railroad property, would you have any objection to condemning a right of way along the margin of their property?

A. Any objection for what reason?

Q. For any reason.

A. I will tell you. The Michigan Central Company have
298 a right to the use of all their grounds; their business is growing all the time; they say they are going to build freight-houses all the way along their grounds down to where they cross, within a reasonable time now. That is an objection to that, to our acquiring any of their depot grounds, even for that highway; they have a right to occupy their full front in any manner which they require, and if they need a freight-house on any part of these grounds they have a right to put it there. They may need every inch of it, and the law intends to secure every inch of that to them. They have put off of it their car shops and their freight shops, off that ground, for whatever they wished to use it for, whether for

freight sheds, on the east or west side, they have a right so to use it; we have no right to interfere with it.

By a JUROR: As I understand the case, this viaduct for teams is a part of this condemnation of the Michigan Central?

A. No, sir; it is not.

Q. It is shown us as part of the plan.

A. That is no part of the matter before this jury. That may never be built. When we did talk about that—we did talk about it at one time—the Michigan Central refused to allow any land to be used, and they proved, as they thought, before that commission, that to take that little piece of ground below where the track comes across River street, down to the end of it, was worth to them $200,000; where there was a single track, they proved it was worth to them $200,000.

Mr. BAKER: On the south side of River street?

Mr. BAKER: I desire to call your attention to that case. The railroad commissioner, or the State railroad crossing board in the first instance, and the railroad commissioner in the supplementary order, ordered the two companies to build a viaduct for teams?

299 A. Yes, sir.

Q. In the condemnation case brought by the union depot company to condemn a right of way for its elevated road in front of the Michigan Central property, was not this the position of the two companies; the Fort Street Union Depot Company desired to condemn a right of way for its elevated road?

A. Yes, sir.

Q. To build that in front of the property of the Michigan Central Railroad Company, and to build it in the street?

A. Yes, sir.

Q. The Michigan Central Company claimed that inasmuch as the board had ordered this viaduct for teams to be constructed, they were entitled, as a part of their damages, to compensation for the strip of land that would be necessary to take across the crossing there off of their property for that purpose; but that question was argued and submitted to the commissioners, and they decided that in the condemnation proceedings the Michigan Central Railroad Company was not entitled to any compensation for building the viaduct for teams?

A. They didn't consider that.

Q. They didn't award any damages for that?

A. No, sir.

Q. So that the depot company condemned a right of way to build its elevated road?

A. And nothing else.

Q. If this viaduct for teams is erected it is to be erected under the order of the city authorities, at the expense of both?

A. Yes, sir.

Q. That is, it is a burden upon the Michigan Central just as much as it is upon the depot company?

300 A. That is the position exactly.

By a JUROR: Do I understand that the commissioner has condemned that driveway on the Michigan Central, if necessary?

Mr. BAKER: No, sir; they do not condemn it at all. They just cover a right of way to build the elevated road there. The railroad commissioners and the railroad crossing board have ordered both companies to put that viaduct in there. They have ordered the Michigan Central to do it, and this company. It is an enterprise of their own; it is separate from this.

A JUROR: Was not that one of the conditions of the crossing board?

Mr. BAKER: Certainly. The crossing board has ordered that to be done, and the supreme court has sustained it; but the only consequence it is here is that we show the completed plan, how it is to be constructed; but when that comes to be built it is to be built by these two companies, under a contract let by these two companies, and in which the two companies jointly will be required to pay any damage that will be done by the viaduct. Nobody claims it could be done without the viaduct; that is to be done, but it is not to be done by the union depot company alone; there is somebody else that has got to pay one-half of every dollar that it costs, one-half of every damage that it does.

Mr. DICKINSON: That is a fair statement of Mr. Baker.

A JUROR: If it had to be done as one of the conditions of the crossing.

Mr. BAKER: It is not put in that shape; he simply grants an order that it be done, and at the same time approves the map.

301 Mr. DICKINSON: It is made a condition of the elevated structure.

Mr. BAKER: It is not made one of the conditions. The Michigan Central railroad insisted upon having a crossing of that kind, and they signed an agreement; that has not been put in evidence yet, but they signed an agreement that this could be used and all that sort of thing, and they are undoubtedly under a legal obligation; in fact the supreme court has decided that that has got to be built by these two companies; there is no question about it; but it is no part of this case, it was no part of the case before Mr. Hecker and the other commissioners, and when they looked it all over and examined it fully, they excluded it.

Judge CHIPMAN: Where is that agreement?

Mr. BAKER: It is in existence. It is in the petition and in the proceedings.

Judge CHIPMAN: Will you bring it in here?

Mr. BAKER: Yes, sir.

Mr. DICKINSON: Let us have that in the morning?

Mr. BAKER: Yes, sir.

(By Mr. BAKER:)

Q. Upon what basis or for what reason do you say that this elevated road will compare with the New York elevated street railways?

A. It is for passengers largely, and has its locomotives, uses loco-

motives, uses passenger cars, does the same kind of business very largely, runs along a street as they do, burning coal, in every respect a railroad, a railroad with locomotives, cars and carrying passengers, just like this.

Q. It is the same gauge?

A. Yes, sir.

Q. Only the locomotives are a little larger here?

A. They are a little lighter there.

302 Q. And the cars are not so heavy?

A. They are not quite so heavy.

Q. But they are locomotives?

A. Yes, sir, burning coal as we do, in every respect.

Mr. DICKINSON: You don't mean burning the same coal; they use anthracite?

A. Under the law, we have got to use anthracite here.

Q. But they don't use it yet, they use bituminous coal?

A. Not yet.

Q. They use bituminous coal on all the lines that enter here?

A. They do now, but they won't.

Q. In New York they have never used anything but the anthracite, have they?

A. I don't think so.

Mr. BAKER: The ordinance there requires them to use anthracite coal?

A. Yes, sir.

Q. And they have an ordinance here which will compel you to do the same here?

A. Yes, sir, we will have to do it here.

Mr. DICKINSON: There is not a word about anthracite coal.

Mr. BAKER: But that is the result of it.

Mr. DICKINSON: They have an ordinance in New York providing that they use anthracite coal; it is in their charter; but your charter does not provide it, nor does the ordinance here.

Mr. BAKER: Under this ordinance, would it be possible to operate this road without using anthracite coal?

A. I don't think it will.

303 Q. That is, it will be a violation of the ordinance to use bituminous coal on your elevated road?

A. Yes, sir, and we should be liable to a $100 fine for every time we used it, and perhaps imprisonment to the men.

Q. There is some difference between these roads as to the amount of traffic; the trains are almost constant in New York?

A. I think they run every minute or so there.

Q. It will be some years before there is such a traffic on this road?

A. Yes, sir. The elevated roads, with the five-cent fare, Mr. Gould told me, earn more than the entire business of the Pennsylvania Central road, on the whole system.

Mr. DICKINSON: Why is there a mortgage for $40,000,000 on it?

A. I cannot tell you that. It earns more money from passengers than the entire system of the Pennsylvania Central Company earns from passengers, and they run all day.

Mr. BAKER: That is the elevated street railway in New York?

A. Yes, sir.

Q. In testifying about the Pennsylvania Central coming in here, as I understand you, the Pennsylvania Central is an old road and a very rich one?

A. Yes, sir.

Q. As far as the mere matter of expense is concerned, they could build a line—they could raise any amount of money?

A. They could raise any amount of money.

Q. But as a practical railroad scheme, would such business
304 as the Pennsylvania Central could obtain here justify any such enterprise on their part?

A. No, sir; they never would do it unless they could get into the union depot; they would never come here.

Q. If the Pennsylvania Central comes here, must it not be in some union depot provided for them?

A. Beyond all doubt.

Q. On the other trial did you hear any particular contention on the part of Mr. Backus or his counsel, that the margin of the Michigan Central property could be taken?

A. I don't know as I did; I don't think I did.

Q. They contended generally that you ought to come up there through their property?

A. Up through the Michigan Central grounds.

Q. But the exact location of the ground was not insisted upon?

A. It was not mentioned at all.

Q. Do you know anything about the elevated road purchasing property down in Louisville—the Louisville & Nashville road?

A. No, sir; I don't.

Q. All you know about it is that an elevated road does run along the street there?

A. Yes, sir; and right in front of the stores and buildings in the street.

Q. Does business go right on along that street?

A. Yes, sir; under it, on the levee, all the time.

Q. What kind of property is situated along the street?

A. Business property all along there. I cannot tell what business they do, but stores are occupied all along there.

Q. It is store property?

305 A. Yes, sir; I don't think I noticed any manufactures there, but it is occupied with brick buildings all along, and they run right close in front of them, but it is all open underneath.

Q. The Pennsylvania Central railroad comes into Jersey City on a public highway, with a line of railroad, a track or two in the center of the highway?

A. Yes, sir.

Q. And with a passageway on each side?

A. Yes, sir.

Q. And houses on each side?

A. Yes, sir.

Q. And a large number of cross-streets?
A. Yes, sir.
Q. They come right up along the New York harbor?
A. Yes, sir.
Q. And right through the heart of the city?
A. Yes, sir.
Q. Right across the main business street?
A. Through the center of the city, like running down Woodward avenue, right in the heart of the city.
Q. That necessitated a large number of grade crossings?
A. Oh, yes, a hundred and more; there must have been more than a hundred.
Q. And the elevated road that has been built there has simply raised the road up in the highway, so that those grade crossings are avoided?
A. Yes, sir; they all go underneath.
Q. They leave height enough there so that traffic can go right on under the elevated road?
306 A. Yes, sir, and my impression is, and I don't think I am mistaken, that it spans the whole street, so that the street, the same as it was before, is used there.
Q. And it may be as in some of the streets in New York, if it is a wide street, there may be a passage on both sides in addition to the passage of the elevated road?
A. It might be so.
Q. That is, the elevated road does not span the whole street; the posts are set 40 feet apart, there is a street on each side?
A. Yes, sir. On some they could not span the whole street, but where they can span the whole street and leave the whole street open, they do so.
Q. You have not been an officer or connected with the Michigan Central railroad for a number of years?
A. Twelve or 14 years.
Q. Were you employed by them to argue this tax question for them at Lansing?
A. No, sir, not at all.
Q. Did they know you would make any argument?
A. No, sir, I didn't go there for that purpose.
Q. How did you come to make an argument?
A. Simply because I sat by there and heard the arguments made on the other side, and it struck me that there might be some danger of the Michigan legislature passing an unconstitutional law, which they have agreed not to do, involving the Michigan Central in litigation which they ought not to be involved in. I did not think it was right, and therefore I expressed myself so.
Q. Did you go on and state the early history of the Michigan Central?
307 A. I stated the whole history of the Michigan Central from the beginning, how the clause relative to taxation happened to be placed there, and the necessity the State were under

for selling the road; I gave the whole history of it and the whole negotiation.

Q. Will you state in that connection, whether or not it was an easy thing to get the money with which to buy the Michigan Central of the State?

A. It was with the utmost difficulty in the world. We got the charter in the best shape in which it could be obtained. We then went east to consult the parties whose names were in the charter, whom we had supposed would take it. We had negotiation with them, but when they came to look at the charter and see what they had to do, they declined to do it. We had then to get up another company and a different set of men.

Q. How long a time did the legislature give you?

A. Six months, and it took us the whole six months to do it, and it was not until the last day of the six months that we got the stock taken. The new company came in; we discussed it with the old ones and the new ones; we got finally a new company with whom we thought we could carry the thing through and get them to take the stock, and we then arranged with the old company to subscribe to the stock as originally intended, and assign it to the new parties who agreed to take it; and it was with the utmost difficulty that we could get it taken then; we could not have got it taken at all but for the tax clause, which left them not to be taxed in any municipality and town through which they might run.

Q. How big a town was Detroit then, in 1846?

A. About seven or eight thousand people.

Q. How big was Chicago?

A. It was not so large as Detroit at that time. In 1838, I
308 was in Chicago when there was about 2,500 people there, not more than that. Up to 1846 Detroit was in the lead. By 1849 or 1850 Chicago was a little bit larger, but before that time Detroit was ahead of it.

Q. Did anybody dream at that time that in a few years there would be the great city of Chicago?

A. No, sir. I will give you a little history. Mr. Brooks, who was the engineer who built the Michigan Central road, lived in Detroit; he and I together were in charge of the Michigan Central here and everything connected with it. The Michigan Southern road was built out somewheres in the vicinity of Hillsdale, which was by its charter to have been extended, to connect with the Michigan Central at Niles. We were afraid that some other company would take that road and build a rival road around to Chicago, and we could buy the property for $500,000; that was the price the State asked for it. Mr. Brooks and I conceived the idea of inducing the Michigan Central road to buy that road for the purpose of obviating a rival road at an early day around Chicago. I got Mr. Brooks, who was the engineer, and who had become well acquainted with this country, to write a letter to the officers of the Michigan Central road in Boston, and I agreed to take that down to them and advocate the buying of that road. Mr. Brooks in that letter as one of the arguments why they should buy that road, made use of this

expression in regard to Chicago: "Chicago is not a very large city now, but within 20 years there will be 200,000 inhabitants in Chicago." That was one of the arguments I had to use in favor of our controlling the travel between Chicago and the East. Well, I got the stockholders together. One of them, an old gentleman by the name of John C. Greene, who lived in New Jersey—I had to
309 go to see him in New York—when I came to that clause in the letter he said, "Mr. Brooks is as wild as a hog; it destroys my confidence in his judgment," and we could not get a dollar of his to buy the Michigan Southern road.

Q. It discredited it all around?

A. Yes, sir; because it made that prophesy. He said, "He is perfectly wild, it has destroyed my confidence in his judgment," and I could not do anything with him. But soon after a company did take it and we did build another road around to Chicago.

Q. From your knowledge of these depot grounds in Chicago and St. Louis and other places, could you tell us whether five acres is any more than a company ought to have?

A. For passenger purposes, no, sir; it is a small ground.

Mr. DICKINSON: There is no doubt about that. We concede that five acres is about right.

A. I am acquainted with a great many station grounds, and, while I have not measured them, except with the eye, and while I know them very well, and some of them I bought the grounds for, I don't think there is any passenger ground in any city in the world, and doing a business that we shall do, that has a depot for passenger business less than we take, and there is no company in Kansas City or Chicago or any large city that has not as much ground for freight and passenger purposes, and they must have it.

Q. Some reference has been made to the fact of the depot on Forty-second street, that the depot of the New York Central road in New York was formerly downtown.

A. That never was any further downtown. They use- to haul their cars down with horses to below the tunnel.

Q. That is Chambers street?

310 A. I forget the name. That was done to the Madison Square Garden. I think what afterwards became the garden there.

Q. Did a railroad ever run down there?

A. No, sir; but a track was laid down there and horses use- to draw the cars back and forth.

Q. Locomotives did not go down there?

A. No, sir.

Q. When that depot was built, would it have been practicable or a reasonable railroad scheme in New York to have built an elevated road and put that depot away downtown, considering the value of the property there and the situation of the town?

A. As I take it, the New York Central, with the business that they do, could never have a station high up in the air to do it, and they could not go down there on an elevated road and run down into a passenger depot or a freight depot.

Q. Do you think that the growth of this city has been such that the Michigan Central depot ought to be moved further out?

A. It would be fatal to the city and to the road to move it further out.

Q. Is it a reasonable proposition, as far as the city is concerned and these companies are concerned, to locate a depot on Third street?

A. Yes, sir, it is reasonable and right. It is a thing for the interests of the city and the interests of the country, and for everybody that wants to come in from the country, or go from the city into the country.

Q. Has this property down there got the value of Woodward Avenue property.

311 A. No, sir, it is cheap property down there.

Q. The plans in evidence here provide for two tracks in front of the property of Mr. Backus, and then for three tracks?

A. Yes, sir.

Q. Will you state what use can be made of a third track from that point in?

A. Sometimes it occurs that there comes in here a large number of people on excursions from the country. When they do come on a large excursion there may be 15 or 20 cars; they have to be divided into sections, and one section may run in on one track and another section on another track; at the same time there may be a passenger train in the depot that wants to go out; therefore when you get up there you need three tracks, not because you want to use three tracks all the time, perhaps, but because when trains come in there may be some going out on that section, and you may have to run in on one track and another and divide your trains, while one is coming out on the third.

Q. Is that the use that will be made ordinarily of the third track?

A. That is all.

Q. It will not be used as a part of the railroad yard where you make up trains and do switching?

A. Not at all.

Q. This strip of land that the Detroit, Lansing & Northern sold to the Michigan Central, is it a strip of land which ran through the Michigan Central road?

A. Yes, sir, through the middle of it now.

Q. And it had been originally acquired by the Detroit, Lansing & Northern, when they commenced to use the property of the Michigan Central?

312 A. Yes, sir; I sold it to the Detroit, Lansing & Northern myself; I think it is 60 feet.

Q. We will find out just how many feet it was from some other source. But the Detroit, Lansing & Northern having decided to join this enterprise and come into this depot, had no further use for that, and they sold it to the Michigan Central for $80,000.

A. Yes, sir, I think that is the price.

Q. It is the river-front property, and extends from River street through to the channel bank, like all other river property?

A. Yes, sir, something more than 300 feet deep, 350 perhaps.
Q. That is to the margin of the river?
A. Yes, sir.

Recross-examination by Mr. DICKINSON:

Q. At the time you organized the original Detroit Union Depot Company, you were contemplating then that the Grand Trunk would come in with you?
A. Yes, sir.
Q. And subsequently, after you organized the Detroit Union Depot Company, the Grand Trunk bought the Detroit, Grand Haven & Milwaukee station ground?
A. They bought the Great Western road in Canada, and that belonged to the Great Western road and came in with the other.
Q. That was then about 1885?
A. I don't remember the time.
Q. It was subsequent to the formation of your company when the Grand Trunk refused to come in?
313 A. It was subsequent to the time we got interested in it and bought the property.
Q. Up to the time the Grand Trunk road bought the Great Western, the Grand Trunk road, with all its business, came into the Michigan Central grounds, didn't it?
A. No, sir; the Grand Trunk then did a through business by the way of Port Huron, and they used to come in at the junction to Detroit; the through business all went the other way.
Q. So far as it came to Detroit, it came in the Michigan Central ground and left there?
A. Yes, sir.
Q. At the same time the Flint & Pere Marquette used it and came clear in at that time?
A. No, sir; the Flint & Pere Marquette used to use the Detroit & Milwaukee depot.
Q. But at this time?
A. They came in there while I was president of the Michigan Central road, they were there.
Q. At the time you formed the old union depot the Grand Trunk road was to come in with you; have you not said in your direct examination that the reason they did not come in here is because they bought these grounds up here, and before that were they not coming into the Michigan Central?
A. They were; we had progressed a good way with the old union depot company before we got the charter.
Q. I only want to show that they came in there, the Grand Trunk and the Flint & Pere Marquette.
A. Yes, sir; they did.
Q. And the Detroit, Lansing & Northern did?
A. Yes, sir; the Flint & Pere Marquette and the Detroit,
314 Lansing & Northern and the Michigan Central and the Great Western all came in there.

Q. And the Grand River Valley?
A. That is a good way out.
Q. But the passenger business came into the Michigan Central?
A. Yes, sir.
Q. And the Grand Rapids & Indiana, so far as they ran trains here?
A. They didn't come into the city.
Q. Where did the Eel River road come in?
A. Not at all.
Q. Where did the Butler road stop?
A. It agreed to run around the Detroit & Milwaukee.
Q. And they found that it could not come in there conveniently?
A. That was the reason they formed this organization.
Q. The reason it was discommoding the Grand Trunk was because the Grand Trunk had one track?
A. I think it was because they had not ground enough to accommodate it.
Q. But they had but one track running out to the junction?
A. That is true, they had but one track.

Redirect examination by Mr. BAKER:

Q. You say the Wabash ran around there?
A. Yes, sir.
Q. Could it do business satisfactorily around there?
A. No, sir; not at all.
Q. Why?
315 A. Simply because when they got around there the road was so embarrassed by the number of trains that ran over it and the number of cars they had to handle around there, that they would not allow the Wabash trains to run in at all, but they would run to the horn, as it was called, and when it was convenient for them to haul cars in they would send out a switch-engine.
Q. The Wabash had second place all the time?
A. They had not a place at all.
Q. But their interests were subordinated?
A. To everything else.
Q. Do you know whether the Detroit, Lansing & Northern and the Flint & Pere Marquette have ample facilities now on the Michigan Central?
A. The Michigan Central have always said they could not accommodate them and they must get out; they have said that for years, and they have been in a perpetual difficulty down there nearly all the time.
Mr. DICKINSON: They are competing lines with the Michigan Central?
A. Yes, sir.
Mr. DICKINSON: Mr. Joy, I wish you would bring up or send up the agreement of the Michigan Central with the union depot company?
Mr. BAKER: I will put all that in evidence.
Adjourned to Thursday, June 18, 1891, 2 p. m.

316 THURSDAY, *June* 18, 1891—2 p. m.

THOMAS J. HATSWELL, sworn in behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. Saginaw, east side.
Q. How long have you lived in Saginaw?
A. Nineteen years.
Q. What is your business?
A. Master mechanic of the F. & P. M. road.
Q. How long have you been the master mechanic of that road?
A. Fifteen years.
Q. As master mechanic, is it your duty to look after the locomotives on the road?
A. Yes, sir.
Q. Do you know how to build a locomotive?
A. Yes, sir.
Q. Do you know how to operate one?
A. Yes. sir.
Q. Will you state as briefly as you can to the jury the present devices that are used upon locomotives for the purpose of avoiding smoke and cinders; go on in the first place and state how you construct a locomotive in reference to that part of it?
A. We consider at the present day what we call the extended smoke arch to be the best preventive against the throwing of cinders.
Q. Where is that smoke arch?
A. On the front end, and to decrease the smoke to as low
317 a minimum as possible, we use in the fire-box of the engine a brick arch; it is carried on arch pipes; the water circulates through the pipes; we put that brick arch from the flue sheet over the fire, so that from the top of the brick and what we call the crown sheet or roof of the fire-box, it varies according to the size of your engine; in the case of the engines we use on our road we have from fifteen to seventeen inches from the top of the brick to the bottom of the crown sheet.
Q. The fire-box is at the rear end of the boiler?
A. Yes, sir.
Q. Usually in a square form?
A. A rectangular form.
Q. And in the bottom of that fire-box is where the coal lays when it is being consumed?
A. Yes, sir.
Q. About how deep is a fire-box up and down?
A. They vary from 50 to 64 inches.
Q. How wide are they?
A. Thirty-four inches wide.
Q. This fire-box is situated at the rear end of the boiler?
A. Yes, sir.
Q. How long is the boiler usually on an ordinary engine?

A. The boilers without the smoke arch are 16 feet 18 to feet long.

Q. Is the boiler in cylinder form usually?

A. The barrel of the boiler forward of the smoke arch is in cylinder form.

Q. Does that boiler consist of quite a number of flues that run through it?

A. Yes, sir.

Q. About how many flues are there in an ordinary locomotive boiler?

318 A. The testimony I am giving in regard to the dimensions of locomotive boilers is the dimensions in use on our road.

Q. They make them of different dimensions?

A. Yes, sir; the dimensions I am giving are about the general dimensions that we are using on our road.

Q. Take the ordinary locomotive on your road, how many flues are there that run through it longitudinally?

A. They vary. We have some boilers with 117, and some with 206.

Q. Do those flues exceed the passages through which the smoke and fire proceeds, with which you heat the water?

A. Yes, sir.

Q. How is the brick arch constructed in the fire-box? Just describe that if you can.

A. The fire-box is in a rectangular form.

Q. Here is a cross-section of it (showing diagram).

A. That is a section, through the fire-box; this represents the brick; the brick we use are four inches thick and eight inches wide. You see that runs up there 32 inches, and there is 28 inches, and here is the bottom flue; this is a place to represent the fire-door where the coal goes in; the grates in the fire are here; all the fire goes up from here and passes over this brick arch, and has gone through the flues.

Q. Are there any flues below that arch?

A. Not any.

Q. The arch commences, then, at the bottom of the boiler?

A. The top of the arch is supposed to be four inches below the bottom of the lower flue; that is our standard for putting it.

319 Q. So that the entrance to the flues is all above that arch?

A. Yes, sir.

Q. (Using two books.) Then, as I understand it, suppose those two books—the space between those two books—represents the fire-box, and the end of the boiler stops here; this brick arch is situated substantially, not exactly, but substantially in that form?

A. Yes, sir. Now the jury can look at the back end of the boiler; that is the position of the brick arch.

Q. Here is the fire-box where the fireman throws in the coal?

A. About there.

Q. And the fire starts here and comes around this arch here to go into the flue?

A. Yes, sir.

Q. What is the object of that brick arch extending out over the

coal, over the fire? I show you a diagram; it is a cross-section of it looking at it from the side.

A. Yes, sir.

Q. This represents the ends of the brick cut right in two?

A. Yes, sir.

Q. And it is supported, as I understand you, on tubes in which water circulates?

A. Yes, sir.

Q. What is the object of having that arch there?

A. To prevent an accumulation of smoke in the front end; we have then to beat up the cinders; as the engine is working the coal is consumed; the cinders that are formed in the place passing in a direct line through the flues, impinge against this brick arch, and the brick arch, when it becomes hot, helps to ignite the gases, and it does away with and helps to consume this dense smoke, and it retards the direct action of the smoke through the flues, so that the longer we can hold the heat in going through the flues, the better combustion we arrive at and the better results we get from our fuel.

320

Q. Do you have a draft that comes through the coal in the bottom?

A. We have a damper in the front here and back, that lets the air through the grates and through the coal.

Q. In addition to that, is any air emptied for the purpose of increasing the combustion as the smoke goes around that arch?

A. We don't.

Q. Can it be done?

A. It is done.

Q. By leaving the door open do you increase the consumption?

A. We have a device on the passenger engines that acts as a deflector; in the ordinary locomotives the door is swung open on a foot-board, the coal is put in and the door is closed; now I use a device, experimenting with it, and it works very satisfactorily; the door is hung on the inside of the fire-box and closed on the inside, and opens right in the fire-box; the shape of that door makes a deflector when it is open, so that it throws the air right down onto the coal, and we think that by introducing that oxygen in there it ignites with the gases, and we do away with that black smoke.

Q. Now, that is the fire-box part of the engine. Will you tell us now what devices have been adopted at the other end of the boiler, after the smoke goes around this arch and goes through the flues 15 or 18 feet, whatever it may be, to the end of the boiler; will you tell us the present method of construction, with reference, of course, to the subject of disposing of the smoke and cinders?

321

A. We have what we call a deflecting plate; of course the boiler is round, and we have a deflecting plate that comes off from 12 to 20 inches, from the end of the flues.

Q. Let me ask you a question right there. Here is the end of the boiler; supposing it is round, is that deflecting plate anything

more than a piece of iron or plate, that hangs down over the front of the boiler like that?

A. We make it of No. 10 iron.

Q. It is a sort of plate that hangs like that, just beyond the end of the flues?

A. Yes, sir.

Q. What is the object of that?

A. To stop the direct action of the cinders going through and to squeeze the draft through the flues.

Q. As cinders come through the flues do they strike a bit against this deflecting plate?

A. Yes, sir.

Q. They go down under the edge of that plate?

A. Yes, sir, they come down under the bottom of the plate.

Q. Do they open into a box at that place?

A. Yes, sir.

Q. About how big is that, on your locomotives?

A. We have from 44 to 56 inches in diameter, and 40 inches long, and the netting will take up about one-third.

Q. I have not yet come to that. As the cinders come out and strike against this deflecting plate, they revolve round and get into this box?

322 A. Yes, sir.

Q. Does the smokestack go out of that box?

A. On the top of it, yes, sir.

Q. At the front end of it, or close to the boiler?

A. Close to the boiler.

Q. Is there anything in that smokestack for the purpose of increasing the draft, or that is used for that; what have you in there to create a draft?

A. The exhaust pipe of the engine.

Q. Is there anything in that box; what, if anything, is put in that box, and where is it placed, for the purpose of arresting the sparks and cinders?

A. We use what we call a three and a half by three and a half mesh netting, No. 12 wire gauge; there is angle irons riveted onto the sides of this smoke arch from the deflecting plate forward, and this netting is bolted onto those angle irons.

Q. Does that cover the entire — of that box?

A. The entire surface of the upper portion of that box.

Q. That is between the deflecting plate and the outer edges of it?

A. Yes, sir.

Q. How far from the top of that box is it with reference to the bottom; is it in the middle, or two-thirds of the way up?

A. About two-thirds of the way up.

Q. So that it extends from this deflecting plate to the opposite side of the box, so that no smoke can go through there without going through this netting?

A. No, sir.

Q. What do you mean by three and a half wire?

A. Three and a half inch mesh, that there is three and a half
323 meshes to an inch; and then there is No. 12, that takes out four wire-, No. 12 wire gauge, out of the inch, and that leaves the opening about three thirty-seconds of an inch square.

Q. What effect does this wire netting or sieve that extends over this box have upon the cinders that come through the flues?

A. They arrest them.

Q. Where do they fall or stop?

A. They are deposited in the bottom of the box.

Q. Do they accumulate in any particular part of the bottom?

A. All through the whole bottom; they commence more on the front of the boiler and bank up like that (illustrating).

Q. That is, they fill up in the corner?

A. They fill up forward in the front of the boiler, like that.

Q. (Showing a diagram.) Is the diagram I now show you a cross-section of the front part of a locomotive?

A. Yes, sir.

Q. Looking at it from the side?

A. Cut right in two.

Q. Is the lightest mark on this diagram the deflecting plate? Just point out the deflecting plate.

A. There is the deflecting plate there; it runs from there right down.

Q. It is the lightest mark extended?

A. Yes, sir; from there, the top of the smoke arch, down.

Q. Do these heavy marks at the left represent the flues?

A. Yes, sir.

324 Q. So that the smoke and cinders come out and strike against this deflecting plate?

A. The cinders come out through the flues, strike this deflecting plate, pass down there, and then up out here.

Q. What does the semicircular marking represent?

A. The netting.

Q. The course of the netting?

A. Yes, sir.

Q. And this is open space here?

A. Yes, sir.

Q. What is this at the bottom?

A. A spark trap; that is for emptying the cinders that collect in the smoke arch.

Q. Do you mean that when the engine is in operation the cinders that are arrested in this netting accumulate in this corner?

A. Yes, sir; right there.

Q. And they gradually increase until it is necessary at some suitable place on the road to open that trap and let them out?

A. Yes, sir.

Q. Where is the exhaust on that?

A. There (pointing).

Q. Discharging directly in the smokestack?

A. Yes, sir.

Q. What effect has that upon the air in this box, in the flues and in the fire-box?

A. It creates a vacuum and a draft.

Q. Through the entire locomotive?

A. Through the fire-box and the tubes.

Q. To what extent do these devices stop the emission of smoke and cinders from the locomotive?

325 A. They reduce the emission of smoke and cinders from a locomotive to the lowest minimum. That is the object of it.

Q. In the Saginaw country you have a great many saw-mills and planing mills and such things, I believe?

A. Yes, sir.

Q. Has the Flint & Pere Marquette any railroad there that runs into the vicinity of the saw-mills and planing mills?

A. Yes, sir.

Q. Have you a belt line in your city?

A. Yes, sir.

Q. Does that belong to your road?

A. Yes, sir.

Q. How many miles long is the belt line?

A. Nearly twelve miles round.

Q. Where does it run?

A. From what we call the east side right around the city, round the outskirts of the city.

Q. What sort of business does that road do?

A. Principally lumber.

Q. Does it run to the different saw-mills and manufacturing institutions that surround the city of Saginaw?

A. All of them; it is in that vicinity.

Q. It is maintained and operated for the purpose of furnishing them railroad facilities?

A. Yes, sir.

Q. How long has that belt line been in operation?

A. Part of it has been in operation for 16 or 17 years.

Q. And the rest of it?

A. It has been completed two years.

Q. Does the main line of the Flint & Pere Marquette road in Saginaw run near to or adjacent to saw-mills or planing mills?

326 A. Yes, sir.

Q. Have you a line to Bay City?

A. Yes, sir.

Q. Does the road at Bay City run in the vicinity of that kind of property?

A. Yes, sir.

Q. In Saginaw, as I remember it, there is a large amount of made land, is there not?

A. Yes, quite an amount.

Q. Made of sawdust and slabs?

A. Yes, sir.

Q. Does the Flint & Pere Marquette road or this line run over this land?

A. Some portions of it.

Q. How near to a planing mill or a saw-mill does either one of those roads run there; how close to the railroad is there a planing mill or a saw-mill?

A. Six feet; six or eight feet.

Q. There are large quantities of lumber stored upon the docks and along the railroad in Saginaw?

A. Yes, sir.

Q. How close to the railroads do they pile lumber there?

A. From two to six feet; that is, it clears the coaches from two to six feet.

Q. I suppose an ordinary coach is nine to ten feet wide?

A. Yes, sir.

Q. In the operation of the Flint & Pere Marquette road, since you have been connected with it, to what extent have you avoided setting fire to this combustible property near which you run?

A. I don't know of a claim.

327 Q. Since your connection with the road has any claim been made against the company?

A. Not by any of those mills, to my knowledge.

Q. It is proposed, in this case, to build a railroad along River street; on that railroad the rails will be 23 to 25 feet, I think, on an average, about 24 feet above the level of the street; the rails are supported by a superstructure resting upon posts; that superstructure will be open so that there will be at least 14 feet in the clear from the bottom of the girders to the street; it is proposed to run such a superstructure along River street, with the posts resting at the edge of the curb, so that the superstructure will span the entire paved portion of the street; and in front of the property in question in this case a part of the way there will be two tracks, and a part of the way three tracks, but those tracks, or rather the ends of the ties upon this superstructure, will be nearly if not quite 40 feet from a brick planing mill that is being operated by Mr. Backus; he has a shaving-house, a building that comes down closer; it will be some six or eight feet, something like that, from the ends of the ties, and it is proposed to operate a railroad—four different railroad companies, your railroad in addition to others, will operate locomotives upon this superstructure by this property. What I want to know is this: Will the presence of locomotives, properly constructed according to the present state of the art, and carefully and properly operated as they run up and down in front of this property, increase, in your judgment, the fire risk of this planing mill; under such conditions, will the presence of this road make it more probable or more likely that this mill will be consumed by fire?

A. I have had some past experience in such cases, and
328 from the knowledge I have, it would not to any great extent.

Q. It would not increase it?

A. No, sir, not from the experience and knowledge I have in regard to such cases.

Q. State whether or not, when a locomotive is in operation, what-

ever escapes from the smokestack is thrown with considerable force into the air.

A. Certainly.

Q. That is, when the dampers are open and the locomotive is in operation, with the aid of the exhaust, the discharge from the smokestack is with considerable force, is it not?

A. That depends upon the conditions of service; it depends on the speed, the grade, and the weight of the train.

Q. What is the fact where a locomotive is properly constructed and properly operated, as to its emitting sparks, or cinders that have life enough to set fire to anything?

A. With the present device, where there are no mechanical defects, there is no great danger of setting fire to anything.

Q. Can any sparks or cinders, or live coal, get through this sieve, except they are small enough to get through these meshes?

A. No, sir.

Q. That is, it is so constructed that everything that goes through the smokestack has to go through this sieve?

A. Yes, sir.

Q. I suppose that what sparks or cinders do go through, if they were alive, they would go out before they strike the ground?

329 A. Yes, sir.

Q. The very fact that they are up in the air is an additional safety?

A. They would go out before they stopped going up.

Q. What kind of coal is used on your road?

A. What we call bituminous coal.

Q. Can you use anthracite coal in the same engines?

A. That is a question I do not consider myself capable of answering; I have not had experience with anthracite coal.

Q. Could you use coke in the same engines?

A. We could use it, but with what results I could not say.

Q. You have had no experience with anthracite coal?

A. No practical experience with it.

Q. Nor with coke?

A. No, sir.

Q. You know something about the operation of that road?

A. Yes, sir.

Q. Do you have charge of the management of the engines on the road, as to where the engines shall go, and how long they shall work?

A. Yes, sir.

Q. That is, you have charge of the locomotive department?

A. Yes, sir.

Q. Would it be practicable to operate a union depot in the city of Detroit by changing the locomotives, say at a junction out in the suburbs, say at Delray on the Wabash, or at the junction on the Michigan Central; would it be practicable to operate a railroad and have engines there that were constructed for the use of anthracite coal or coke, to haul the trains in?

330 A. Yes, sir.

Q. There would be no difficulty, no particular delay in changing engines at such a place?

A. It would cause a small delay.

Q. How long does it take ordinarily to change an engine?

A. Three to five minutes.

Q. Can it be done in three minutes?

A. Yes, sir.

Q. Any less?

A. Yes, sir.

Q. If the tracks are suitable and the men prompt, it can be done in less — three minutes?

A. Yes, sir.

Q. To what extent can a locomotive be operated with the dampers closed?

A. They can be operated to a limited distance.

Q. Did you ever have a place on the Flint & Pere Marquette road where they were operated with the dampers closed, where that was the practice of the company?

A. Yes, sir.

Q. Where was that point?

A. At Flint.

Q. Which side of the station?

A. West.

Q. The depot in Flint is near the Flint river?

A. Yes, sir.

Q. As you went west across the bridge over the river, did you formerly go through a lumber section?

A. Yes, sir.

Q. Where the lumber mill of H. H. H. Crapo and Mr. MacFarland, and a number of other large manufacturers were situated?

331 A. Yes, sir.

Q. I suppose years ago wood was used on your road?

A. Yes, sir.

Q. Will you state whether it was practicable to operate the road going out of that station with the boxes closed?

A. It was done.

Q. How far did you run; how long was this dangerous section?

A. About a mile.

Q. Did you have charge of the way engineers operated the engines through that?

A. Yes, sir.

Q. Did you have any difficulty in having them operate there with the dampers closed?

A. No, sir.

Q. About when did you cease to use wood on that road?

A. 1877; we commenced using coal in 1877, fourteen years ago.

Q. Bituminous coal?

A. Yes, sir.

Q. Since you have used bituminous coal, has it been necessary in running out of Flint to have the dampers closed?

A. No, sir.

Q. It was necessary before, because of the fact that you were using wood?

A. Yes, sir.

Q. The union depot company proposed to erect, or is erecting, a union passenger-house at the corner of Third and Fort street west in this city; they will have trestle-work along River street, and two or three tracks running out of this depot down to the old
332 union depot grounds, to property that is situated at the foot of Eighteenth-and-a-half street; there is, I should judge, about a mile, possibly a little more than a mile, of this road; there will be about half a mile of it that will run along River street, with manufacturing establishments on the north side of the street, and the Michigan Central railroad with a railroad yard on the south side of the street. Will you tell this jury if it would be practicable, if it were necessary to do so, to operate that end of these railroads that are to terminate there with the dampers of the engines closed?

A. Yes, sir.

Q. What would it be necessary for the engineers to do in order to do that; what precautions would they have to take?

A. They would not have to take any precautions. They might have to open their furnace door, possibly an inch.

Q. But what precautions would they have to take in approaching such a place?

A. At the end of a trip?

Q. Yes.

A. They wouldn't have to take any.

Q. If it was at the end of a trip, would they have to have an extra supply of steam or fire?

A. No, sir.

Q. If they were about at the end of their trip, with such steam as they ordinarily have, could they go on into the depot with their train?

A. Yes, sir. My testimony is based on our ordinary trains on our road, the road which I am connected with.

(By JUROR:)

Q. What do you mean by ordinary trains?

A. Five coaches to one train; that is our ordinary train.

(By Mr. BAKER:)

Q. Your ordinary trains are five passenger coaches?

333 A. Four and five.

Q. Would there be any difficulty in going in with a number of other coaches?

A. No; they would have to work their engine a little harder up the grade and consume more steam.

Q. I suppose there are different supplies of steam maintained in an engine?

A. They might have their fire in the furnace under a little different conditions with a heavier train than with a lighter one.

Q. Suppose a locomotive was standing in the depot, about to go out, waiting for the passengers to go aboard, would there be any practical difficulty in having steam enough on so that they could run out on this trestle-work and outside of the dangerous locality, if one existed there, with the dampers closed?

A. Yes, sir.

Q. There would be a practical difficulty?

A. I don't know whether they could; I understood, would it be practicable for them to run out, as I understood the question.

Q. How far do you think they could run, as a practical question?

A. A mile.

Q. Would there be any difficulty in running a mile?

A. No, sir.

Cross-examination by Mr. DICKINSON:

Q. Have you been connected with any other road except the Flint & Pere Marquette?

A. Yes, sir.

Q. Were you ever connected with the Pennsylvania?

334 A. No, sir.

Q. What other road were you connected with?

A. The Lake Shore & Michigan Southern.

Q. Will you tell the jury the length of a passenger car, such as you have on your road?

A. Our passenger cars are from 45 to 60 feet.

Q. And what would be the extreme length of a train with five passenger coaches, with the locomotive?

A. About 425 feet.

Q. You include the spaces between the cars?

A. Platforms to be added.

Q. You don't give that in your 40 feet?

A. No, sir.

Q. And you think with that kind of passenger car you could run a mile in the depot, the old depot grounds, if it is a mile, with dampers closed, or open half an inch, did you say?

A. I said opening the door about half an inch or an inch; I mean the furnace draft, simply to relieve the suction on the fire-box.

Q. Suppose you had double that length of train and weight of cars?

A. It would be possible to do it.

Q. With any more opening of the door?

A. No, sir.

Q. Are you speaking of running in at grade?

A. I understood the grade.

Q. What did you understand the grade that you were to run up?

A. I cannot say I understood the grade.

Q. That is what I am asking, whether you understood in your direct examination that you were running up at grade?

335 A. No, sir, on an incline.

Q. Of how much?

A. I was talking because I knew what it was supposed to be, 50-foot grade to the mile for a short distance.

Q. Did you, in considering that matter, take into consideration only your own locomotives and your own plan of locomotive?

A. Yes, sir.

Q. You don't take into consideration the locomotives, or plans of locomotives, of other roads than yours?

A. No, sir.

Q. Is it not the instruction to all engineers, in approaching a depot, in all the railroad business, to run in as far as possible with the dampers closed, now, in entering their depots?

A. There is no restrictions placed on engineers in regard to that; the orders to engineers are to run at all times, more especially around passenger depots, with the least possible amount of smoke.

Q. That is the general railroad instruction to all engineers of locomotives?

A. Yes, sir, and the manipulation of those things is left to their judgment.

Q. The matter would have to be left largely to the vigilance of the engineers in any case?

A. Yes, sir.

Q. You never run out and see what your engineers do; you, as master mechanic, do you?

A. Oh, yes.

Q. As a matter of ordinary business?

A. Yes, sir.

Q. How often do you go out?

336 A. I go out sometimes once a week, sometimes once a month.

Q. You keep a kind of supervision over it to see what they are doing?

A. Yes, sir.

Q. Every well-conducted road endeavors to see to it that in entering its depots and in entering inflammable property, and in any other cities, that they run in this way as far as possible avoiding danger from fire?

A. Yes, sir, that is true.

Q. And every well-regulated road so instructs and endeavors so to conduct its business?

A. I suppose so.

Q. Do you know of any other road that had your peculiar device for locomotives?

A. I don't know whether they use it exactly the same. There are other roads that are using about the same device we are using.

Q. What other roads?

A. The Detroit, Lansing & Northern is one I know of.

Q. That enters here also?
A. Yes, sir.
Q. Is the Michigan Central usually considered a pretty well-conducted road?
A. I don't know about that.
Q. Do they use such a device?
A. I don't know.
Q. Do you consider the Pennsylvania road, take it for all in all, especially its eastern connection, we will say between New York and Washington—do you know it is reputed to be the best-conducted road in the country?
A. It was so reputed.
337 Q. Do they have this device?
A. I don't know.
Q. Do you know that the Pennsylvania road has tried 561 devices for smoke consuming upon their road?
A. Yes, sir.
Q. Has your device been offered to the Pennsylvania people?
A. No, sir.
Q. But it has all been a consideration in well-conducted roads, especially in passenger business, to avoid smoke and cinders?
A. Yes, sir; always has been with us.
Q. They are always reaching out with some such device?
A. Yes, sir.
Q. You are familiar with the railroad business of the United States pretty well?
A. Some.
Q. You keep the run of it?
A. To a certain extent.
Q. Do you know the New Jersey Central?
A. I know there is such a road.
Q. You know that is a well-conducted road, the New Jersey Central?
A. I don't know anything about it.
Q. Running out of New York?
A. I don't know anything about it except the name.
Q. A large number of passengers are daily conducted out of New York to various places?
A. I suppose so.
Q. Do you know of any one that has succeeded with a cinder and smoke consumer in avoiding cinders and smoke?
338 A. I have seen it advertised by some roads; I don't know what roads, but I don't know personally.
Q. Do you know of any one that has succeeded except yourself?
A. I didn't say that I had succeeded.
Q. Do you know how many devices have been patented in the United States; have you given the subject any attention?
A. Not in that light.
Q. Is this your own invention that you have got on the Flint & Pere Marquette?

A. What we use on the Flint & Pere Marquette is the device that we by experimenting have arrived at the best results with.

Q. It is the best thing you can do with this?

A. We are using the best that we have arrived at so far.

Q. You are constantly trying to improve it?

A. We are trying to do better.

Q. Do you have this device on all your passenger engines?

A. All of our engines.

Q. Both freight and passenger?

A. All our engines.

Q. Do you know why it is that the lumber that comes from the Flint & Pere Marquette territory to Detroit, comes covered with cinders?

A. I didn't know it came covered with cinders.

Q. How long have you used this device upon your road?

A. We commenced it nine years ago.

Q. Do you know why it is that since that and now the Flint & Pere Marquette lumber that comes in Flint & Pere Marquette cars comes in laden with cinders; that a cinderman is employed at every lumber yard to first clean the lumber of the cinders, as the first duty of unloading?

339 A. In Detroit?

Q. Yes, or any other lumber place.

A. I didn't know that such was the case.

Q. You don't think it could get that amount of cinders between here and Wayne, four miles or more, or between the junction and here?

A. I don't know anything about that.

Q. Do you know about the number of quarts of cinders that are taken out of Flint & Pere Marquette cars that come to Detroit every day?

A. No, sir.

Q. Do you know that from one to three quarts were taken from a train at the Central depot, when the cars were cleaned every day?

A. I heard you say so.

Q. In the other trial?

A. Yes, sir.

Q. You didn't know?

A. No, sir.

Q. You didn't listen to the testimony before; I suppose you went home?

A. Yes, sir.

Q. Inside the passenger coaches, and upon the coaches, upon the platforms, did you know that from one to three quarts of cinders, from those passenger coaches when they are cleaned, are taken, coming in from the Flint & Pere Marquette road?

A. Not to my personal knowledge.

Q. You have not succeeded in avoiding that difficulty?

A. I know we don't have any cinders in our coaches when every-

thing is in proper order, running from Manistee to Saginaw,
340 a distance of 150 miles; I know we don't have any cinders in our coaches running from Saginaw to Port Huron, a distance of 90 miles, because I am over that territory.

Q. If you have that device, you have one of the most valuable things in passenger railroading.

A. That is too broad a question.

Q. Is not the principal consideration in conducting a passenger business now, in excursion time and in summer time, especially when passengers are moving largely, to make them as comfortable as possible?

A. That is the consideration.

Q. You know one of the principal discomforts is smoke and cinders now, and that is acknowledged?

A. Yes, sir.

Q. Then if you have a device by which smoke and cinders do not enter the coaches when you are running your trains, then you have one of the most valuable steps in improvement that is known in the passenger business.

A. We reduce that; if we get it reduced to the lowest possible point.

Q. But you say on the Port Huron passenger branch you have no cinders?

A. I say we don't have any cinders in our coaches.

Q. But your trains are run from Saginaw, and proceed over the Flint & Pere Marquette to Detroit?

A. Yes, sir.

Q. And this device works all the while?

A. This device is on the engine.

Q. And is specially worked all the while?

A. Yes, sir.

Q. And it works as well, or a little better, does it, with the dampers open than with them closed?

341 A. The dampers have no effect upon it particularly.

Q. But with the draft?

A. The damper is for the admission of air to make the fire.

Q. You make your device work well?

A. If we didn't get any fire we would have no cinders.

Q. Your theory is that you burn the smoke and cinders?

A. Oh, no, we don't pretend to say that we can do away with all the smoke.

Q. But the theory is that it does consume more than the old system?

A. Yes, sir.

Q. And does not that require a draft?

A. It requires a draft; it has to have a draft.

Q. So that it does not work if your draft is shut off?

A. Not so well.

Q. Now in the Saginaw business you are the master mechanic of the road, to whom claims are made when claims are made against the road for injury?

A. Fire claims?

Q. Any claims against the company.

A. There is a man named Edwin Sanders who has to do that, to look after that business.

Q. Are any claims for fire made to the master mechanic on your road?

A. Only through him. If there is any claim made for fire, we receive notification from him.

Q. I think your main passenger depot at Saginaw is a little outside of the city?

A. Oh, no; it might be; it is on Potter street.

Q. And there your passenger trains usually stop for Saginaw?

A. Yes, sir.

342 Q. What is it run around the belt line?

A. The belt line consists of passenger trains.

Q. You stop at streets and pick them up?

A. Yes, sir.

Q. You also have on your belt line freight cars, to pick up the freight, and switching from the different yards?

A. Yes, sir.

Q. That belt line makes a switch connection for passengers, from the main depot?

A. It is used for passenger traffic between the east and west sides, and for freight traffic.

Q. Do the same locomotives drag the trains?

A. Yes, sir.

Q. You make up a train for the belt line, don't you?

A. We have one train that leaves Saginaw on the east side, that goes around the belt line, the same engine and cars that goes to Port Huron.

Q. That is for passengers?

A. Yes, sir.

Q. As to your freight business connected with lumber yards through there, is there any lumber yard there which your main line runs to, or is it your belt line?

A. The belt line is the main line.

Q. The main line apart from the belt line?

A. Yes, sir.

Q. Where does the main line of the Flint & Pere Marquette at Saginaw pass through any lumber yard at Saginaw?

A. West of the river, on the west side.

Q. On the Saginaw City side?

A. Yes, sir.

Q. Where is your freight depot?

343 A. On Third street.

Q. On which side of the river?

A. East side.

Q. Your main freight depot is on the east side?

A. Yes, sir.

Q. Do you use the belt-line tracks on running on the west side?

A. Yes, sir.

Q. You have pretty good railroading in Michigan; you are more intimate with that than with the railroading of the United States generally; you have been how many years in Michigan?

A. I have been on the Flint & Pere Marquette 19 years.

Q. You are more familiar with the railroads of Michigan than with those outside?

A. Yes, sir.

Q. They are pretty well conducted roads that go here, aren't they?

A. The roads that I have been connected with; I have not been connected with but two roads, as I have mentioned.

Q. You have been about railroads some?

A. Yes, sir: I have been about.

Q. The roads of Michigan that come to Detroit are pretty well conducted, are they not? I want your judgment as a railroad man. I don't want you to be philosophically exact.

A. I might say that some was and some was not.

Q. I am not going to make you invidious and tell whom you think are not, but let me ask you if the general instructions of well-regulated roads are to enter cities and depots, or where there
341 is inflammable property, with this care, closed dampers as far as possible, to avoid the emission of sparks to set fire? What would you say was the trouble, if in the course of one fiscal year here there were 65 fires in the city of Detroit made from sparks from locomotives?

A. I should say there was some mechanical defect.

Q. Even in your device?

A. I am not egotistical enough to suppose it perfect; I think the device we are using gives as good satisfaction as the majority of devices for that.

Q. And yet all railroads are endeavoring to give the greatest comfort and avoid damages?

A. Yes, sir.

Q. And you would say that if that were true, that there were 65 fires set in Detroit from the sparks from locomotives, that they used defective devices, even with all care?

A. I said there was a mechanical defect.

Q. Is it not true that, with the best you can do, there is always more or less danger from a locomotive, and will be so long as a locomotive makes steam by fire. Of course you may reduce it comparatively, but don't you always think there will be more or less danger from a locomotive in passing inflammable material, so long as the steam is made or the locomotive power is generated with fire?

A. So long as you use fire in a locomotive the men have to use all precaution.

Q. It is a matter of vigilance all the while?

A. All the while.

Q. It takes a different construction of engine to burn anthracite coal from those using bituminous coal, does it not?

A. I have no experience or knowledge of the construction of

engines required for good practical results in using anthracite coal.

345 Q. Do you know of any locomotive in the world, anywhere, or any railroad operating a trunk line, for large passenger coaches, or standard coaches and the standard freight cars, that burns or can utilize anthracite coal in making steam so far as your knowledge extends?

A. My knowledge does not extend to anything except what I have seen. The Lehigh Valley uses anthracite coal to some extent, and the Michigan Central does, I think, to some extent.

Q. Do you know whether they use anthracite coal in pulling their heavy trains?

A. I don't.

Q. You know what they use in New York in pulling these street cars on the elevated roads?

A. No, sir.

Q. You don't know they use anthracite coal there?

A. No, sir.

Q. But it has a different construction of engine?

A. Yes, sir; what I have seen of it.

Q. How many engines do you think it would take to pull in, stand ready to pull in 38 trains every 24 hours, and pull them out for a distance of, we will say, two miles into Detroit, to change engines and to take care of 38 trains in and out?

A. Nine trains each way, two miles?

Q. How many engines would it take to serve those trains; you could not have an engine serving one train at a time, I suppose?

A. One engine would do it.

Q. One engine would serve all those?

A. Yes, sir.

346 Q. Do you know of any city in the world—of course it is a matter of desire on the part of the railroads to make as quick time as possible in the passenger business?

A. Yes, sir.

Q. And delays upon railroads, if delays are known to exist, injure the passenger business?

A. Yes, sir.

Q. Don't you know that it is a matter of irritation and aggravation, and so known to the railroad companies, for passengers to be detained in any city and going to their place of destination?

A. Well, no, I didn't know that.

Q. When a fellow is getting home and is delayed in getting into a town, you didn't know it created irritation?

A. How long would you want him delayed.

Q. I am asking you generally about the delay.

A. If he got snowed in or anything like that?

Q. If he got snowed in he would swear; and the railroad company is not at fault in such case. I ruled that a railroad should not be fined or blamed for any non-delivery of a mail when stuck in a snow-bank; so I am with you on that. Do you know of any rail-

road in any city in the world, with a direct line into a depot in the city, that changes its engines before entering the city?

A. I don't know.

Q. Do you believe that three or four great trunk lines entering this city will ever change engines outside of the city to get their trains in, stop and do it?

A. I don't know.

Q. Do you believe it will have to be done?

A. I don't know; but I said it was practicable to be done.

347 Q. You said a moment ago that one extra engine would serve 38 trains?

A. Yes, sir.

Q. I suppose that on the three tracks that enter, there are four independent railroads, and they both have the same time, or two of them have the same time, it would take two engines?

A. Certainly.

Q. And if there are three or four, that engine coming in and going out ten miles an hour, how long would it take?

A. They could make the schedule that it would take 38 engines to do it.

Q. But how long would it take this engine to run into the depot and dislodge its cars and detach its trains, and switch out, and get back to the place again, at ten miles an hour?

A. Two miles, that is 76 miles, and you said 24 hours?

Q. Yes.

A. I think it would run only about three miles an hour.

Q. But they don't run in all hours; I give you a margin of 24 hours; how long would it take a train?

A. Twelve minutes in, and 12 minutes out.

Q. There would be some delay in the depot?

A. Give it 15 to pull it in and shove it out; give it 15 minutes.

Q. And you anticipate that it would drag the train out again in that 15 minutes, or take itself out again?

A. We pull a train three miles and pull it back again in 25 minutes, that is the schedule time.

Q. What is the time that you refer to?

A. In ten minutes.

Q. How fast do you run?

348 A. Three miles ten minutes, and they have got ten minutes to come back, and from the time it runs to one point and goes the three miles and comes around and back it is 25 minutes.

Q. When sparks and cinders and smoke are emitted from an engine, is the tendency for the smoke and cinders to deflect and fall; take weather like this today (a dull, sultry day)?

A. A day like this it would have a tendency for the cinders to deflect and fall.

Q. Take any day, is the tendency of cinders to go down from the smokestack?

A. No, sir, they would go up; they have got to go up first.

Q. How many feet?

A. I don't know.

Q. From the force of the emission from the smokestack, after that force is lost, the tendency is to fall?

A. It is so soon that you see these cinders come lighted that we cannot measure it.

Q. What is the tendency of cinders after they lose the force from the smokestack, whether to rise or fall?

A. By the force it receives it goes up.

Q. And then after it loses the force?

A. It has got to fall down.

Q. You have testified as to this elevated structure in front of Mr. Backus' property, and given an opinion, I suppose, as a railroad man, as an expert, as to the injury it will be to the property; did you ever have any experience in elevated-road practice before?

A. No, sir; I did over bridges.

349 Q. But on an elevated structure like this, that is set upon stanchions?

A. My testimony was based on experience.

Q. Did you ever have any experience with an elevated structure like this?

A. And from the experience I have, the accumulation of cinders on an elevated trestle-work would be no more than on the ground. The cinders would only just have so much further to fall to the ground; that is the only difference.

Q. And they would have an opportunity to get into the upper windows, if the smokestack was above the windows, would they, not?

A. No, sir, I don't think they would. They don't go sideways they would go up and drop down.

Q. Don't go up sideways?

A. Unless there is a heavy wind.

Q. You have run out on engines and trains yourself?

A. Yes, sir.

Q. Don't you know that the smoke lays along and falls at the side for miles, so that you can see it from the car window on whichever side it is?

A. I have not lately.

Q. Do you tell this jury that smoke and cinders fall right over the back of the train?

A. Unless there is a strong wind.

Q. Suppose there is a wind from the river which would be blowing towards the Backus property, on that side of the elevated structure, and there were smoke and cinders, would the cinders be more likely to enter the windows than running at grade?

A. If there is a train coming in of our road, pulling an ordinary passenger car, and running over that road, running past

350 Mr. Backus' property, I should be willing to assert that if he didn't see the train go by he would not know by the amount of cinders he would get in there; if he did not see it he would not know it went by.

Q. One of your trains?

A. One of our trains, that end of the route.
Q. But if there were cinders, would it be more likely to get in his upper windows than if he ran at grade?
A. I don't think it.
Q. Where have you had any experience with an elevated road?
A. I never ran on an elevated road.
Q. Never observed the operation of one?
A. No, sir—in what respect?
Q. The operation of one upon trestles like this.
A. Running over it; it is nothing more than a long bridge.
Q. It is on trestles?
A. It is just the same as running over a bridge.
Q. It is the same as running over a bridge?
A. Yes, sir, I should say so.
Q. That is all?
A. That is all.

Redirect examination by Mr. BAKER:

Q. You spoke of opening the doors of the fire-box an inch or a small distance for the purpose of aiding the draft. You didn't refer in that testimony to the dampers, did you?
A. No, sir.
Q. The dampers are at the bottom of the fire-box, so that whatever air comes in at the dampers, goes through the coal?
351 A. Yes, sir.
Q. Above the coal is a door in which the fireman throws in his coal, and you can aid the draft somewhat by leaving that open or partly open?
A. Yes, sir.
Q. But of course when that is left open the draft is above the coal, and it has not so great a tendency to draw cinders from the coal?
A. No, sir.
Q. You have no knowledge as to the construction of the locomotives of the Michigan Central railroad?
A. No, sir.
Q. You have no knowledge as to the construction of the locomotives of the Grand Trunk and the Detroit, Grand Haven & Milwaukee?
A. No, sir.
Q. Have you any knowledge as to the construction of the locomotives upon the Lake Shore road?
A. Not at the present day.
Q. That is the road that runs from here to Monroe and to Chicago; you have no present knowledge?
A. No practical knowledge, none that I could testify to.
Q. You have knowledge more particularly of your own road?
A. Yes, sir.
Q. And you know generally that the Detroit, Lansing & Northern uses the same device?

A. Yes, sir, I was so informed.
Q. Do you know how the Wabash is operated?
A. No, sir.
Q. Do your engines run the entire length of your road from Monroe to Ludington without change?
352 A. No, sir.
Q. How often do you change engines on your through trains?
A. We change at Saginaw.
Q. Do your engines go through Toledo?
A. Yes, sir, on some of our trains.
Q. They go from Toledo through to Saginaw?
A. Yes, sir.
Q. Do your engines come into the city of Detroit?
A. One of our engines.
Q. Do your passenger engines come in here?
A. One.
Q. How is the rest of the service performed?
A. The Michigan Central Company furnishes the engines for the rest.
Q. That is they haul all your freight in?
A. They haul all of our freight in, and all of our passenger trains in from Wayne, but one.
Q. What train is that?
A. That is train No. 9.
Q. It gets here at what time?
A. About 9.20 or 9.40 in the morning.
Q. So that the train that leaves here for Saginaw, all of your trains with that exception change engines at Wayne?
A. Yes, sir.
Q. And they change again at Saginaw?
A. Yes, sir.
Q. Does the same engine go up to Bay City?
A. No, sir.
Q. Even to make the run up there you change engines?
A. Yes, sir.
353 Q. And the trains that go up to Ludington up there change engines at Saginaw?
A. Yes, sir.
Q. What is the fact about these lines generally, whether or not they frequently or at times on a trunk line change engines; do you know what the practice is?
A. They change; they have regular terminals.
Q. Do you know whether the Michigan Central runs engines right through to Chicago?
A. I have understood to the contrary, but I have no personal knowledge of it.
Q. The trains that go through to New York, do you understand that the same engine goes right through?
A. No, sir; not in the time that I have been down there.

Q. As a matter of fact engines are frequently changed on these roads?

A. On all roads to my knowledge.

Q. So that so far as that is concerned, it would be perfectly practicable to change engines as you entered a large city, if there was any necessity for doing it?

A. Some roads have limited the number of miles that they will allow an engine to run without being put in the house.

Q. Is there any mechanical reason for that?

A. The danger of the engine getting warm in any of its bearings and delaying the train.

Q. It is more apt to wear out if it is kept hot too long?

A. Yes, sir.

Q. Suppose that the common council of this city has, or should pass an ordinance, and it was sustained by the supreme court, that made it necessary to use anthracite coal or coke in this city
354 upon all locomotives that are operated in the city, would there be any practical difficulty in changing cars at the junction, or changing engines at the junction, and continuing the operation of the road?

Mr. DICKINSON: I take the objection that there is no such ordinance in this city, or any other city, requiring the burning of anthracite coal.

Mr. BAKER: It don't express it that way; I don't claim it does, but that it is the legal effect of the ordinance, it makes it necessary to burn anthracite coal or coke.

Q. Would there be any practical difficulty in changing engines when you reached the city line?

A. No, sir; no practical difficulty.

WILLIAM S. MORRIS, sworn in behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you reside?

A. Grand Rapids, Mich.

Q. How long have you lived there?

A. It will be two years the 10th of July.

Q. Where did you formerly reside?

A. Fort Wayne, Ind.

Q. What is your business?

A. I am the superintendent of motive power and rolling stock of the Detroit, Lansing & Northern, the Chicago & West Michigan, and the Saginaw Valley & St. Louis railroads.

Q. That is the Detroit, Lansing & Northern system of railways?

A. The Detroit, Lansing & Northern railway, the Chicago & West Michigan railway, and the Saginaw Valley & St. Louis railway.

355 Q. Three different companies.

A. Yes, sir.

Q. All practically under the same management?
A. Yes, sir.
Q. Mr. Heald is general superintendent?
A. General manager.
Q. Those roads run, one from Grand Rapids to Chicago?
A. No, sir; from Grand Rapids to New Buffalo or La Crosse, the Chicago line; we join the Michigan Central at New Buffalo.
Q. And then go into Chicago on the Michigan Central?
A. Our cars do; our engines don't.
Q. And the Detroit, Lansing & Northern runs from Detroit to Grand Rapids?
A. Yes, sir.
Q. With a branch up to Ionia and Howard City?
A. Yes, sir.
Q. And where does the other road you named run?
A. From Howard City to Saginaw.
Q. Across the State?
A. Yes, sir.
Q. How long have you had charge of the locomotive department—the motor department of these roads?
A. It will be two years the 10th of July.
Q. And what was your business at Fort Wayne?
A. Master mechanic.
Q. What road?
A. The Wabash railway, under General McNulty.
Q. How long were you connected with the Wabash?
A. The last position that I held with the Wabash I was with them almost four years, but I had served in several other capacities on the line.
356 Q. How long have you been a master mechanic, or how long has your experience extended with this particular business?
A. With this business my experience has been about 17 years, but as a master mechanic only about 10 years.
Q. Do you know how to build a locomotive?
A. Yes, sir.
Q. Do you know how to operate one?
A. Yes, sir.
Q. How many years have you been connected with the management of or in connection with railroads?
A. I don't understand your question. How long have I been in the locomotive business?
Q. Yes.
A. Seventeen years.
Q. Your headquarters are at Grand Rapids?
A. Yes, sir.
Q. And all these three roads are operated from that city?
A. Yes, sir.
Q. Will you explain to the jury the devices that are adopted upon the locomotives of that system of railroads for the purpose of avoiding smoke and cinders, as briefly and concisely as you can?

A. We use in the fire-box a brick arch to promote combustion, to retain and burn in the proper place all the gases that it is possible to do so. We use in the front of the engine what is called an extension front, a receptacle, so to speak. Should sparks go through the flues, this receptacle retains the sparks in the front end, and they are carried to a terminal point or any designated point, where the cinders are required to be cleaned from the engine, and they are dumped, instead of throwing them out of the stack.

357 Q. Will you state the method of construction; how is that arch built in the back part of the engine?

A. The arch is diagonally located, extends across the extreme width of the fire-box, with an opening at the back end of from four to five inches, as the design of the fire-box requires, and this arch is supported by water tubes for the better circulation of the water in the boiler, and also by lugs or bolts screwed into the side of the fire-box, for the purpose of retaining the arch in its suspended position, in the position required.

Q. How is this receptacle prepared so as to arrest the sparks at that point, those that get through the flues?

A. A diaphragm or baffling plate is located immediately in front of the front flue sheet; from this baffling plate extends a netting; the exhaust of the engine instead of exhausting below the netting so as to force the sparks at all through the openings, is placed above the netting, and the draft alone is all the force the sparks have to carry them to the front end, and are retained there.

Q. Are these the devices that are used on your road?

A. Yes, sir.

Q. Have you made diagrams of them?

A. I have a diagram in my pocket. (Produced it.) There is a section showing the brick arch, and there is a section showing the front end. (Two diagrams.)

Q. We will take this one first. Just explain the diagram to the jury that I show you.

A. This represents the brick arch, this represents the fire-box—the inside of it.

Q. Where is the door to the fire-box?

A. Here.

Q. There is where they shovel in the coal?

358 A. Yes, sir. These are the grates; this is the ash-pan; those are the dampers on the ash-pan.

Q. That is at the end here?

A. Yes, sir. This is the flue running from the fire-box; they are to the front end of the engine.

Q. You only have one there, but there is a number really.

A. Yes, sir; that is just to represent the location; there is the top flue and there the bottom.

Q. But this is all full of flues?

A. Yes, sir, this is full, as full as we can get in there consistently. This is the circulating tubes where the water around the fire-box passes up there in circulation with the fire, and we utilize the heat in the fire-box by placing this surface immediately over the fire;

that is within the fire-box; the ash-pan is between the drivers, but lower—the center of the drivers lower than the axle, but not lower than the wheel.

Q. These tubes that run across here of course do not inclose the passageway around there; how big are they?

A. They are three inches in diameter.

Q. So there is an open space left there?

A. Yes, sir.

Q. But the brick arch is solid right across the entire top?

A. Yes, sir, perfectly solid. That represents the section of the center there, as though you sawed it right through; it is a brick wall, you might understand it by that term better; this answers on a stationary engine the same as a combustion chamber.

Q. The smoke goes up here, that space there?

A. The gases do.

Q. What becomes of the smoke?

359 A. We try not to have any smoke.

Q. How far do you succeed in that?

A. Almost perfectly.

Q. (Another diagram is shown witness.) Now show us the front end of the engine.

A. This is the section right through the center; this is the deflecting plate or diaphragm; it extends over the top row of flues; there are the two flues extended, and it extends over the top row of flues down to about this point.

Q. Is this point adjustable?

A. Yes, sir.

Q. So that you can raise it or lower it to get the proper suction draft?

A. Yes, sir.

Q. Whatever smoke and cinders come through the flues, must they stirke these plates?

A. Yes, sir.

Q. Is that a solid plate?

A. Yes, sir.

Q. Made of what?

A. Steel ⅛ inch in thickness.

Q. When the cinders strike there where do they go?

A. To this point here.

Q. What does that represent?

A. That is the exhaust pipe; that carries the exhaust steam from the cylinders above the netting.

Q. What is that large open space there?

A. That is the receptacle I referred to that carries the sparks that are not consumed in the box.

Q. Where is the netting?

A. Right here, from this point here to this point here; it connects to the baffling plate right across.

360 Q. The exhaust goes right up through?

A. Yes, sir; the exhaust is carried through.

Q. It commences at this plate and runs there on a level, then upon an angle to the corner of the box or receptacle?

A. Yes, sir; you can see the position of the netting here.

Q. Have you a piece of that netting with you?

A. I have.

Q. What size is it?

A. It is what is known in mechanical terms as three and a half by three and a half; there is three and a half meshes and three and a half wires to one inch; there is the netting we are using (producing it).

Q. That is $3\frac{1}{2}$ by $3\frac{1}{2}$?

A. Yes, sir.

Q. So that the way these locomotives are constructed, everything that goes through the smokestack must go through that netting?

A. Yes, sir.

Q. It is a physical impossibility for it to do otherwise?

A. Yes, sir.

Q. To what extent do these devices stop the emission of sparks and cinders from a locomotive?

A. They reduce and prevent the sparks and smoke, when they are properly fired by the fireman, absolutely.

Q. What do you mean by properly fired; how does the engine have to be fired in order to have that effect?

A. The fireman should understand the principles of combustion, and not overload his engine.

Q. What do you mean by overloading?

A. Putting in too much coal; there should be admitted the proper amount of air to the furnace, so that the gases will unite and form perfect combustion.

361 Q. Do you produce the best practical results in producing steam in that way?

A. Yes, sir.

Q. But if you put in too much coal it sort of smothers the fire?

A. You cannot produce a perfect combustion if you overload it, you burn a carbonic oxide when you should burn a carbonic acid gas.

A JUROR: You make more sparks with that?

A. No, sir; the sparks are at a minimum; you make more smoke, that is, you burn the carbon into the atmosphere unconsumed.

Q. To what extent have you adopted these devices on your roads?

A. We have them on all of the engines of the lines that I mentioned, with the exception of two.

Q. With the exception of two; where are those two operated?

A. One is operated in Grand Rapids yard—that should be 3 instead of 2—and the other two are on the Chicago & West Michigan road at different places.

Q. Are these devices in use on all the engines that come to the city of Detroit?

A. They are.

Q. What effect do these devices have upon the fire risk that is occasioned by locomotives?

A. That is what the devices are placed there for.

Q. Does it reduce the fire risk?

A. It does.

Q. To what extent can a locomotive be operated without the dampers at the base of the fire-box being opened?

362 A. That depends largely upon circumstances. I have run an engine five miles with the dampers closed, purposely to reduce the steam to the amount of steam I wanted.

Q. That is, you had more steam than you were prepared to carry?

A. Yes, sir; to prevent the steam from escaping and frightening horses and one thing and another.

Q. Would it be practicable to haul a train say a mile or a mile and a half at the end of a route with the dampers closed?

A. Yes, sir, it can be done, and practicably, if you see fit to do so.

Q. Is it practicable in starting out from a depot, supposing you start out from a station, and there was dangerous property along the route of the road, would it be practicable to run any considerable distance without opening the fire dampers?

A. If it was necessary to do so.

Q. Do you think that with these devices that are in use it would be necessary?

A. No, sir, I don't.

Q. Your judgment is that the danger is reduced to a minimum?

A. Yes, sir.

Adjourned to Friday, June 19, 1891, 2 p. m.

363 FRIDAY, *June* 19, 1891—2 p. m.

Cross-examination of WILLIAM S. MORRIS by Judge CHIPMAN:

Q. What is the object of this device, which you have explained to the jury?

A. The perfection of combustion.

Q. That is all, is it?

A. And the arresting of sparks and the reducing to the lowest possible minimum any danger from setting fires.

Q. How long have you had this device on your road?

A. It has been on the D., L. & N. longer than I have been connected with the road.

Q. How long did you say you had been connected with it?

A. Two years the 10th of next month.

Q. You found it there when you went there?

A. Yes, sir.

Q. One of the purposes of this machinery or device is to keep cinders off from the cars and from the platform.

A. Yes, sir.

Q. Does it do that?

A. I think it does.
Q. Thoroughly?
A. To the lowest possible minimum.
Q. I don't care anything about your minimums. Does it do it thoroughly or does it not?
A. I think it does.
Q. You think that your cars are not troubled with cinders?
A. I do.
Q. You think so?
A. Not from the stack. Understand me: cars may have cinders on, but I don't think they come from the stack.
364 Q. Where do they come from?
A. I should have to explain that to you. At the points that we dump our eiders at, there is a large accumulation of the same; those cinders that are retained at the front end and dumped at those points, are loaded on flat and gondola cars and taken out and shoveled off by the sectionmen for track ballast. They do not clean the cars very clean, and the cinders, of course, that are left on the cars, dry and blow about on the cars. That is about the only way that I can account for any accumulation of cinders on the cars.
Q. How do the cinders get there originally?
A. They are shoveled on the cars by the men at the pits.
Q. Do the men shovel the cinders on your cars?
A. Yes, sir.
Q. What do they do that for?
A. To carry them away from the pit out onto the line of the road to use them for ballast.
Q. But I speak of your passenger coaches and lumber cars and cars of that kind?
A. I didn't understand you to say passenger cars.
Q. Then you don't shovel them onto the passenger cars?
A. I have no recollection of seeing any cinders on our passenger cars.
Q. Will you testify to this jury that there are no cinders on the passenger cars since you were connected with the road?
A. I have not seen any.
Q. Have you ever looked for them?
A. Yes, sir.
Q. Never found any?
A. No, sir.
Q. Never seen any on any passenger car on your road?
365 A. I don't remember seeing any.
Q. Do you remember ever seeing any on any lumber cars?
A. No, sir.
Q. Or in lumber yards?
A. No, sir, I don't remember seeing any.
Q. You have been connected with the road two years?
A. Yes, sir.
Q. And never have seen anything of this kind, no cinders in the passenger cars, and no cinders on the lumber or on your lumber cars, or on your cars for lumber, and on other cars, for that matter?

A. I have only seen them in the way I have described.
Q. Will you say that there was not?
A. I have not seen any.
Q. Your locomotives drive the trains into the station here, do they not?
A. Yes, sir.
Q. In freight, passengers, and all kinds?
A. What station do you refer to?
Q. The station here at Detroit.
A. I don't think our freight engines come down here; our passenger engines do.
Q. Where do your freight engines stop at?
A. They stop generally out at the Grand Trunk junction.
Q. Out of the city?
A. Yes, sir.
By JUROR: Can you tell us whether there is any fire originates from the sparks from the locomotives, passing through the forests?
A. No, sir, I don't remember of a report of that kind, and
366 I would know if there was anything of the kind. If the jury will permit me, or if it is proper, I will show a diagram.
Mr. BAKER. That is something that I omitted. I will call your attention to that. You say in answer to the juryman that you don't remember of a case being reported where a fire was set in a forest, or alongside of the road?
A. Not that was thrown from the locomotives; no, sir.
A JUROR: Nor from any spark setting fire to bridges?
A. No, sir.
By JUDGE CHIPMAN: You have known of forests to be on fire alongside of tracks?
A. Yes, sir, recently.
Q. How recently?
A. We had some three weeks ago, some very heavy fires on the West Michigan line.
Q. Did you know of any others before?
A. Not set from sparks from the locomotive.
Q. I don't ask you that. You have only been in this State a little while?
A. Yes, sir.
Q. How many forest fires have you known alongside of your track?
A. That is the only one I remember.
Q. When you say you don't know of any bridges being on fire along your road?
A. I have known of bridges to be on fire.
By Mr. DICKINSON: Did you come down by way of the Detroit, Lansing & Northern here?
A. No, sir, not when I came this time.
Q. You came here?
A. Yes, sir.
367 Q. Is there any other locomotive than your locomotive that uses the track between Brighton and Lansing?

A. Yes, sir; I believe the Michigan Central use it.
Q. On your track, on the Detroit, Lansing & Northern?
A. I think not.
Q. It is your own locomotives?
A. Yes, sir.
Q. Have you been advised that some three miles out of Brighton, between Brighton and Lansing, not this side of Brighton, the fence-have been set on fire and burned?
A. I don't remember any such advice.
Q. Do you think if they were burned between Brighton and Lansing, the fence alongside the roadway, do you think it must have been set on fire and not from your locomotive?
A. I think that is possible, yes, sir.
Q. It must have been set on fire; you have such confidence in your device; you have not passed over the road and cannot tell, but I ask from your judgment; your judgment would be that if the fence had burned up, for a hundred feet of fence, you think it must have been set on fire in another way, rather than come from the railroad?
A. I could not say that it was set on fire.
Q. How do you think the fire would be occasioned?
A. I should have to investigate.
Q. How wide is your roadway between Brighton and Lansing?
A. I could not say; I don't know but I think about 100 feet.
Q. Is it not 200 feet?
A. I don't know.
Q. How much space does your track occupy?
A. Four and a half feet.
368 Q. Right in the center of your roadway?
A. Yes, sir.
Q. So that if it is 100 feet, taking out the 4½ feet, or 2¼ feet, the distance would be about 47½ feet to the fence from the track?
A. About that; that is near enough.

(By a JUROR:)

Q. Will you give us a definition of the word cinders. What does cinders mean?
A. Cinders, as I apply it, has several meanings. One is an unconsumed carbon, coal that is not burned; another cinder is a mass of foreign matter that won't burn, the carbon is entirely abstracted from it, and not entirely a clear ash, there is sulphur in the cinder, frequently iron, and depends largely upon what fuel you are using and what composes that fuel.

Mr. Dickinson shows the witness a box containing some particles of matter and asks:

Q. In connection with the question of the juror, would you call that cinders?
A. (After examining it.) That is unconsumed carbon.
Q. Would you call it cinders?
A. I should call it unconsumed carbon.

Q. You would not call it cinders?
A. I should call it unconsumed carbon.
Q. Does unconsumed carbon come out of the smokestack?
A. Yes, sir.
Q. Then unconsumed carbon you don't call cinders?
A. In some applications.
Q. Does unconsumed carbon ever come out of the smokestack on fire and fail to burn up?
A. Yes, sir.
369 Q. Then you call these unconsumed carbon, and not cinders?
No answer.
Q. Where would you say that the stuff such as I show you in this box comes from originally, out of the smokestack?
A. That would; it might.
Q. Well, unconsumed carbon would have to come out of the smokestack, and to do that it would have to come out of the furnace?
A. Yes, sir.

Mr. BAKER: He does not say that is not cinders.

A. I don't wish to be understood so. It had the appearance to me of unconsumed carbon.
By JUROR: How long does this unconsumed carbon enliven coal before it goes dead out, when it strikes the air?
A. Unconsumed carbon, leaving the stack, passing through the atmosphere, from what I have seen, will probably raise, so that it is perceptible after dark, about 10 to 15 feet; you cannot see it any longer; it is reducing its temperature at about the rate of 180 to 200 degrees, every foot of atmosphere it goes through; when this unconsumed carbon, that this matter in the box to me appears to be, it is smaller than the mesh of our netting,—leaves the stack and shows a brightness, it is probably at a temperature of 2,600 or 2,700 Fahr. When it loses its brightness it is at a less degree of heat than it is possible to cause combustion or cause fire with the dryest possible pine that ever was known; it takes 800 degrees Fahr. to unite, to produce the carbon in a dry piece of pine, then it will burn; that is the best I can explain it.
Q. I want to find out how long it keeps alive to ignite.
370 Mr. BAKER: The juryman means, how long it keeps alive so as to set fire.
A. Traveling a distance of 15 feet, or thereabouts, or between 15 and 20 feet, no matter in what direction, it will be almost or quite, according to the size of the cinder, of course, that has a great deal to do with it, it will be the temperature of the atmosphere or the air about it, not to exceed 15 feet, I think; it may vary some, it will vary according to the size of the cinder, or unconsumed carbon, as you may term it.
Mr. BAKER: About how long a time would elapse from the time it got out of the smokestack until it got out, how many moments or seconds?

A. That would depend largely upon the force of the exhaust; it would be less than a second.

Q. Less than a second?

A. Yes, sir.

Q. What you mean to say is that the small particles of unconsumed carbon or cinders that come out of the stack go out in less than a second?

A. Yes, sir; less than a second.

Q. And in that time they travel about a distance of fifteen feet?

A. About that; some that was heavier will go still higher, but you can trace them in the dark by the light; you understand, as long as that light lasts.

Q. So that, by looking at an engine operating in the dark, you can tell about how long it takes for the cinders to go out?

A. Yes, sir.

Q. You don't mean to say that no unconsumed carbon escapes from your engines; that is, I mean from the smokestack?

371 A. No, sir.

Q. The object of the netting is to reduce the cinder that goes through to the lowest possible size, so it will not carry a live fire?

A. Yes, sir.

Q. That is what the mesh is for?

A. Yes, sir.

Q. Is the unconsumed carbon that they have here small enough to go through your mesh?

Witness takes some particles of matter out of the box and puts them on the mesh.

A. Some of it is, and some of it is not.

JUROR: With the strength of that exhaust, would not that push those little pieces out?

A. The exhaust is above this and not under it.

Q. How can this go through if there is no power to force it through?

A. It is a question of being caused by the vacuum in the stack.

Mr. BAKER: Explain how the smoke and the small cinders do go through the netting; what causes them to go through.

A. The exhaust steam passing through the stack creates what is termed a vacuum; that is, it exhausts the atmospheric pressure with the tubes. That causes the atmospheric pressure which is on the outside, to force its way through the fire to fill this vacuum; it is not a perfect vacuum, you understand; nothing will stand in a perfect vacuum; but it travels with an amount of force that is exerted by causing that vacuum.

JUROR: You have an opening here; here is a netting here,

372 and here is your exhaust from there; it is a kind of draft, it pushes there, it strikes that netting, and when it is too big it remains there, but there is a certain pressure in striking there, and it passes through?

A. Before it strikes this netting, it strikes this steel plate and forces it and breaks it.

Q. But you have your brick wall there?

A. The brick wall is in the fire-box; we are talking about the netting in the front of it.

Q. But your exhaust must connect with it; there is an opening?

A. There is an opening, but the exhaust is in the front end.

Q. But there is a certain amount of pressure that forces those things through; they will go through?

A. The only pressure is the draft (pointing to diagram). Here is the exhaust coming here, about the netting, the vacuum is caused by going up in this stack, makes a suction here, exhausts the atmospheric pressure, and all the draft is the draft which would come from the fire-box and from these flues. Now, the greater part of the cinders striking the brick wall, as you stated, in the fire-box, they fall out and burn, but there is a very small percentage indeed.

Q. Don't you think the pressure of the exhaust would make more pieces pass through that sieve than it would without a pressure?

A. There is no question about that, if we had no draft; anything larger than the holes the pressure of the exhaust would not be sufficient to drive the cinders through that.

Q. That is the reason, you say?

A. That is the point; they could not pass through the sieve if they were too large to go through, no matter what pressure there was, the exhaust is not sufficient to drive them through that size.

373 Q. A few minutes ago you said that at night you could see the carbon fifteen feet high—see fire fifteen feet high from the smokestack?

A. Small sparks that pass through.

Q. Then there must have been live fire in that spark to see the fire at that distance?

A. Yes, sir.

Q. Supposing the wind would strike that spark, whether it is carbon or whatever it is, there would be more life two feet from the smokestack than at fifteen feet; and you said that at fifteen feet you could see fire?

A. Ten feet, if you please.

Q. You said fifteen feet?

A. Yes, sir; we will say ten feet.

Q. There is a heavy wind coming towards the building of Backus, it strikes that fire at two feet, the strength of the wind would make that carbon more inflammable than it would at ten feet?

A. No, sir; it wouldn't.

Q. Didn't you say before that what kills that carbon is the atmosphere?

A. Passing through the atmosphere.

Q. But if it does not pass through?

A. It passes through the atmosphere, whether it goes one way or

the other. If it passes through the stack it is in the atmosphere. It is not necessary to go up. It is in the atmosphere, and it absorbs the temperature of the atmosphere, the same as you take a red-hot piece of iron; you can put it into a quart of water, and it will heat the water to a temperature of less than the iron, and you pass it into another cold quart, and you soon reduce the temperature of the iron. The other is just the same, only more rapid.

374 Q. You take a piece of red-hot coal and it will burn you?

A. But at the same time, if any other man picks it up after you have hold of it, it is not quite so hot.

Q. He will get burned just the same, though?

No answer.

Redirect examination by Mr. BAKER:

Q. Is not this the fact, that after unconsumed carbon comes out of the smokestack, it will cool at about 15 feet, whether it goes up or down or sideways?

A. It does not make any difference where it goes; it is nature's law.

Q. It is the temperature of the air that cools it?

A. Yes, sir.

Q. And when it is outside there the temperature is the same?

A. Yes, sir.

Q. That is, it goes along with the air?

A. In any direction, so long as it is in the atmosphere.

Q. And those cinders are very light particles?

A. Yes, sir.

Q. And easily float in the air?

A. Yes, sir.

Q. But, of course, the laws of specific gravity take them to the ground sooner or later?

A. Yes, sir.

Q. Does your road, or either one of your roads, run in the immediate vicinity of planing mills and saw-mills at Muskegon, or at any other point?

A. Particularly so at Muskegon.

Q. How close to planing mills and saw-mills does the main line of your road run in Muskegon?

375 A. All the way from ten feet, and in some places they are closer to the track than that. I have some diagrams here that will just show what we are running through in Muskegon every day.

Q. Does this diagram represent a section of your road (showing diagram)?

A. Yes, sir; this represents the main line and sidings in Muskegon, from Water street to what is called our lower depot, at Western avenue.

Q. Will you point out your depot there, this end here?

A. That is the lower depot, at Western avenue.

Q. What is this building here, a platform for loading lumber onto the cars?
A. Yes, sir.
Q. What is the next one to the right?
A. That is a saw-mill of Torrance & Co., a large saw-mill.
Q. Where they saw pine lumber?
A. Yes, sir.
Q. With all the surroundings of a mill?
A. Yes, sir.
Q. How far from your road?
A. Twenty-seven feet from the main line of the road.
Q. The corner of the mill is within 27 feet?
A. Yes, sir.
Q. What is the next building to the east, or further up the road?
A. The Ryerson Manufacturing Co.
Q. What do they manufacture?
A. Dressed timber.
Q. What do you mean by that, that they dress square timber?
376 A. They finish and prepare the timber for market, the boards, and in fact all; it is a planing mill and saw-mill and everything combined.
Q. A sort of finishing mill?
A. Yes, sir.
Q. How close is that mill to the track?
A. Fourteen feet.
Q. How many stories is that mill?
A. Two stories, I think; I won't be positive about that.
Q. Is it brick or wood?
A. Wood frame.
Q. What are the next buildings on the curve?
A. This is the Muskegon Milling Co.
Q. What do they do?
A. Saw-mill.
Q. How close to that mill does your main track run?
A. About 25 feet; 17 feet from the side track.
Q. What is the next mill, or next piece of property?
A. That is a lime depot.
Q. These mills that you have testified in regard to have been in operation there since you have been connected with this road?
A. Yes, sir, and are there today.
Q. Have you a map of any other portion of Muskegon?
A. Yes, sir, here is a map. (Witness produces another map. This is the line between Water street and Western avenue. This is the main line indicated there, marked "Main line."
Q. What is this largest building here?
A. A planing mill.
Q. Where they dress lumber?
A. Yes, sir.
377 Q. Whose is it?
A. I don't remember.

Q. Is it a large mill?
A. Yes, sir. That is 100 feet to the inch. The mill is about 150 feet.
Q. How close does that run to your main track?
A. About 15 feet; seven feet from the side track.
Q. What is on the opposite side of the main line?
A. A dry kiln, 25 feet from the main line.
Q. What is the building further to the left?
A. A shed; 29 feet from the track.
Q. What is that building further to the right?
A. Another shed.
Q. How far is that from the side track?
A. Twelve feet.
Q. How far from the main line?
A. About 27 or 28 feet.
Q. What is this circular thing to indicate here?
A. A pile of sawdust and shavings, that is frequently piled there.
Q. That is refuse from the mills that is piled there?
A. Yes, sir.
Q. Is it burned there or carted away?
A. I could not say.
Q. But it is piled there as it comes from the mill?
A. Yes, sir.
Q. What is this large mill towards Cedar street?
A. A large planing mill.
Q. What is this small building at the corner here?
A. A shed in connection with it.
Q. How close is that exposure to the main line?
A. About forty feet.
378 Q. And how far from these side tracks?
A. It is eight feet and five inches.
Q. From the first side track?
A. Yes, sir.
Q. What is the next building to the right?
A. The Standard Oil Co.
Q. What kind of oil do they handle?
A. They handle kerosene mostly, coal oil.
Q. Is that a storehouse?
A. Yes, sir, for barrels and oil and everything else; that Standard Oil place is 20 feet from the main line.
Q. What is the building further to the right?
A. A shingle mill; that is 27 feet from the main line.
Q. Your road has been operated adjacent to all this property since you have been there?
A. Yes, sir.
Q. How many times have you set fire to these buildings since you have been there?
A. We have never set fire to them that I know of. We have eighteen passenger trains and eight freight trains; all but four of the passenger trains pass most, in fact all of those buildings, every day.

Q. That is, the buildings on both maps?

A. Yes, sir. In addition to that we have five switch-engines operating continually days as the business requires. Sometimes it is three and sometimes five at night, operating through those mills, in those side tracks, and all about Muskegon, in addition to the regular trains that run in there.

Q. Muskegon is a large lumber country?

A. Yes, sir.

379 Q. It is a place where a great deal of lumber is manufactured?

A. Yes, sir.

Q. And your railroads there run around to the different mills?

A. Yes, sir.

Q. And also the Grand Rapids & Indiana?

A. Yes, sir.

Q. And furnish side-track facilities to them?

A. Yes, sir.

Q. The side tracks are simply spurs from the main line?

A. Yes, sir.

Q. They had a big fire up there in Muskegon the other day?

A. Yes, sir.

Q. Did the railroad set that afire?

A. No, sir.

Q. Did the railroad ever set any fire there?

A. I don't remember of it ever setting a fire in Muskegon. If the jury would like they can look through our time table, and see the trains that are on the table there in Muskegon, in addition to the five regular switch-engines. There are eighteen passenger trains that arrive on the lines and eight freight trains, without extras, that are run.

Q. But in a place like Muskegon, is it necessary to do a large amount of yard-work?

A. Yes, sir.

Q. How many switch-engines have you?

A. Five.

Q. And they are working backward and forward among these mills and planing mills and manufacturing institutions?

A. Continually, that is, during working hours.

380 Q. You have never heard of them setting fire to anything?

A. No, sir.

Recross-examination by Judge CHIPMAN:

Q. What railroads run through Muskegon?

A. The Chicago & West Michigan, and the Toledo, Saginaw & Muskegon railway.

Q. Three?

A. Two.

Q. There is your own?

A. Yes, sir, the Chicago & West Michigan.

Q. And the Detroit, Lansing & Northern?

A. No, sir, not there; you are on the other side of the fence now.
Q. This West Michigan road that you are connected with has the same device?
A. Yes, sir.
Q. What sort of a device have they on the other road that runs through there?
A. I don't know.
Q. Don't you know anything about that?
A. No, sir.
Q. I would like to know what made you take so long in answering Mr. Baker's question as to how far this unconsumed carbon, as you call it, would go before it expired?
A. I was trying to figure in my mind the number of feet that the spark of unconsumed carbon would have to travel before it would be at the temperature or below the temperature of igniting.
Q. Now, I ask you what made you take so long to do it, if you knew all about it; you put your hand to your brow and waited a long time.
A. It was simply a mathematical question.
381 Q. What are the elements of your mathematical calculation in that case?
A. I take them from a French scientist, whose——
Q. Never mind where you take them from. I ask what they are; never mind about the authority, come right to the point?
A. That a spark travelling through the atmosphere will reduce its temperature at about 180 to 200 degrees Fahrenheit.
Q. I saw you took great pains to say that it made no difference in which direction it went?
A. It does not, according to my experience.
Q. Now then, does the velocity with which it comes from the pipe make any difference?
A. I think not.
Q. Does the temperature make any difference?
A. Certainly.
Q. Does the state of the atmosphere as to wind make any difference, the speed, the violence of the wind?
A. It would have a tendency to cool it all the faster.
Q. Does it make any difference as to the space that it travels; that is the question we are after?
A. The force would make some difference.
Q. Then there is no certain rule by which you can determine how far it will go?
A. Except from what observation I have made myself.
Q. One of the jurors asked about this mesh that you have here; where is it?

Witness produces it.

Q. You sifted some of this stuff lightly through the mesh. When the cinders come in contact with this, is there not some force accompanying it?
382 A. Very little.

Q. There is some?
A. Some.
Q. What keeps this from getting clogged?
A. They frequently do become clogged.
Q. What is the effect then?
A. The effect is no draft.
Q. No draft whatever?
A. No, sir; according to how much of the opening is closed, to what extent the opening is closed.
Q. This part might be closed, and that open, and it might be closed in spots?
A. Yes, sir.
Q. Then there is force enough there to fasten cinders in, or unconsumed carbon, as you choose to call it, so that at times you have to clean them out?
A. We are not troubled so much from the cinders.
Q. I am not asking you that; answer that question directly.
A. I am trying to.
Q. No, you are not. I say both ways, cinders or unconsumed carbon; answer it my way. Let me repeat the question: Sometimes these get clogged up so that you have to use force or a power of some kind, the hands of a man, or a rake or something in order to get them out and unclog it, is not that so?
A. I tried to answer that question, but you didn't wait until I did.
Q. You were not trying to; you commenced giving us your theories, and I want this jury to understand this testimony, and I don't think they are understanding a word of it. Now, do you have to use force sometimes in order to clean this netting out?
383 A. I don't remember ever using force to clean it.
Q. Do you have to use a man's hands to clean it; how do you clean it?
A. You asked if they become clogged; stopped sometimes.
Q. And you said they did.
A. Yes, when we are firing up our locomotives; that is where the difficulty arises generally, in the round-house. The sap or pitch in the pine we fire with, frequently clogs those things.
Q. How do you clean them out?
A. We burn it out; that is one way of cleaning it.
Q. Any other way?
A. And taking the netting out and putting in a new one, if it is necessary, to save it.
Q. Any other way?
A. That is the way we would apply it; those are the quickest ways we know.
Q. Any other way you ever do it?
A. No, sir.
By JUROR: Would it not be a practical way to turn on more steam, to give more force, to do that?
A. No, sir, there wouldn't be force enough to clean it.

Q. Is there not force in that combustion that you create, caused by the steam coming in contact with the hot air?

A. No, sir.

Q. Is not that coming from the reserve steam you get from the temperature of your boiler?

A. What do you mean?

Q. Where do you get that?

A. That is not sufficient.

384 Q. You use that for depositing those cinders there; where do you get your draft?

A. I don't understand you.

Q. You don't want to, then.

A. I don't understand you.

By Judge CHIPMAN: You appear to be a scientific gentleman.

A. I don't pretend to be so.

Q. I judged so from your conversation. What do you call a piece of charcoal?

A. Carbon.

Q. If a piece of charcoal is on fire and floating through the air, it is carbon still; there may be some of it ashes, but it is carbon until it is all burned up?

A. No, sir, it is a combination.

Q. A combination of what?

A. Of oxygen and carbon.

Q. But the carbon itself remains carbon until the oxygen consumes it?

A. The oxygen doesn't consume it.

Q. What does consume it; the oxygen does consume it, does it not?

A. The combustion consumes it.

Q. What makes the combustion?

A. The uniting of the oxygen with the carbon under fixed temperature.

Q. Then that part which is not united with the oxygen and consumed remains carbon until the end?

A. Yes, sir.

Q. This stuff that you call carbon here probably belonged to greater lumps originally?

A. Possibly so.

385 Q. Then that is unconsumed carbon, according to your story. You have often seen plates or pieces of charcoal, things of that kind, floating in the air, have you not?

A. I don't remember seeing them.

Q. You say that there have been no fires along your railroad, no mills burnt down, no lumber yards burnt down?

A. There has been mills burnt down on the road.

Q. Where?

A. At Muskegon.

Q. When?

A. There was one burnt last winter.

Q. What mill was that?

A. I don't remember the name.
Q. What kind of a mill was it?
A. A saw-mill.
Q. A pine mill, I suppose?
A. Yes, sir.
Q. Do you know of any other mills being burnt down there along the line of your road?
A. No, sir.
Q. On the line of your Chicago & West Michigan; do you know of other mills being burnt there along the line of that road?
A. No, sir.
Q. Do you know of any other property besides mills being burnt?
A. I don't remember of any.
Q. Was there a fire in Muskegon the other day?
A. Yes, sir.
Q. How big a fire was it?
A. I could not say how big it was.
Q. A pretty big fire was it not?
386 A. Yes, sir; a very large fire.
Q. It started in a lumber yard, didn't it?
A. I don't know where it started.
Mr. DICKINSON: It burnt over an area of about a quarter of the town of Muskegon?
A. Yes, sir.
Judge CHIPMAN: It burnt about a quarter of the town, and it started in a lumber yard, the papers say?
A. I don't know.
Q. Have you heard that it started from a locomotive?
A. No, sir.
Q. You have heard all else about the fire except that?
A. I have not heard that.

Mr. BAKER: No one else heard it either.
Judge CHIPMAN: We will put you on the stand to testify to that. I did hear that.

Q. This fire in Muskegon the other day started, as you understand it, in a lumber yard?
A. I don't know where it started. I should know it if it started from a locomotive.
Mr. DICKINSON: From one of yours, but you would not know it unless it started from your road, if it started from another road?
A. I might hear it.
Q. But you don't live at Muskegon?
A. No, sir; at Grand Rapids.
Q. (Showing diagram.) Did you prepare this?
A. No, sir.
Q. What is the scale of this?
A. 100 feet to the inch.
Q. How far is your railroad depot in which your freight and passenger trains run, from the furthest of these mills?
387 A. We have two depots there in Muskegon.

Q. A depot and a freight-house?
A. Yes, sir.
Q. How far are these mills, the list you gave to Mr. Baker, from your passenger depot?
A. Some of them are two or three squares in between the two depots, a great many of them.
Q. Only about two or three squares; about how much to a square?
A. About 300 feet, one or two or three hundred feet; they range from one or two or three hundred feet from the depot.
Q. (Showing another diagram.) Do you know how much this small map is scaled?
A. One hundred feet to the inch.

Mr. Dickinson asks that the two diagrams just shown witness shall be marked, and they are marked Morris Exhibits 1 and 2 respectively.

Q. The switch-engines that you have spoken of served the purposes of all sorts of manufactures to load?
A. Yes, sir.
Q. Did you ever in your life hear of a fire originating from a switch-engine attending to the business of manufacturers on any railroad?
A. I don't think they have.
Q. They have them to use about their business in every sort of business that ships goods?
A. It is for shifting the cars from one point to another.
Q. Does your road run from your depot to these business places you have named, at grade?
A. Yes, sir.
Q. It is all grade?
A. Yes, sir.

388 Redirect examination by Mr. BAKER:

Q. The mills along there are on the same grade?
A. Yes, sir.
Q. That is the road is even, or substantially even with the first floor of the mill?
A. Yes, sir.
Q. And the mills are usually more than one story?
A. Usually; yes, sir.
Q. So that there are cases of a railroad running right along in front of mill property, manufacturing property?
A. Yes, sir.
Q. About how high are your smokestacks from the ground?
A. Our maximum height is about 15 feet.
Q. And the first story of an ordinary mill is about 10 or 12 feet?
A. As much as that, I should judge.
Q. You use bituminous coal there?
A. Yes, sir.

Q. Was that fire in Muskegon anywhere near a railroad?
A. I didn't go over the burnt district; I don't know how close it was.
Q. Did any of your depots or side tracks or anything like that burn?
A. No, sir.
Q. You don't know the exact location of the fire, or its dimensions?
A. No, sir; I have not had time to look that over.
Q. You have not heard in any way that it was occasioned by any of your roads, or that any one claimed so?
389 A. No, sir.

Mr. Baker states that he will have the diagrams of the engine also marked, and they are marked Morris Exhibits 3 and 4, respectively.

JOSHUA B. BARNES, sworn in behalf of the petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. Springfield, Ill.
Q. How long have you lived there?
A. Six years.
Q. Where did you reside before going to Springfield?
A. Fort Wayne, Ind.
Q. How long did you live there?
A. Twenty years.
Q. What is your business?
A. At present superintendent of the motive power of the Wabash road.
Q. How long have you held that position?
A. Six years.
Q. What was your business prior to that?
A. Master mechanic at Fort Wayne for the same company.
Q. How long were you master mechanic?
A. Between four and five years.
Q. What was your business before that?
A. I was general foreman in the shops.
Q. Of the locomotive works?
A. Yes, sir.
Q. How long were you foreman?
390 A. About 12 years.
Q. What did you do before that?
A. I worked in the shop; in different shops throughout the country, in the United States.
Q. How many years' experience have you had in working in shops?
A. Twenty-five or 30 years.
Q. All the time in the shops where they manufactured locomotives?

A. Not all the time. I was out of doors some of the time, traveling on the road.
Q. You are a machinist?
A. Yes, sir.
Q. Do you know how to manufacture and operate a locomotive?
A. Yes, sir; I have done that work.
Q. And you now have charge of the motor or locomotive department of the entire Wabash road?
A. Yes, sir.
Q. About how many miles of road has that company?
A. In the neighborhood of 2,000 miles.
Q. Where does the road extend from; give us the most easterly and western termini?
A. Kansas City, Toledo and Detroit, St. Louis and Chicago.
Q. How far west does it go?
A. Kansas City.
Q. And has a line into Chicago?
A. Yes, sir.
Q. About 2,000 miles of it.
A. About that.
Q. It goes to St. Louis?
391 A. Yes, sir.
Q. You have had charge of this motor department for the last six years. Have you had any experience in any of these cities to which your road runs relative to the suppressing of smoke and cinders?
A. We have had some complaints, more or less, from several of them.
Q. Have you given any attention to that subject for the last four or five years?
A. Yes, sir.
Q. Will you state what devices have been used upon your road for the purpose of suppressing cinders?
A. We have an extension front in, perforating sheet, straight stack, circulating tubes, supporting brick arch, for that purpose.
Q. All one combination?
A. Yes, sir.
Q. There are a number of devices?
A. There are numerous kinds of them that are used for that purpose.
Q. Have you improved or perfected it recently?
A. The majority of the railroads for the past four or five years have been doing everything that they could to perfect that, in order to prevent smoke and cinders, and some of them have succeeded very well in it.
Q. Your road you say runs into Chicago?
A. Yes, sir.
Q. Do you know whether they have an ordinance there against smoke and cinders?
A. I believe they have.
Q. Did your road get into any difficulty on account of it?

A. We have been complained of sometimes, as a great many others. A year ago they made several complaints.

392 Q. Did they impose any fines?

A. I think they did.

Q. So that your attention was particularly called to the subject?

A. The attention of my master mechanic at Springfield was called to it. It is a matter of local attention, with which the master mechanic of each district has to do, and he went before the jury and showed them the device he was using, and I think they had $850 fine, but they released it when they found what we were doing to prevent it.

Q. Did you make a practical demonstration there as to what could be done with the smoke and cinders?

A. Yes, sir.

Q. Now will you go on, using the diagrams or maps if you have them, and explain these devices and how they operate on an engine?

Witness produces diagrams and exhibits them to the jury.

A. In the first place, this is a three-inch tube, that is placed through the water leg of the boiler.

Q. So it connects with the water?

A. It connects with the water. It is connected onto the inner leg; here there are two sheets four inches apart running round the entire fire-box; the tube is fastened into the sheet here the same as the tube is fastened in the boiler, allowing the water to circulate through that tube, answering for two purposes, circulating the water through the tube and supporting the firebrick arch; those brick are 30 inches square, and three in number, carried far enough there so as not to allow the sparks to pass through too easily and go through the flues, and consume as many of them as possible, as those

393 brick are very hot; if those become very hot they melt and run together to a certain extent, and they are so hot that when the sparks are drawn up, good many of them are consumed; that passes through there and draws the gases or unconsumed carbon or coal and everything through there that will not consume there, striking a deflecting plate, it runs down through the flue sheet further below there, with a sliding plate that can be lowered still further if necessary, a deflecting plate; after they leave that deflecting plate they pass along under there and come in contact with a perforated sheet of steel that is fast to a baffling plate, and runs across the entire length of the front end, filling it perfectly tight, as represented in this sheet there (pointing to diagram).

Q. Covering the entire space?

A. Yes, sir; and then they are drawn up against that and beat against that until they are small enough to go through it, and by that time pretty near all the fire is out of them; then they go up through that, striking another baffling plate that reaches up to this point, up to the roof or base here. That is a conductor that conducts them to the stack. Then they go through this throat and this stack, which is contracted there so as to increase the velocity of the

spark or cinder or unconsumed carbon; then it is released again; this tends to release the friction, and it passes out of there very rapidly, and when they reach the top of the stack there is very little or no fire, when all conditions are right, but there are conditions when it is not right, from wear or negligence, when they will throw more fire than others. Those engines, every time they make a journey over the road (100 to 175 miles is a district), those engines are inspected by an inspector, and if there is anything wrong with them when they come in, the engineer reports it.

394 By JUROR: You call this a brick wall?

A. That is fire brick, three inches, thirty inches square; that is a brick arch.

Q. Do you mean to say that is made there just to keep the cinders from coming out?

A. It is to deflect the cinders back to the boiler there; to burn them, so as not to let them pass up in the flues immediately; to keep them traveling in the fire-box longer.

Q. Is not that brick wall to keep the flames from going into the flues, and to keep the flames to strike the boiler, in order to heat your boiler—is that the principal object of that brick wall?

A. If we should carry that there further back still, and continue its course back there until we only have four or five inches there, we would burn a hole through that crown sheet, and there is where the destruction would come in, and we cannot keep it for that purpose; if we did, we would burn a hole through that crown sheet.

Q. And if you had no brick wall, what would be the consequence?

A. It would burn up and go right in the flues. The heating of your fire is done in the side of the boiler; the principal amount of the steam is generated from the sides of the sheets, where the fire is right against the side, and through the engine front it strikes the crown sheet. We try to prevent that, because the mud lies there sometimes, and it is very injurious, and if it were too hot there it would injure it—what we call pocketing. We have to guard that with this brick arch as much as possible.

Q. That is to arrest the flames?

A. It is to keep the flames from traveling that way.

Q. Does it have any effect on the cinders?

395 A. It consumes more than half the cinders.

Q. You consume more than half of them right there?

A. By the fire-box; and it increases the steam according to the capacity of the engine, by retaining and burning those cinders in there.

Q. If the brick was not there it would go through the flues?

A. Naturally so.

Q. That increases the heat there?

A. Yes, sir.

Q. So that practically it would aid you both ways?

A. Yes, sir; that is the intention.

By ANOTHER JUROR: Are there any locomotives built without that brick arch?

A. Plenty of them; and then another thing: In passing that flame back that way and admitting here through that little tube, you see a plate on the rear end of that boiler; the air and the flame passing there passes over and ignites together and burns two-thirds of the smoke right there.

Q. Do you mean to say that all boilers elsewhere have no brick wall?

A. It is a necessity for that purpose. This is what we call the improvement on the consumption of cinders and smoke.

Mr. BAKER: This operates to some extent like the chimney of a kerosene lamp?

A. Yes, sir, you get combustion there.

Q. And about 50 per cent., you say, is consumed right there?

A. Yes, sir.

Q. And the other 50 per cent. passes through the flues?

A. Yes, sir, and then strikes this netting there.

396 Q. You say that that is a perforated plate?

A. Yes, sir.

Q. Have you got pieces of that there; you use perforated plate of wire netting; what size is in use on your engine?

A. It depends upon the class of coal largely, and where we are running, and on the class of engine and the steaming qualities, and so on.

Q. What is the ordinary size? Do you use more or less of all those different classes?

A. Yes, sir; those are the standard sizes.

Q. What is the smallest?

A. Sixth inch wide by $\frac{3}{4}$, and $\frac{1}{8}$ by $\frac{3}{4}$; it depends on the class of coal you want to use.

Q. Do you use anthracite coal on your road?

A. No, sir; bituminous coal.

Q. Is there a different grade of that?

A. Yes, sir, several of them. We have some coal in Indiana that is very light, blows away very easily.

Q. Do you use a finer mesh for that coal?

A. Yes, sir, wherever the necessity requires you, as nearly perfect as we can.

Q. This diagram at the right of this map represents the perforated plate?

A. Yes, sir, showing a plan of it.

Q. What is that round hole?

A. That is where the exhaust comes through and that is where the steam pipe comes through.

Q. Otherwise that is all open there?

A. It is all solid.

Q. Except the perforations which are open?

A. Yes, sir, subject to the exhaust.

397 Q. And you extend that right through straight across there?

A. Yes, sir, 36 inches.

Q. Do your cinders collect down in the corner?

A. Yes, sir.

Q. And you drop them out?

A. Yes, sir, into a hot conder bucket.

Q. You also put on a conductor plate?

A. Yes, sir, that is a solid plate, not perforated to allow any suction there, so that they can be retained here and baffled and the fire extinguished as much as possible, and then they are passed out.

Q. This baffling plate that extends down here is solid?

A. Solid steel plate unperforated.

Q. You have an adjustable slide at the bottom of that, to raise and lower it?

A. Yes, sir, according to the steam she is drawing; we adjust it so that it may take a long time there, take a longer time to baffle them.

Q. Who invented this, or where did it come from?

A. This is the Barnes patent.

Mr. DICKINSON: That is yours?

A. Yes, sir. The Southern Pacific, the Northern Pacific, are using it, they use the attachment that goes with it, that has been lately gotten out and improved upon, also mine, which is in operation at the depot here in Detroit, subject to the inspection of yourself and the jury, or any one else that want to look at it, and I would be pleased to show you what it will do any time that you will designate; and we have got it in operation there right along in and out on the Wabash switch-engine, that is located there permanently to do the switching, at the passenger depot and
398 around the boats, that is engine 35, which can be seen there every day, and can be tested by experts as to its suppressing smoke and cinders.

Mr. BAKER: Will you describe this additional device?

A. There is a valve placed on the top of the boiler head inside of the cab, which is operated by the fireman and engineer; it requires no skilled labor to operate it; anybody can open and close it without any difficulty. The steam is passed down there into the pipe right around the boiler to the root or base of the stack; at the same time there is a pipe connected in with that one, of smaller dimensions, one three-quarters and the other one-quarter; the three-quarter pipe is connected with the fire-door of the boiler; that is represented right there; that is a cast-iron plate with seven 2-inch tubes passing right through the boiler to the fire, and in those seven 2-inch tubes there are nipples placed in them, one-sixteenth of an inch opening, and connecting with an inch core, running through this cast-iron pipe; if it is furnished with steam on the outside there are 24 three-eighths run direct through the casting, and connect with that nipple; as soon as the steam is turned on that forms an ejector and forces the steam into the fire, and at the same time this is operated and forms a cone of steam, this drawing over here to allow access here, making a combustion from one end of the boiler to the root of the stack perfect.

Q. Do you retain the exhaust in the smokestack?

A. Just the same.

Q. And you have an additional discharge of steam there?

A. We make no changes whatever from the original engine; but only add this.

399 Q. What is the practical effect of these devices?

A. This has been in operation about a month. We have seven on in Chicago, which they have accepted as all right.

Q. Who accepted them?

A. Under the smoke ordinance up there; they accepted them finally, and they are all right, and we are putting them on as fast as we can. When I was asked to come here last week by Mr. Joy, I made my master mechanic at Fort Wayne have one equipped with all the latest improvement-, for your benefit, for you gentlemen to look at.

Q. To what extent can you suppress smoke and cinders with this device?

A. Seven-eighths, about that.

Q. To what extent can you reduce the fire risk from an engine?

A. Almost absolutely.

Q. The fire risk is reduced to almost nothing?

A. Almost nothing; I would not say perfectly, because there is nothing perfect.

Q. In operating an engine, you say in order to do this work as well as it can be, it is necessary that the conditions should be perfect. What are the conditions that would throw the devices out of their proper working capacity?

A. Sometimes it lays with the engineer and fireman.

Q. What sort of negligence on their part or want of skill would affect it?

A. They overload the engine with coal, and then they destroy the combustion; that is in regard to smoke.

Q. That is, you could put in too much coal and it would have substantially the same effect as burning a kerosene lamp too high?

A. Just the same effect, exactly.

400 Q. So that the coal should be properly fed to the engine?

A. Necessarily so.

Q. When does an engineer usually overload it, when they want to leave their engine a few moments?

A. Not exactly that; but they are very fond of the cushion on the seat of the box, some of the firemen, they get up there and rest.

Q. They have to get up and make a movement?

A. Yes, sir, to come down off their box.

Q. But if an engine is properly equipped and properly operated, would there be any nuisance or any damage that could come from one of them?

A. Not ordinarily; no, sir.

Q. Do you think that you have succeeded in reducing this to as low a minimum as can be reached?

A. That I could not say. There might be others that would

have better success than I have had with it after a time, but I have done my best, and think, so far, that is the best there is now, or as good.

Q. Have you adopted this on the engines that are operating in Chicago?

A. Yes, sir.

Q. How many do you have there?

A. We have nine switch-engines and one suburban engine and eight passenger engines that come there into the union depot.

Q. Is that the Dearborn Street depot?

A. Yes, sir.

Q. All on the Wabash?

A. Yes, sir, that is, it is on the Western & Indiana line; we don't run in there; that is the road that takes all the roads in.

401 Q. The Western & Indiana owns the right of way; it is a union depot company?

A. Yes, sir.

Q. Do your engines go into the depot?

A. Yes, sir.

Q. They go in with this device?

A. Those that we have this on; we haven't had time yet to put it on all.

Q. Has the Western & Indiana adopted it?

A. No, sir.

Q. Has any other company adopted it?

A. No, sir, not there; they have some of them got on the Hutchinson burner.

Q. Is that like this?

A. I have never seen it.

Q. Do you know whether the Hutchinson burner was accepted by the Chicago authorities?

A. I think it was.

Q. You know yours was?

A. Yes, sir.

Q. They have recently passed in this city an ordinance prohibiting the emission of dense smoke or cinders by locomotives; will there be any practical difficulty in your complying with such an ordinance, so far as the Wabash road is concerned?

A. I don't know to what extent we would have to comply with it. I have got an engine down here that is equipped, and if it was thoroughly inspected, I think it would answer. I could make all the rest of them just like that.

Q. Could you show us that engine this afternoon?

A. Any time you wish to see it, and in practical operation.

402 I will show you the niceties of it all over; the inside of the fire-box and the way it is fired, and the operation of it, and why it burns the smoke, and how it arrests the sparks.

Q. Do you know whether it is at Delray or at the slip?

A. It is at the depot now awaiting your pleasure.

Mr. BAKER: I would like very much to have the jury and counsel go down and let the witness operate the engine and explain it.

WITNESS: I should be glad to have you go down and see it. We have spent a great deal of money and a great deal of time the last 3 or 4 years, and we have worked very hard with it, and we feel very gratified that we have accomplished so much in that direction. I can leave these cards or diagrams with you for future reference; I will leave them right here.

Mr. BAKER: We would like the jury to go and see that, and have you there to show the engine.

A. We will show the engine pulling cars and any use whatever you wish to put it to; we will put a coach behind the engine and run the engine on the track, and we will leave the windows and doors open, or any way you want it.

Mr. DICKINSON: The jury may do whatever they see fit.

WITNESS: The engine has been assigned there and has been working.

Mr. DICKINSON: This device is a simple one?

A. Yes, sir.

Q. Any engineer can work it?

A. Any child can work it that is big enough to open the valve.

Q. It is not necessary for you to be there?

A. No, sir; any engineer can work it.

A JUROR: I would like to go there at night.

403 WITNESS: It is about as near perfect as anything I ever saw.

Mr. BAKER: It is for the jury to decide whether they will go.

Juror CHAREST: Mr. Greiner cannot go and I cannot go.

Mr. DICKINSON: I think the suggestion that you see it some evening after dark is a good one.

WITNESS: I will put it at your disposal any time you say so, and anywhere you like.

Mr. BAKER: Mr. Lesher, will you see what the jury determine to do. The jury may retire and consult if they wish.

The jury then retire to consult as to the matter of going to see the engine with the device upon it.

During the absence of the jury Mr. Dickinson says:

Mr. DICKINSON: The showing of a device which is not in general use, and which is practically so new a device as to be an experiment, and not in general use and operation on the railroads, we think is incompetent, and we take an exception to the investigation of it by the jury.

Mr. BAKER: It is not in general use, but it is in use. He has got beyond that which is invention; it would be in use, under his testimony, on the question of complying with the ordinance.

After being out about five minutes, the jury returned, and the foreman says:

Mr. LESHER, the foreman: The jury has decided to go down some evening next week; they prefer to hear the evidence today, and will fix a time next week when it will suit their convenience to go.

404 Some of them may not be able to go. We cannot fix day and date yet, but will do so next week. And they would like to have a train to it to see what it will do, and run out to Delray or some place.

Mr. BAKER: That is satisfactory. We will take you out to Delray or out somewhere.

Mr. DICKINSON: We would like to have you give us notice when you want it done, on the afternoon of the day you determine to have it done.

The examination of the witness is then continued as follows by Mr. Baker:

Q. How many engines have you put this completed device upon, upon your road?

A. We have possibly got now 10 or 12 with it completed.

Q. How many are in operation in Chicago?

A. Four, I think, switch-engines.

Q. Four switch-engines?

A. Yes, sir.

Mr. DICKINSON: How many trunk lines are there that enter Chicago with this last device?

A. Only one.

Mr. BAKER: Does that engine do all the hauling?

A. I will say that the Rock Island & Pacific, I think, has this device; they adopted it a year ago; they must have in the neighborhood of 300 engines.

Mr. DICKINSON: Have they it on all?

A. No, sir, not all, but a great many.

Q. Which device?

A. The first, not the last. All except the additional steam pipe.

Mr. BAKER: You have it on about five that operate in Chicago?

A. About that number.

Q. Four switch-engines and one that carries passengers?

405 A. Yes, sir, it is a suburban engine.

Q. Do your engines on the main line go into the depot in Chicago?

A. Yes, sir.

Q. You have not adopted it on those engines?

A. We are putting it on some of them.

Q. As rapidly as you can, I suppose?

A. Yes, sir.

Q. Recently, since your attention was called to this case, you sent this engine to Detroit?

A. The attachment was put on the engine at Detroit; the engine has been working here all the time since she left the shop, probably six months or a year ago.

Q. In its present shape?

A. Yes, sir, they have just added this attachment to it.

Q. This additional attachment?

A. Yes, sir.

Q. That is the only thing in the device that is quite recent?

A. That is the only change in that from the original device.

Q. Before you put this attachment on the engine was it here before you; you put it on since you have been here this time?

A. No, sir, three or four days previous to my coming.

Q. Before putting the last device on, did it have your first device that you have shown?

A. The engine was doing well and giving good satisfaction.

Q. But you have two devices?

A. She had the original one.

Mr. BAKER: She has had that on for some time?

406 A. Yes, sir.

Q. How long?

A. Probably a year ago it was put on; the other switch-engines running here have got diamond stacks on; they are different and not so good.

Q. How many engines has the Wabash system altogether?

A. In the neighborhood of 400.

Q. It will take some little time to put it on them all?

A. Quite a while.

Q. Are all those engines operated in populous cities?

A. Yes, sir.

Q. They all go through populous towns?

A. Yes, sir.

Q. How often do you change engines on your lines?

A. For what purpose?

Q. Take the run from here to St. Louis, do your engines go right through to St. Louis?

A. No, sir.

Q. How many times do you change?

A. The average run for the engines on the Wabash system, as it is on a great many other roads, is from 100 to 175 miles, as the stations or terminal points may be convenient to do that.

Q. Then you have two engines that run between here and Chicago?

A. Yes, sir, two engines, one runs from here to Lexington Junction and the other from there to Chicago.

Q. So that it is a common thing in operating a railroad to change engines?

A. Yes, sir.

Q. You do that usually in 100 or 175 miles?

A. From 100 to 175 miles, just as it may be convenient

407 to do so for round houses and terminal points; of course it would not hardly be advisable to make an actual mileage stop-out on the prairie.

Q. You do it according to the convenience of the station?

A. Yes, sir, convenient terminal points.

Cross-examination by Judge CRIPMAN:

Q. You say that this device is your patent?

A. My patent, the first one, not the last one.

Q. How long ago did you patent the first one?

A. I think that was patented in 1877 or 1878.

Q. Fourteen years ago?

A. The last patent was in 1887, I think.

Q. But you commenced on it in 1877?
A. Yes, sir.
Q. And have been at it ever since?
A. I was at it before that. We have all been at it, all railroad men have been looking after that.
Q. It is a matter of general concern?
A. Yes, sir; every one has been at that for the last 20 years.
Q. How many patents are there for smoke-consumers?
A. There might be 5,000 for all I know.
Q. Do you know anything about it?
A. I have never examined the Patent Office on that.
Q. You know there are a great many, though?
A. I should think there might be 5,000; I give a guess at it, because I have not examined the Patent Office.
Q. But you have knowledge enough to know there are a great many?
A. Yes, sir; it is important enough.
Q. How many locomotives have you on the Wabash system?
408 A. Four hundred or nearly that.
Q. How many have your device attached to them?
A. I presume probably in the neighborhood of 300.
Q. In actual use?
A. Yes, sir.
Q. How many coming into the city of Detroit have they?
A. Do you mean passenger, freight or switch?
Q. I don't care what kind.
A. That depends on the business we have here. Sometimes there may be 8 or 10, sometimes 5.
Q. I don't think you understand me. How many engines with your device come into the city of Detroit?
A. That depends largely upon the business coming here. Our business may require 10 of them, and half of those might have my device on.
Q. All of them have not your device on?
A. Not all.
Q. You speak of using more than one locomotive on a trip, say from Detroit to Chicago; is that determined by divisions?
A. Yes, sir.
Q. One locomotive runs over one division of their road?
A. Usually, yes, sir, unless the other engine is broken down or something, and through necessity it goes along.
Q. But that is the general rule?
A. That is the general practice.
Q. And another locomotive runs over the other division to the terminus at the end of the line?
A. Yes, sir.
Q. When a locomotive takes a train out at this place you spoke of a minute ago, and you change locomotives, does that locomotive go on into Chicago?
409 A. At Lexington Junction?

Q. Wherever it is.
A. Yes, sir; that goes right into the union depot.
Q. What depot do you say your trains go into Chicago in?
A. Into the Polk Street depot.
Q. What company owns that?
A. A great many companies own it, I think.
Q. Is your company one of the owners of it?
A. I don't know what interest they have in there.
Q. It was built and in operation before you went into Chicago?
A. No, sir, it has been built since they ran in there; I think it has been built within the last seven or eight years.
Q. What track do you run on?
A. Over the Western & Indiana, I believe.
Q. That is the track of another railroad?
A. I think so.

Mr. Joy: It is the track of the union depot company, for your information.

Q. How many different roads use that track?
A. I could not tell you. There is a great many roads coming in and out over those tracks there, and I don't know how many roads there are using it.
Q. You say there is a great variety of these patents?
A. There is a great variety of patents.
Q. There is a great variety in actual use?
A. Yes, sir.
Q. Is your device used on the Detroit, Lansing & Northern?
A. No, sir; but similar to it, so nearly like it that it was only the least change in the combination to avoid the patent.
410 Q. Why don't you sue them for an infringement?
A. I cannot; I have not money enough to fight them.
Q. It is the money, but you have no doubt they are infringing your patent?
A. I have no doubt of it at all; the Pennsylvania road is using it too.
Q. You have perfect confidence in your patent, have you not?
A. I have so much confidence in it that I am not afraid for you to go down on that engine and see how it works.

The witness says he will leave the cards or diagrams, being No. 181, and plate No. 189.
Mr. Baker and Mr. Dickinson say the cards may be considered in evidence.

HENRY C. SIMPSON, sworn in behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. Saginaw, east side.
Q. How long have you lived there?
A. About 21 years.

Q. What is your business?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer?
A. About 21 years.
Q. What road do you work on?
A. The Flint & Pere Marquette.
Q. How long have you worked on that road?
A. Twenty-one years.
Q. In what capacity?
A. Locomotive engineer.
411 Q. Do you work on what is known as their belt line?
A. No, sir; I run on the Bay City division of the F. & P. M.
Q. Does the section of the road on which you run, run through lumber yards and planing mills and such sort of property up there?
A. It runs by one planing mill and by two lumber yards before you get to the yard where they d the switching.
Q. Whereabouts—in East Sa aw?
A. In Bay City.
Q. How close to the planing l do you go?
A. I should judge it was between 18 and 20 feet; I never measured it exactly, but I think about that distance.
Q. That is, the side of your engine comes within 18 or 20 feet of the building?
A. Yes, sir.
Q. Did you ever go round on the belt line?
A. No, sir.
Q. You have never operated there?
A. No, sir.
Q. How near do you go to a lumber pile?
A. So near that I could lean out of the cab window and touch them; that is, in the yard I go through; about three times.
Q. Is your yard on the river?
A. It is close to the river, at Bay City.
Q. Is there any part of your road where the ballast is covered with shavings and sawdust?
A. There is a portion of the road where there is an accumulation from the planing mill, where the track is covered with an accumulation of that from a saw-mill, as high up as the top of the rail.
412 Q. How often have you been there?
A. I have run continuously there for two or three months, on the regular run there, but I have been there about twelve or fifteen years.
Q. Mr. Hatswell is the master mechanic of your road?
A. Yes, sir.
Q. And you operate the engines that are constructed and planned by him?
A. Yes, sir.
Q. To what extent does the operation of the engines that you work upon, through property of the kind you have described, injure that property as to loss by fire?

A. Well, I could not say as to that. I can say that we have never set any fire there, and never been troubled in that way.

Q. Not for 21 years?

A. Not for 18 years that I have been going through there.

Q. How far is it practical to operate a locomotive without opening the dampers?

A. Well, you have your water up at a good stage, have plenty of water so that you will not have to put on your ejector, have steam all right, and you can run a mile or a mile and a half from the start.

Q. Suppose you were coming into a station, suppose you were at West Detroit, how far could you come into the station with your dampers closed, supposing you were afterwards going into the roundhouse?

A. You could not run much further than that. You could run a mile and a half.

Q. You could run a mile and a half this way?

A. Yes, sir.

413 Q. Could you increase the draft or maintain heat in your fire-box and flues by opening the door through which you feed the coal?

A. You cannot increase the draft to be of any benefit to the fires; you would simply keep the smoke from trailing from the stack. What I mean is, if you had more draft through the fire-box it would have a tendency to do that.

Q. That is, you could increase the draft, but it would not increase the fire?

A. It would not benefit the fire.

Q. In running over this sawdust formation, and close to a planing mill, do you have your dampers open in such places as that?

A. Yes, sir.

Q. That is the way you operate up there?

A. Yes, sir.

Q. Is it necessary in running, the way your engines are constructed, to close the dampers in such a place?

A. We run, I know, with the dampers open, and pull big trains out of there with the dampers open.

Q. And you have not known a fire occasioned by it in your experience?

A. I have not.

Q. That is a lumber country up there at Saginaw?

A. Yes, sir.

Cross examination by Mr. DICKINSON:

Q. Near your yard there is one planing mill, I think you said?

A. There is two that we pass.

Q. You pass two within what distance?

414 A. I guess they are about a mile and a half apart, I should judge.

Q. Are they both about the same distance from your track?

A. Yes, sir.

Q. Fifteen or twenty feet?
A. Yes, sir.
Q. You were examined on the first trial of this case before?
A. I was in the case of the Union Mills Company.
Q. You think both the planing mills are 15 or 20 feet?
A. I should judge they would be about that. The first one is not much more than that.
Q. Whose are they?
A. I don't know.
Q. Have you been running by them for 18 or 21 years?
A. No, sir; I have been running by them steady for about three months. The first one has not been built only four or five years.
Q. And you have been running by there for about three months?
A. Yes, sir, steady run.
Q. You have done business for those mills, switching?
A. I don't run switching. There are three engines doing switching.
Q. But in connection with your road they do all the switching?
A. Yes, sir; there is tracks branch off the main track; the tracks are made to clear the mills with the cars.
Q. I want to know whether the switches run between your main track and the mill?
415 A. Yes, sir; the side track is between the side track and the mill.
Q. Have you ever seen the Backus property?
A. I don't think I did. I may have seen it, but never to examine it closely.
Q. Have you ever been in those planing mills in Bay City?
A. Yes, sir.
Q. What kind or part of the business is done in the ends of the mill toward the track?
A. They have piled there dry lumber and box shooks, sash, and so on.
Q. It is a storage place?
A. They are piled there outside the building.
Q. What is the outside of the building next to the track, on the side of the building?
A. Windows and doors.
Q. Opening on your track?
A. Yes, sir.
Q. You have been in both mills?
A. Yes, sir.
Q. How many times?
A. I could not say.
Q. Several times?
A. Several times.
Q. But you don't know who owns them or runs them?
A. No, sir; I have never made any inquiries, and I don't know.
Q. You run a passenger train?
A. Yes, sir; that is, I run a passenger train, and two of my runs are freight, a freight each way.

Q. How many cars do you run in your passenger train down there?

416 A. Five is the longest train and two the shortest.

Q. Let me understand you. You run a passenger train, and do you run freight trains also?

A. Yes, sir.

Q. As engineer?

A. Yes, sir, on the branch run, two trains that I handle each day are freight.

Q. Do you connect them with your passenger cars?

A. No, sir.

Q. You have to change engines?

A. No, sir, I use the same engine that I use for the passenger service. The track is comparatively level and I can pull a pretty good train.

Q. In running by the lumber yard, how near is that to the track?

A. There is one lumber yard, I should judge, would be about the same distance as the planing mill, 18 or 20 feet; there is a side track to the lumber yard.

Q. Whose lumber yard is it?

A. I don't know.

Q. You have been in the lumber yard?

A. No, sir.

Q. What kind of lumber do they pile next to the track?

A. Rough pine lumber.

Q. Is there a mill connected with that lumber yard?

A. I think there is a planing mill in there, but it is quite a ways from the track.

Q. How near is that to your railroad yard?

A. The lumber yard?

Q. Yes.

A. The upper yard runs right by it, right into that lumber yard.

417 Q. And you never close your dampers in passing either one of these places?

A. No, sir; that is, when we have surplus steam, working along slow, I close the damper and open the door to keep the pressure down, to keep her from popping.

Q. But you don't do that in order to pass these places, the planing mills and lumber yard?

A. No, sir.

Q. That is not the object of it?

A. No, sir.

Q. Whereabouts do you shut your dampers so as to try the experiment of how long you can run without opening?

A. When she has surplus steam we run along the road——

Q. You never do it unless you have surplus steam?

A. Yes, there is places we have to do it.

Q. What do you do it for?

A. To keep the steam down, and to comply with the city ordinance.

Q. Are these lumber yards and planing mills that you speak of in Bay City?

A. Yes, sir.

Q. And the city ordinance requires you to close your dampers?

A. It requires us not to make a noise, and to throw as little smoke as possible.

Q. I asked you a moment ago to tell me how and when you tried the experiment to see how far you could run with the dampers closed, and you said that you tried that because of the city ordinance, in addition to your other reason that you did it when you had surplus steam. Now you say in running by these planing mills you don't close your damper for the purpose of running by?

418 A. Not for the purpose of running by.

Q. But whether you close them for the purpose of running by or not, do you close them when you go by there?

A. Occasionally we do.

Q. It is not your practice?

A. No, sir.

Q. Where do you close your dampers as a matter of practice?

A. Coming up through the street in Bay City.

Q. Does the ordinance require you to close the dampers running in the street?

A. Yes, sir.

Q. Does it require you to close them within the city limits of Bay City?

A. I don't think it does, except on this street, from the depot to Eleventh street.

Q. Do you testify that the ordinance requires you to close your dampers when you pass through that street?

A. I think it does.

Q. And that it does not require you to close your dampers in running within the city limits?

A. If it does I don't know it.

Q. How long a distance is the street?

A. I think half to three-quarters of a mile.

Q. That is all level grade?

A. Going south is a little upgrade.

Q. How much?

A. I could not tell you that.

Q. There is not much grade in Bay City?

A. No, sir, it is nearly level.

Q. Is there any other grade in your line that you have been on for 18 or 21 years?

419 A. I have not been on that run for 18 or 21 years.

Q. On any run you have been on?

A. Yes, sir.

Q. Whereabouts?

A. From Wayne to Saginaw there is quite a heavy grade.

Q. Did you ever run up that grade with your dampers closed?

A. No, sir.

Q. Did you ever run up any grade in your life, what may be called a steep grade, with your dampers closed?

A. Not any distance at all.

Q. What is the utmost you ever did it?

A. That would be a hard matter to determine.

Q. You don't remember any instance, do you?

A. No, sir.

Q. Suppose you had, not a switch-engine, but a locomotive engine, and you were driving up a train of say 500 feet long, the total train was 500 feet, how many cars do you say you had?

A. Five in the passenger trains.

Q. How many freight cars do you pull?

A. Forty.

Q. Did you ever pull forty cars and run with your dampers closed, even on a grade?

A. I have by those planing mills.

Q. Loaded?

A. Not all loaded.

Q. How many were loaded?

A. I could not tell you.

Q. About how long is a forty-car freight train?

A. I could not tell you that; I never measured it.

420 Mr. BAKER: Over 1,200 feet.

Q. How did you come to close your dampers with forty cars in running by the planing mill?

A. We stopped half a mile or so from that planing mill, and in loading freight there is a surplus of steam accumulates, and we run by there.

Q. The reason is because you stop, and from the steam accumulating?

A. Yes, sir.

Q. Because you have more steam than you want?

A. Yes, sir.

Q. And you don't close your dampers because you run by the planing mill?

A. No, sir; it was because we had surplus steam.

Q. You would stop about how long to get an accumulation?

A. Sometimes 15 or 20 minutes.

Q. With forty cars, partly loaded and partly unloaded, part light, on a level track, have you ever run with forty cars, without having a stop to accumulate steam, with your dampers closed?

A. Yes, sir.

Q. Where?

A. On the Bay City division.

Q. This same line?

A. Yes, sir.

Q. What was the occasion or object of keeping the dampers closed?

A. To keep her from blowing off the surplus steam.

Q. That was when you had an overplus of steam?
A. Yes, sir.
Q. Do you testify that you could run up a grade of fifty-two
421 and a half feet to the mile with such a train, without opening your dampers, and without getting a surplus of steam?
A. You could not run up without opening the dampers; we would have to open the dampers to get up there.
Q. I think you would, there is no doubt about it. And what is the effect of opening the dampers?
A. To give her more draft to burn your fire.
Q. If you had a load, you, in going up that kind of grade, would open up your dampers?
A. Yes, sir.
Q. Do you know of an engineer on earth who would not in practice?
A. I don't know that I do, if he wanted to go up the hill.

CLINTON B. CONGER, sworn in behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. Grand Rapids.
Q. How long have you lived there?
A. Since March 1.
Q. Where did you live before that?
A. Port Huron.
Q. How long did you live in Port Huron?
A. I lived there from 1870 to 1880, and from 1882 to until March 1, 1891.
Q. What is your business?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer?
A. Since July, 1870.
Q. What roads have you worked on as a locomotive engineer?
A. I worked on the road that had several different names,
422 but it is now the Chicago & Grand Trunk, from October, 1870, to October, 1887.
Q. Where does that road run?
A. From Port Huron to Chicago. It was the Port Huron & Lake Michigan when I commenced to work with it; the name was then changed to the Chicago & Lake Huron, and then to the Northwestern & Grand Trunk, and then to the Chicago & Grand Trunk, but it was the same line all this time that I was on it.
Q. What road are you now working on?
A. The Chicago & West Michigan, and the Detroit, Lansing & Northern, and the Saginaw Valley & St. Louis.
Q. That is the system of railroad that is managed by Mr. Heald, of which Mr. Morris is the master mechanic?
A. Yes, sir.
Q. Where do you run?
A. I am not running a locomotive at present. I am what you

call traveling engineer. I look after the consumption of coal and the use of oil, and the way the locomotives are handled by the men when out on the line.

Q. And at the different yards?

A. Yes, sir; switch-engines and main-line engines alike.

Q. Are you familiar with the locations of the lines of these railroads in Muskegon?

A. Yes, sir; pretty well familiar.

Q. And in Grand Rapids?

A. Not all the points that they run to.

Q. Is Muskegon a lumbering town?

A. It is.

Q. And a saw-mill town?

A. Yes, sir.

423 Q. Are there any planing mills there?

A. Yes, sir.

Q. To what extent do the engines on this system of roads on which you are engaged now endanger loss by fire to the adjoining property?

A. I cannot see that there is any danger.

Q. Was this big Muskegon fire that occurred a few weeks ago occasioned by any of your engines?

A. No, sir; I don't understand that it was. I was taken up to the point, as a matter of curiosity, and shown where the fire was started, how it started. All the buildings between there and the railroad are still intact.

Q. It didn't commence near the railroad?

A. No, sir; quite a way back from the railroad—the second or third street. I was shown the place by some citizens, and also by one of the railroad employés.

Q. So that when Judge Chipman heard it was started by the railroads, he was mistaken?

A. I could not say that.

Judge CHIPMAN: I did not say it was started by this railroad.

Q. You have seen the place where it started?

A. I was shown where the blacksmith shop and livery stable stood, in which it started.

Q. How much was it burned up?

A. I didn't go over all of it. There is a wide strip on Pine street, right through the town, away from the railroad. I never heard it stated that it was set fire to by any locomotive.

Q. Did it indicate, from the location, that the railroad started it?

A. No, sir; the same shavings and pieces of shingles are

424 lying there now that lay there before the fire. The road runs through part of that.

Q. How far is it practicable to operate a locomotive with the dampers closed?

A. If the dampers are perfectly air tight, probably half a mile on a heavy grade and two miles on a level, if the engine is working light. It depends altogether on how hard the engine is working.

Foreman LESHER: Some of the jury would like to know the distance of where the fire started from the railroad?

A. The railroad runs this side of the West Western avenue, right against the mills, between there and the street, I should think West Western avenue is about 100 feet, and then there is a row of buildings and another street back of that, and down 10 or 15 below the level of that street, which has been graded up, is where the fire started.

Judge CHIPMAN: Is there another railroad near there?

A. No, sir.

Foreman LESHER: Could it be possible, in going around, for sparks to escape and go around there and set it afire?

A. No, sir; I would not be afraid to put powder out on the street, so far as sparks are concerned. A man pointed out to me the point where it was understood the fire started, in the blacksmith shop.

Mr. BAKER: Inside?

A. Yes, sir; I think it was inside. The blacksmith shop burnt first and the wind carried it, I understand, to a livery stable, which next burned, and the wind blowing in that direction carried the fire to all those little wooden buildings, as well as to the very fine wooden buildings.

Judge CHIPMAN: Did you try the experiment of putting powder there and trying to blow yourself up?

425 A. No, sir; but so far as the sparks from the locomotive are concerned, I think the powder would be perfectly safe.

JUROR: Did you ever know of any sparks igniting from a locomotive?

A. I cannot say about that. My experience with a locomotive has been principally through a clear country, but not since we commenced burning coal have I known of fire starting by a locomotive.

Q. During your whole connection with the Grand Trunk did you cross any forests at all?

A. Yes, sir.

Q. Didn't you have any forest fires during the whole time you were with them?

A. I don't remember of any.

Q. What was that great fire about 10 years ago through the State of Michigan; was not that caused by a locomotive?

A. I don't know whether that fire was before the narrow gauge went up to the Thumb or not.

Q. I mean the fire in the Thumb.

A. I don't understand that was caused by a locomotive.

Mr. BAKER: There was no railroad there.

A JUROR: I think the narrow gauge was there at that time.

A. I don't understand that caught from a locomotive.

ANOTHER JUROR: During the fall of the year don't you often find spots of grass burning on the side of the track?

A. Lit by locomotives?

Q. Yes.

A. No, sir.

Q. I have seen spots of grass along the track on fire; I have noticed it, and I wanted to ask whether it was done by locomotives?

426 A. The men set fire to it.

Judge CHIPMAN: What do you mean by men setting fire to it?

A. The sectionmen burn up the ties along the track, and they burn also the grass as soon as it gets dry enough, burn it out as far as the fence. I have known it to be burned as high as three times in one season, as often as it gets dry.

Judge CHIPMAN: We have no cross-examination.

JAMES A. ROBERTSON, sworn in behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. Grand Rapids.
Q. How long have you lived there?
A. About five years.
Q. Where did you live before that?
A. Ionia.
Q. How long did you live in Ionia?
A. I lived there over eight years; not permanently located there, though, for more than that.
Q. What is your business?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer?
A. Nearly 14 years.
Q. What roads have you worked on?
A. The Detroit, Lansing & Northern.
Q. Is that the only road you have worked on?
A. As a locomotive engineer.
Q. You have been there about 14 years?
A. I have worked there since the road was constructed east of Lansing.

427 Q. Or west of Lansing?

A. No, sir; the road was constructed from Lansing to Greenville when I went to work for the company.
Q. Is Greenville a lumber town?
A. Yes, sir, it used to be, and it is quite so yet.
Q. Is Ionia a lumber town?
A. Not so much.
Q. Grand Rapids?
A. Yes, sir; quite a good deal.
Q. A good deal of manufacturing in Grand Rapids?
A. Yes, sir.
Q. Have you run into Muskegon?
A. Not much.
Q. Have you run to Big Rapids?
A. A little there, not much.

Q. Is that a lumber town?

A. Yes, sir.

Q. How close have you run with your locomotives to a planing mill or a saw-mill?

A. Oh, in yards where there is switching to be done, with freight trains and so on, we have went onto tracks where there is piles near; we have went right over the mill to the piles.

Q. But take the main line of the Detroit, Lansing & Northern, does it run close to any saw-mills, or planing mills, or lumber yard?

A. It runs close, but I cannot say how close.

Q. Forty or fifty feet away; that is from such properties on the road that adjoin the right of way; are there such properties?

A. I think there is; I am not familiar with anything except between Grand Rapids at present, as far as that is concerned.

428 There are no planing mills within 40 or 50 feet of the tracks; there is lumber yards but no mills that I know of there.

Q. Do you remember, there is a planing mill in Lansing right across from the depot?

A. But that is more than 40 feet, about that anyway; 50 feet I should say.

Q. As a locomotive engineer, will you tell the jury to what extent the locomotives on your road injure the adjoining property from loss by fire?

A. I don't think it injures it.

Q. That is based upon your experience along the line of your road?

A. Yes, sir.

Q. How far is it practicable to operate an engine with the dampers closed?

A. On a level track you could run with your dampers closed for a mile, I should say.

Q. Suppose you were going up quite a steep grade, how far could you go with your dampers closed?

A. I should say we could go about half a mile.

Q. You could not go so far, of course?

A. No, sir.

Judge CHIPMAN: We have no questions.

FRANCIS ADAMS, sworn in behalf of petitioner.

Examined by Mr. BAKER:

Q. How long have you lived in Detroit?

A. About 34 years consecutively.

Q. You must be an old settler?

429 A. I am so, old-settled at last.

Q. How old are you?

A. In a few days I shall be 60.

Q. What has been your business since you have lived in Detroit?

A. My chief business has been a lumberman, manufacturing lumber, and buying and selling lumber.

Q. Did you ever have a saw-mill in Detroit?
A. I had three.
Q. Where were they located?
A. One was located at the front of Tenth street, on the Michigan Central track, and the two others on the east and west side of Thirteenth street, if continued to the river.
Q. Where the old union depot grounds now are?
A. Yes, sir; it forms part of them.
Q. Where do you reside?
A. At the corner of Fifth and Lafayette avenue.
Q. How long have you resided there?
A. 24 years.
Q. Have you had any experience in real estate in Detroit?
A. Some. I have bought some and sold some.
Q. Have you had any knowledge of the value of real estate in the vicinity of Mr. Backus' planing mill and box factory?
A. At different times, both sides of it.
Q. Your saw-mills were mills at which pine lumber was sawn?
A. Yes, sir.
Q. And one of them was located this side of the Michigan Central crossing?
A. Yes, sir.
Q. How long ago was that?
430 A. I think we vacated that in 1863.
Q. Did you go down to the other location at that time?
A. I had occupied that for a year or two then. We occupied both locations at one time.
Q. How long after that did you have a saw-mill near the foot of Thirteenth street?
A. We had one prior to our vacating at Tenth street.
Q. But how long a time did it continue?
A. We continued that as a saw-mill until 1873.
Q. What was it used for?
A. A planing mill for some time.
Q. Was that known as the Brooks & Adams mill?
A. It was.
Q. From your knowledge of the value of property in that vicinity, and considering the location of Mr. Backus' planing-mill property there, what, in your judgment, would be the value of the River Street front of that property, running halfway back say, what would be the market value, in your judgment, of the land itself, if it was vacant?
A. About $100 a foot.
Q. You think that would be a fair market price for it?
A. I think it would be a good price for it.
Q. What do you base that opinion on?
A. On the purposes that it could be used for, and the large amount of corresponding land that is for sale in this city at much less prices.

A JUROR: What is the depth of that?

Mr. BAKER: I think the depth is about 150 to 200 feet, halfway back.

Q. What would the Fort Street front be worth?
A. Very nearly the same; I should say a little less.

431 Cross-examination by Mr. DICKINSON:

Q. In the various businesses you have been engaged in have you not omitted something in the list; have you not been engaged in depot-building to some extent?
A. I have to some extent; at the same time I didn't leave the lumber business to go into it.
Q. Did you have any planing mill like Backus'?
A. Somewhat similar.
Q. What did you make in your planing mill?
A. What we used to call straight lumber, no cut work.
Q. You had no wainscoting?
A. Yes, sir, lots of it.
Q. Did you do any hard-wood lumber business?
A. Very little.
Q. Did you do the variety of work that Backus does?
A. No, sir.
Q. What varieties did you do?
A. What we call straight work.
Q. How many years ago?
A. I think it is about 12 years.
Q. You mean by straight work, plain lumber, and work in long lumber?
A. Yes, sir.
Q. And made into boxes?
A. Merchantable lumber, stripped.
Q. You have made moldings?
A. Yes, sir.
Q. But that is straight work?
A. Yes, sir; no cut work.
Q. Did you ever go through Backus' mill?
A. Not through the new one, except to look in there.
Q. Do you know anything about it?
432 A. Very little.
Q. Do your know whether comparatively it is one of the finest in the West?
A. I have no doubt about it.
Q. It is one of the best in the United States, from what you know of planing mills?
A. It is not one of the largest.
Q. But it is one of the best; how much lumber does he use a year?
A. He has told me he uses up over 30,000,000.
Q. How much do the largest you speak of use, in the United States?

A. I was in one in Chicago, and they claimed they used over 60,000,000.

Q. Where is there any other one that uses over 30,000,000 in this country?

A. I think you will find one in Albany.

Q. Which one is that?

A. I cannot give you the name.

Q. But the Backus mill is a very fine mill?

A. Yes, sir; and does very good work.

Q. Do you think the situation is pretty good there, with his track facilities with the Michigan Central?

A. Very fair.

Q. It is a nice place for his business?

A. It would not be for me; it is not a place that would suit me for that kind of business.

Q. It is pretty well situated with reference to the rest of his plant, his lumber yard and his storage-house?

A. He thinks so, but I don't think so.

Q. You think he could move out of that place without any material damage, do you?

433 A. It would cost him the expense of moving. I do not think otherwise he would be very much damaged.

Q. And it would not affect his relations with his storage-house and lumber yard?

A. I don't think so.

Q. You think that fine machinery could be utilized by moving it?

A. After being moved; yes, sir.

Q. And could be refitted?

A. Yes, sir.

Q. Have you been in the mill?

A. No, sir.

Q. You know that the mill is adjusted to the machinery and the machinery to the building?

A. I presume so.

Q. The old mill that you had down there the old Detroit union depot took, didn't they?

A. No, sir, they took the ground.

Q. I mean the ground. You took off the mill?

A. Yes, sir.

Q. What did you do with the mill?

A. Sold it?

Q. What did you get for that planing mill?

A. I forget.

Q. You had a fine equipped planing mill?

A. No, sir; pretty well worn out.

Q. And a saw-mill connected with it?

A. Yes, sir; it was pretty well worn out.

Q. What did you get for the planing mill?

A. I think I sold the pit for in the neighborhood of $2,000.

434 Q. What did you get from the Detroit union depot for the real estate?

A. In the neighborhood of $200 a foot.

Q. Where was that situated?

A. In two pieces; a part of it comprising lots 1 and 2, in the west part of the Lafferty farm, and a part on the Godfroy farm.

Q. But where as to streets?

A. Between Fifteenth-and-a-half and Twelfth.

Q. Below Backus' principal property?

A. Below Backus' planing mill and this side of his river property.

Mr. BAKER: It was river-front property?

A. Yes, sir.

Mr. DICKINSON: How much front on River street did you have?

A. Nearly 500 feet.

Q. Running back to the river?

A. To the channel bank of the river, varying from 450 to 475 and 600 feet in depth.

Q. After that you acted for the union depot companies sometimes, didn't you?

A. In a limited capacity for a short time.

Q. You have in all the contests that the union depot Co. had in condemning property for the depot itself, you have been a witness for the depot company on real-estate values?

A. I don't think all; several of them, however.

Q. A good many?

A. Yes, sir, a good many.

Q. Did you ever know a jury to agree with you on the value?

435 A. I never paid much attention to it.

Q. Did you ever know a jury to give less than three times your estimate on a piece of property; give a single instance?

A. I have not burdened my memory with all those things.

Q. You don't think much of the property down there, do you?

A. Yes, sir, I call $100 a foot a good price for it.

Q. Did you have any switch connected with your planing mill?

A. No, sir.

Q. You never had any facilities from the Michigan Central at your planing mill?

A. No, sir; at the Tenth street I had.

Q. I mean the planing mill that you sold; did you do all your shipping by rail by carting to the railroad?

A. Yes, sir.

Q. All of it?

A. Yes, sir.

Q. No facilities for running a car and loading on?

A. No, sir.

Q. No connection with the Michigan Central or any other railroad?

A. No, sir.

Redirect examination by Mr. BAKER:

Q. As I understood you, you indicated that you didn't think Mr. Backus' property was very valuable property, situated as it is, for the purposes for which it is used; I understood that you so stated?

A. No, sir; I thought it was good property.

436 Q. But he has his lumber yard at the foot of Eighteenth-and-a-half street?

A. Yes, sir.

Q. So that he has to haul every particle of his lumber up to the planing mill?

A. Yes, sir.

Q. Do you think that is a good location?

A. That is what I said was not; I said that he appeared to be well pleased with it; I should not be; I should have located on his other property in better shape to suit myself.

Q. You think that is an item of unnecessary expense?

A. I do.

Q. The teaming that he has to do?

A. I do. I think there are more convenient places on the Michigan Central, very near him too.

JUROR: Do you own any stock in the new union depot company?

A. I don't, nor in any other railroad company.

Recross-examination by Mr. DICKINSON:

Q. You think that according to your judgment you could locate Backus' business better?

A. It would suit me better.

Q. Backus has carried on that business since before 1870, has he not?

A. Somewhere about that time, that he was there; on the opposite side of the street, however, I think.

Q. He carried it through the panic of 1873?

A. I don't think he did.

Q. He did business through 1873, didn't he?

A. Well, yes, some, and some he didn't.

Q. You are not very friendly with Mr. Backus, are you?

437 A. I was not at that time.

Q. He made a success of this business?

A. No, sir.

Q. He has not?

A. He has since that time, but not up to that time, he hadn't.

Q. He has made a success, accumulated the lumber yard in the course of his struggle, his lumber yard and his planing mill?

A. He has got them together, but his pecuniary condition I don't know. I knew what it was then.

Mr. BAKER: You did know his condition then?

A. I did.

Q. And his business at that time had not been a success?

A. I didn't think it had, from some things I saw.

Mr. DICKINSON: He made it a success before he left it, didn't he?

A. I don't know. I don't know what it has been since. By outside appearances it is a success.

Q. What is your reason for feeling ill towards him; does he owe you money?

A. No, sir.

Q. Is it a money matter?

A. Do you wish to press that question? I didn't have any personal trouble with him, but if you press the question I will tell you, but I would rather you would not press the question. It is no money of mine.

Adjourned to Monday, June 22, 1891, 2 p. m.

438 JUNE 22, 1891—2 p. m.

J. B. MULLIKEN, sworn for petitioner.

Examined by Mr. BAKER:

Q. Where do you live?

A, Detroit.

Q. What is your business?

A. I am a member of the board of public works.

Q. What was your former business?

A. Railroading.

Q. What roads were you connected with?

A. The Detroit, Lansing & Northern and Chicago & West Michigan.

Q. How long were you connected with the Detroit, Lansing & Northern?

A. Sixteen years.

Q. What was your position on that road?

A. General manager.

Q. Have you held any other railroad positions?

A. Yes, sir, nearly all the positions in railroading.

Q. From general manager down?

A. Yes, sir.

Q. So that you are familiar with the railroad business?

A. I think so.

Q. Were you connected with the D., L. & N. when the Fort Street union depot enterprise was first started?

A. Yes, sir.

Q. And had been for some fifteen or sixteen years?

A. Yes, sir.

Q. That company has done business, has it not, since its organization, at the Michigan Central depot?

439 A. Yes, sir.

Q. Have no quarters of its own in this city?

A. No.

Q. Will you state whether there are any practical difficulties in that company or that road doing business at the Michigan Central depot?

A. Nothing that is absolutely impracticable.

Q. As far as operating the trains is concerned, they have been operated there?

A. Yes, sir.

Q. But with reference to the business of the company that competes with the Michigan Central, are there any difficulties?

A. Yes, sir.

Q. What were those difficulties, the general nature of them?

A. The Michigan Central and the D., L. & . had a contract made some 17 or 18 years ago, which prevented the Lansing road from competing with the Michigan Central.

Q. In what respect?

A. In respect to transporting freight and passengers between points where the Michigan Central road was already constructed to.

Q. Did your road originally run to Grand Rapids?

A. No, sir.

Q. But within two or three years a branch has been constructed from Grand Ledge to Grand Rapids?

A. Three years ago.

Q. So that you have a direct route from Detroit to Grand Rapids?

A. Yes, sir.

440 Q. Has the Michigan Central a line that goes to Grand Rapids?

A. Yes, sir.

Q. It also has a line that goes to Lansing?

A. Yes, sir.

Q. Your road runs through Lansing?

A. Yes, sir.

Q. What was the nature of this contract; did it prevent you from doing business at Lansing or Grand Rapids?

A. It prevented our going to any points not reached at the time the contract was made. It did not prevent doing business at Lansing but it did at Grand Rapids, or any other point that they might see fit to build the road to that was touched by the Michigan Central, doing business with any connecting road that formed a line from such point.

Q. You are not connected with the D., L. & N. now?

A. No, sir.

Q. Don't own any stock in it?

A. No, sir.

Q. Will you state, as a railroad man and citizen of Detroit, whether there would be any public benefit, whether the business of this company could be more advantageously and properly transacted in the proposed union depot.

A. I should say so, yes, sir.

Q. Would you say that, as a railroad man, from your knowledge of the business of that company?

A. Yes, sir.

Q. It is proposed to build a railroad up River street, an elevated railroad. I suppose you are familiar with the location of the property down there?

A. Yes, sir.

Q. And the Fort Street Union Depot Company has laid
441 out a route for its road along River street. Suppose it is legally impracticable, legally impossible for the Fort Street union depot to acquire the right of way over the property of the Michigan Central, what would you say, that being the case, about the feasibility and the practicability of the route that was selected along River street?

A. I think it is perfectly feasible and practicable.

Q. Do you know of any better route into this proposed union depot?

A. No, sir, not if they could not get in over the Michigan Central grounds.

Q. If they could get in over the Michigan Central grounds they would have as direct and as good a route?

A. I think so.

Q. But if you cannot go in over the Michigan Central grounds, you think that is the best one?

A. I think it is as good as any.

Q. I suppose you have learned something about a locomotive; I do not suppose you are a practical engineer?

A. No, sir, although I have run locomotives a great deal.

Q. Can you tell us how far it is practicable to operate a locomotive upon a trestle-work or an elevated road like this without having the dampers open?

A. It would depend altogether upon the grade and the amount of steam on hand at the time of starting up it.

Q. Could you have steam enough on hand to go up a considerable grade without the dampers open?

A. Yes, sir.

Q. Is it practicable to do that?

A. Yes, sir.

Q. On this proposed railroad there is a short grade of 52 feet to the mile, and then it is practically level in the union
442 depot grounds. The place where it is 52 feet to the mile is upon the old union depot grounds beyond the foot of Twelfth street, and it is proposed to run an elevated road through River street to the corner of Third street. Will you state whether it would be practicable in operating the railroad, to run over this trestle-work that commences at Twelfth street, and goes through to the vicinity of Eighth street with the dampers closed?

A. It could be done.

Q. Could it be done without any very great trouble or expense?

A. I don't think it would cost any more. I don't think it would be done in the regular transaction of the business. I don't think it would be carried out.

Q. Why?

A. Simply because the engineers would not do it. I think it would be a great deal better, if you wanted to avoid smoke and dust, to burn a fuel that it did not make any difference.

Q. Is it practical to use anthracite coal?

A. Yes, sir, or coke.

Q. Would there be any practical difficulty in operating a railroad up this street so as to do away with the smoke and cinders?

A. Not at all. It could be done. You would not have a particle of smoke or cinders if you used anthracite coal or coke for fuel.

Cross-examination by Mr. DICKINSON:

Q. How long since you left the management of the D., L. & N.?

A. A year ago last March.

443 Q. Within two years you were still in the management?

A. Yes, sir.

Q. At that time the locomotives were fitted out with substantially the same smoke-consumers that are on the F. & P. M.?

A. Just the same.

Q. After they were so fitted out, or we will say before that, did you observe at any time the D., L. & N. passenger cars after they arrived?

A. Yes, sir; you can't do away with all the cinders.

Q. Can you tell me about how many cinders are taken out of a passenger train of the D., L. & N. coming into the station.

A. They are dropped out at every few stations.

Q. I mean in the passenger trains?

A. I have not any idea.

Q. They clean them out—the passenger cars. You have a person appointed to do that?

A. Yes, sir.

Q. Have you ever seen the amount taken out?

A. No, sir.

Q. The cinder trouble still existed when you left the management of the road?

A. Yes, sir, I never saw a road it did not exist on except the Pennsylvania Central, where they use anthracite coal.

Q. The Pennsylvania, you think, entirely avoids it with anthracite coal?

A. Yes, sir; I never saw any cinders there.

Q. They have a peculiar engine built for that?

A. Yes, sir.

Q. Has to be a special engine for that?

A. Yes, sir.

444 Q. How many engines has the D., L. & N.?

A. I think they have about forty now.

Q. All constructed to burn bituminous coal?

A. Yes, sir.

Q. Do you know of any locomotive that comes into Detroit that burns anything but bituminous coal?

A. I think not. All locomotives that I know of in the State of Michigan that burn anything else are used in the station at Grand Rapids, where they burn coke.

Q. In your riding out and back on the D., L. & N., your experience, both before and after putting on this F. &. P. M. smoke and

cinder consumer, is that cinders will fall into the cars and get in the cars?

A. Yes, sir.

Q. They would cover a newspaper laid down perceptibly?

A. Yes, sir.

Q. And would cover your bags and get in your hair?

A. Yes, sir.

Q. And are very much worse on the platform?

A. Yes, sir.

Q. Will you state whether you do not have your parlor coaches fitted with cinder guards in the windows?

A. Yes, sir.

Q. That was to keep out cinders, was it not?

A. Yes, sir.

Q. And you did that before and after you had on the contrivance of the F. & P. M. on your locomotives?

A. Yes, sir.

Q. I show you this map of the Central grounds. Here are the Michigan Central grounds, here are the old union depot grounds, and here it is where they propose to cross into River street
445 at Twelfth. Now taking the line of the union depot track running along the margin of the old union depot grounds, what from that point at Twelfth street, is the most practical route and the best route into the depot grounds?

A. The most direct line would be the most practical.

Q. Which is that?

A. Following along the margin of the Michigan Central property.

Q. That would be the best route, would it not?

A. In my opinion.

Q. Mr. Baker has asked you about legal difficulties. Do you know of any legal difficulties in the way?

A. I do not; I am not an attorney.

Q. Who is the general counsel of the D., L. & N.?

A. Mr. Charles B. Lothrop.

Q. Mr. G. V. N. Lothrop before that?

A. He was formerly.

Q. That being the best route, was there ever any talk about the power of the railroad company wanting terminal facilities to condemn the Michigan Central ground?

A. Mr. Lothrop told me at one time there was no difficulty in doing that.

Q. Which Lothrop?

A. G. V. N. Lothrop.

Q. The most direct route you think would be up the margin of the Michigan Central?

A. That would be the most direct line.

Q. In the Michigan Central yards, between Twelfth and Third streets they do a passenger business?

A. Yes, sir.

Q. And they do a freight business there?

A. Yes, sir.

446 Q. Most always you find freight cars standing in their yard filling it up?

A. Yes, sir.

Q. All above Twelfth street is frequently stored full of freight cars?

A. Yes, sir.

Q. If there can be conducted under this elevated structure on River street a switch over which may be done all the freight business of such factories as the Diamond Match Company, and stove works, and Union mills, where freight cars can be run under with the locomotive of this elevated structure, standing sufficiently high in the clear to permit the conduct of freight business under that track, do you see any reason why, if the Michigan Central desired to use a track on the margin next to River street, they could not as well conduct a freight business under that as can be done on the switch-engine under the elevated structure; do you see any practical difficulty?

A. I think not.

Q. So that if the elevated structure was run over there, the Central could carry on a freight business under that margin?

A. Yes, sir.

Q. They do not now need or use the space that would be used by the elevated structure?

A. No, they do not use the space above ground.

Q. Have you noticed the old freight sheds and tumble-down brick house they have on the margin along River street?

A. I know they have some buildings there.

Q. Do they use them for anything?

A. I do not know, I am sure, whether they do or not.

447 Q. You did your business there with the Michigan Central for the D., L. & N. so far as the practical conduct of the business was concerned, to say nothing of the annoyance from competing road, you carried it on well, didn't you?

A. Yes, sir.

Q. The passenger trains ran in and out in good shape?

A. Yes, sir.

Q. They had no more than the ordinary delays in any depot?

A. No, sir.

Q. You had a contract made with them when they agreed to give you place that you would not compete with them?

A. Yes, sir.

Q. That was the difficulty?

A. Yes, sir.

Q. You were perfectly comfortable so far as the running of your road was concerned on their grounds and depot?

A. Yes, sir.

Redirect examination:

Q. You say G. V. N. Lothrop was counsel for the D., L. & N. Did you get his opinion on the right to condemn a line of road across the Michigan Central?

A. He gave me his opinion once.
Q. In writing?
A. No, sir.
Q. How long ago was that?
A. I think it was the year before he went to Europe.
Q. Where did you see him?
A. In his office.
Q. Did you go there and ask for his formal opinion?
448 A. No, sir, I was talking over the general situation of our company with the Michigan Central.
Q. Did he make any examination of the subject while you were there?
A. No, sir.
Q. Did he answer you immediately?
A. Yes, sir; that he did not think there would be any reason why the Lansing Company could not condemn a line down the Michigan Central if they wished.
Q. Down from where?
A. From the junction into Detroit.
Q. Right over the Michigan Central?
A. Over the Michigan Central ground.
Q. He expressed that opinion to you?
A. Yes, sir.
Q. It was without any examination?
A. That was without any examination.

Mr. DICKINSON: That you saw.

Q. He answered you immediately?
A. Yes, sir.
Q. Was not that opinion right the other way?
A. No.
Q. Have you talked with Mr. Lothrop about it recently?
A. No.
Q. Never talked with him about it since?
A. No, sir.
Q. Don't you think that opinion was right the other way?
A. I don't think it was.

Recross-examination:

Q. You became the manager of the D., L. & N. how many years ago?
449 A. Fifteen.
Q. When you became the manager Mr. Lothrop was counsel?
A. Yes, sir.
Q. And continued so until he went to Europe in 1885?
A. Yes, sir.
Q. Mr. Baker has asked you whether he gave it any examination; was Mr. Lothrop accustomed to give you superficial opinions in your experience?

A. I don't think so.
Q. You usually could rely upon his opinion?
A. I always found his opinions good.
Q. You found him pretty level-headed ordinarily?
A. Yes, sir.
Q. When you say he gave it in conversation with you without examination, you mean he did not examine it there and then?
A. He did not examine it there and then. He did not examine it, he simply said he did not believe there would be any reason why we could not go over the Michigan Central grounds. We were talking in regard to legislation necessary to get into Detroit.
Q. Did he refer to a piece of legislation?
A. No; about getting legislation. He did not think there would be anything to prevent it.
Q. Did he say anything about a piece of legislation passed in 1881?
A. I don't think so. That was the Saginaw matter, wasn't it?
Q. He thought there would be no difficulty in getting an act under which you could condemn even the right of way in from the junction?
450 A. That was his opinion.
Q. You were not talking about getting depot grounds in the city?
A. No, sir, only the right of way in.
Mr. BAKER: Mr. Lothrop did not tell you you could do that without additional legislation?
A. No, sir.
Q. Did he tell you if you got a bill passed authorizing it it could be done?
A. Yes, sir.
Q. You would have to get the bill passed first?
A. Yes, sir.

FREDERICK T. RANNEY, sworn for petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. Detroit.
Q. What is your business?
A. Real estate—buying and selling.
Q. You have been in that business some little time?
A. Since 1884.
Q. Are you familiar with the value of property in the vicinity of A. Backus, Jr., & Sons' planing mill?
A. Considerably so.
Q. Do you know the value of the property situated on the north side of that street, between the Michigan Central railroad and Twelfth street?
A. Yes, sir.
Q. Suppose the Backus property were vacant, it has a frontage on

451 River street from the railroad of 238 feet, and it extends through to Fort street, and has a less frontage on Fort street, and it also abuts on the Michigan Central on an angle. Take the River Street front, running back halfway, what, in your judgment, would the value of that land be per foot front, say if it were vacant today and it was placed in your hands for sale, what could you realize for it, in your judgment?

A. It varies in value along there from Twelfth to the railroad.

Q. Take the Backus property itself, next to the railroad.

A. I think it is worth about $100 a foot.

Q. Do you think you could get that for it?

A. I think I might.

Q. How much more do you think you could get for it than that?

A. Could not get much, if any more.

Q. What would the Fort Street front be worth per foot front?

A. I think it is worth about the same.

Q. So that, taking the property right through to Fort street, you would value the entire of both fronts at $200 a foot?

A. Yes, sir.

Q. What do you base that opinion on?

A. That is from my general knowledge of the property in that vicinity.

Q. Upon your knowledge of the property and of the prices that are paid?

A. Yes, sir.

Q. What effect do you think the construction of a proposed elevated road in front of that property would have on real estate, as a piece of manufacturing property, upon the market value of it?

A. I think it would affect it some, but not much.

452 DAVID H. SUTHERLAND, sworn for petitioner.

Examined by Mr. BAKER:

Q. What is your business?

A. Division superintendent of the Michigan Central.

Q. How long have you been?

A. Since 1881.

Q. How long have you worked for the Michigan Central?

A. Twenty-seven years.

Q. What are your duties as division superintendent?

A. I have charge of the operating department, the train service, switching and train service.

Q. How far out on the roads does your jurisdiction extend?

A. Three divisions out of Detroit—Toledo, Jackson and Bay City.

Q. You have control of the road to Bay City and out as far as Jackson and down to Toledo?

A. Yes, sir.

Q. The Grand Rapids road branches off from Jackson?

A. Yes, sir.

Q. The Michigan Central has these three divisions running out of this city?

A. Yes, sir.

Q. You have charge of the operating department, the management of trains and the service on those divisions?

A. Yes, sir, the yard service and station service.

Q. You have control of all the yards that are located in Detroit?

A. Yes, sir.

453 Q. About how many miles of track have you in Detroit, in the city of Detroit; I do not confine you necessarily to the city limits?

A. We have about 75 miles of track in what we call the Detroit yard.

Q. Where are those tracks located, in what places?

A. We have the Detroit yard proper between Third and Twelfth streets, the yard at Twentieth street, and a large yard at West Detroit.

Q. Take this yard between Twelfth and Third streets; the Michigan Central occupies all of that property from Twelfth to Third street and south of River street, does it not?

A. Yes, sir.

Q. Will you state whether or not the Michigan Central railroad is in the actual occupancy of all that property?

A. Yes, sir.

Q. What do you do on those grounds?

A. We handle our passenger trains, our city freight and our through business across the river, our elevators and our custom business in Detroit.

Q. Do you use that as a place to store cars?

A. No, sir; it is used in the actual handling of Detroit business and the business that crosses the river.

Q. Do you use all of that property for that purpose?

A. Yes, sir.

Q. Do you need it all in order to do the business?

A. Yes, sir; our facilities are cramped now.

Q. The business of the road, I suppose, increases some every year?

A. Yes, sir; there is almost a steady increase from year to year.

454 Q. Can you tell us about how many cars you handle at the Third Street depot daily?

A. There are received and dispatched from 2,300 to 2,700 cars per day.

Q. Those that come in and go out?

A. Yes, sir.

Q. Does that entire number come to this Third Street depot?

A. No; part of that does not come into the Third Street yard. About three-quarters of it has to pass through the Third Street yard.

Q. The rest, I suppose, goes to the Grand Trunk and stops at Twentieth street?

A. Yes, sir.

Q. Have you the cattle yard at Twentieth street?

A. At the South Junction yard.
Q. You have an elevator on this yard?
A. Two elevators.
Q. You have no elevators down below?
A. We have no elevators out of the city at all.
Q. You have had charge of this department how long?
A. As division superintendent since 1881; as trainmaster since 1875.
Q. What did you do on the road before that?
A. I was in the yard as yardmaster.
Q. You have been familiar with the business of that road a good many years?
A. Twenty-seven.

Cross-examination by Mr. DICKINSON:

Q. How many trains go in and out a day, including the Detroit, Lansing & Northern and the F. & P. M.?
455 A. We handle about 65 trains a day in and out.
Q. How many freight trains?
A. That varies a great deal.
Q. Give us the maximum and minimum.
A. The Michigan Central business runs from 25 to 35 freight trains each way a day.
Q. How many of the other roads?
A. That includes the Michigan Central and the F. & P. M.
Q. The D., L. & N.?
A. Their trains are broken up before they come in.
Q. How many acres do you use down there?
A. That would be a difficult question for me to answer; we have a very large holding.
Q. Suppose you did your freight business at the junction, or outside, how much depot room or yard room would you actually need for your passenger business?
A. The freight is not brought to the Detroit yard until it is ready to deliver to the Detroit yard or across the river. The other handling and switching is done at the junction yard.
Q. It is perfectly convenient to do the Detroit freight business where you do it at the junction?
A. We do not do any Detroit freight business—we are compelled to do that because there is not room in our Detroit yard to do it.
Q. When you do it down there it is convenient for your business?
A. Yes, sir.
Q. How many acres have you down there?
A. We have got a plat down there, I think, very nearly a mile square.
Q. How much room would you require to do your pas-
456 senger business at the Third Street depot with sixty-eight trains a day?
A. Our passenger business takes up about one-quarter of our Detroit yard.

Q. Would you take about ten acres?
A. It would take about a quarter of the facilities.
Q. Are you familiar with the business of other depots?
A. I have had considerable experience.
Q. Do you know the St. Louis union depot?
A. Yes, sir.
Q. Do you know that they have two hundred and forty-four trains a day in and out?
A. No.
Q. Do you know about the New York Central, two hundred and thirty-eight trains a day, in and out; about what acreage is occupied there?
A. I don't know.
Q. You could do the business of sixty-eight trains a day on the space that is occupied by the New York Central, could you not, where they accommodate two hundred and thirty-eight trains a day?
A. The handling of passenger trains depends a good deal on what kind of a station they have.
Q. If it be true that they handle two hundred and thirty-eight trains in the New York depot, you could handle sixty-eight trains in the same space?
A. I could not say that.
Q. If they handle two hundred and forty-four trains a day in the union depot at St. Louis, you could, on the same space they occupy, handle sixty-eight?
A. It would depend a good deal on what kind of trains, whether terminal trains.
457 Q. Terminal trains?
A. I know that our facilities are limited to the business we do on them.
Q. You want more land, don't you?
A. Yes, sir.
Q. You did not know that you had the largest holding of any railroad in the country near the business center?
A. No, sir.
Q. You think if trains were handled in the same way at the Michigan Central, on the yard, as at St. Louis, where they handle two hundred and forty-four trains, you think you could handle sixty-eight trains on the same territory?
A. Terminal trains, yes, sir.
Q. And so with the New York Central at Indianapolis or any other center?
A. Yes, sir.
Q. You say the cars in the yard, between Third and Fourth, are cars that go through?
A. The cars that come into the yard are cars for Detroit delivery, elevators and the business that is going through across the river?
Q. What amount is there for Detroit package business?
A. We load in Detroit about 200 cars a day, the out freight we handle very nearly the same amount of in freight.

Q. About 400 cars a day?

A. Yes, sir; and then we have our elevator business; that runs from 40 cars a day to 200.

Q. What amount do you send through over the river?

A. It will average nearly 1,000 cars a day.

Q. That is, including through as well as local freight?

A. Including all cars.

458 Q. The thousand cars a day of through freight go either West or East?

A. Yes, sir.

Q. The thousand cars a day of freight coming from the East, which is through freight, is there anything standing in the way of your taking that right off the boat and taking it to your yards at the junction?

A. It would be impossible in the ordinary handling of business. We have to have more or less freight ready for the boat in order to handle it. We have to get it inspected and taken care of in order to load on the boat.

Q. It could be inspected advantageously at your freight depot?

A. Not for the crossing.

Q. When it comes over?

A. I was speaking of the freight going through; our freight coming from the boat is brought in and taken to the junction yard.

Q. You do not use it in the yard?

A. A good deal of it is left here.

Q. Today there are standing on the tracks down there—that yard is pretty well filled, since this suit commenced, at all events, with freight cars?

A. I have never seen it when it was not filled.

Q. A good many empty cars?

A. Empty cars for the Detroit business.

Q. How long have the empty cars standing by the fence stood there?

A. What fence?

Q. Over this way, towards River street.

A. Those are shifted every night.

Q. What do you use the building for along River street; the old brick building and frame building?

459 A. The frame building is not there; the brick building is used for delivering city freight.

Q. Do you receive and deliver city freight there?

A. No, sir, we deliver it there.

Q. Where do you receive it?

A. On the river side.

Q. Do you contemplate, in your railroad business there, that you will have to use, in the transaction of your business in that yard, elevated tracks?

A. No, sir, not that I know of.

Q. Not on your present arrangement?

A. No.

Q. Your yard crosses no streets; you have no use for an elevated road?

A. Not between Twelfth and Third streets.

Q. You could not use an elevated track there on trestles to do your business.

A. No, sir.

Q. You do not need it?

A. Could not use it.

By Mr. CHAREST:

Q. You say that at the present time you want all the room you have?

A. Yes, sir, they are cramped now for room.

Q. After the F. & P. M. and the D., L. & N. leave the Michigan Central, won't that make you any easier in your room?

A. No, sir; we have plans now for increasing our yard to a very great extent by moving more of our business to the junction yard.

By Mr. DICKINSON:

Q. You have given the number of freight trains and the
460 number of passenger trains; has that increased in the last ten years, or is it about the same?

A. It has increased.

Q. How much?

A. Our cars have increased in the last five years, I should judge, fully 20 per cent.

Q. How much in ten?

A. The business has changed a great deal in ten. We have more territory emptying in. I should judge we were handling over 50 per cent. more in the last ten years.

Q. You are now handling what the F. & P. M. and the D., L. & N. business brings?

A. That comes through our yards.

Q. When did the Grand Trunk buy the D. & M.?

A. I don't remember.

Q. You had charge of the yard during that period?

A. I don't remember what year.

Q. Formerly you received in your yard, in addition to your own business, the Great Western freight for the Grand Trunk in the same way?

A. Yes, sir, but we did not at that time have any connection with our own Eastern business.

Q. Since you have had your Canada Southern connection you have received Grand Trunk freight and passengers?

A. Not since we got the permanent connection. The Canada Southern formerly made their connection with us at West Detroit, and when it was turned over to the Michigan Central and brought to Detroit we then severed our connection with the Great Western.

Q. Did not the Grand Trunk trains come in at the Michigan Central?

461 A. The Grand Trunk passenger trains ran in there for a little while.

Q. Didn't they run in there all the while for the last 20 years?

A. They did before that.
Q. The Great Western came to the Michigan Central?
A. Yes, sir.
Q. And the Grand Trunk left the Michigan Central?
A. Yes, sir.
Q. That was about 1886?
A. I don't remember what year.
Q. Were you overcrowded?
A. I have never known the time we were not overcrowded in the Detroit yard.
Q. You are very much crowded by the D., L. & N. and the F. & P. M.?
A. And the Michigan Central business we are extending outside.
Q. How long has it been since you have taken the Bay City road into the Michigan Central?
A. I can hardly tell you that. I have only had charge of the Bay City division about two years, but it was Michigan Central before that; how long I could not tell.
Q. Can't you say it was over two years prior to your time?
A. Yes, sir.
Q. Can you fix any period?
A. I could not.
Q. The Mackinac line runs a through line up to the Straits recently?
A. That is the Bay City division.
Q. It runs its own cars.
462 A. It is always run on the Bay City road.
Q. You have taken in the Mackinac?
—. ——.

Redirect examination by Mr. BAKER:

Q. Is it practical to do a railroad business in the city of Detroit without having your elevators located on the river?
A. I should say not.
Q. Whether the Michigan Central maintains a ferry in connection with its Third Street yard?
A. Yes, sir.
Q. The freight business, I suppose, the cars are not detained on this yard for the through business any longer than it is necessary to handle them?
A. We try not to detain them any longer than is possible.
Q. Would it be practical to do that ferriage business without a considerable yard to operate cars in connection with the ferry?
A. No, our breaking up and all that is done at the junction yard. All that is done in Detroit is what is simply necessary for the loading and unloading of Detroit and doing the Detroit business.
Q. Could you do that ferriage if there were nothing else without a considerable yard?
A. No, sir.
Q. You say you take cars there daily, about 1,000 cars?
A. Yes, sir.

Q. The Michigan Central connection east, at the present time, is through a branch that runs from Windsor and Essex Center, connecting with the old Canada Southern line through to Buffalo?

A. Yes, sir.

463 Q. A good many years ago it connected with the Great Western?

A. Yes, sir.

Q. But upon the acquisition or obtaining control of the Canada Southern, the business has been transacted over that line alone?

A. Yes, sir.

Q. And the Great Western has passed into the control of the Grand Trunk?

A. Yes, sir.

Q. You maintain no ferry with the Great Western depot?

A. No, sir.

Q. You ferry across to the Canada Southern depot?

A. Yes, sir.

Q. You say the passenger business down there takes about one-quarter of the ground?

A. Yes, sir.

Q. Is that amount of ground necessary to do the business in the Michigan Central, as it is at present conducted?

A. Yes, sir.

Q. Could you get along with any less ground there either for the freight business or the passenger business to be transacted on your grounds, between Third and Twelfth streets, if the D., L. & N. and the F. & P. M. should move out of there?

A. I don't think we could. Our own business is increasing so that we would probably take up all the room.

Q. You need about so many tracks in order to transact the business properly?

A. Yes, sir.

Q. Is it true that you use any of the tracks down there on the Michigan Central grounds for the purpose of storing cars?

464 A. No, sir, it is used entirely for the Detroit business and for the through business.

Q. How long do the cars stay on that track ordinarily, day in and day out?

A. Our average of cars in there for unloading is about a day and five hours.

Q. Do you mean a day of 24 hours?

A. Yes, sir. There would be some cars that would go out in two or three hours, and other cars might stay two days in getting unloaded.

Q. That includes bringing them in and unloading them, and loading them up again, and taking them out?

A. Bringing them in and unloading them.

Q. How long are the cars shifted upon these tracks that are along the margin of River street?

A. Those tracks are switched every night.

Q. That is, you have your team tracks along there?

A. Yes, sir.
Q. By team tracks, as I understand it, you mean tracks to which a vehicle can be driven alongside of the cars?
A. Where we deliver what we call our car-load freight.
Q. Teams go in there and take the freight right out of the cars and go away with it?
A. Yes, sir.
Q. Or they bring it there and unload it?
A. Yes, sir.
Q. You take the cars in there and take them away every night?
A. No, we do not take them away, the tracks are switched over. There would be cars maybe standing there two or three days before we get the loads out of them. We cannot always get our cars released.
465 Q. Your patrons do not take the freight away right off?
A. No, sir.
Q. They have to have time to haul it away load by load.
A. Yes, sir.
Q. As soon as a car is empty is it shifted?
A. Yes, sir.

Recross-examination by Mr. DICKINSON:

Q. Do you know of any other passenger depot in the United States that does a freight business alongside of its passenger depot in the city except the Michigan Central and the railroads of Detroit? Name one.
A. It would depend a great deal——
Q. Do you know of any place in the United States where it is done?
A. Yes, sir; it is done in Toledo by some of the roads there.
Q. Any other place?
A. The Pennsylvania road in Toledo do their business in the same yard.
Q. Where is their depot?
A. In what is called North Toledo.
Q. Out of the town?
A. Right in the city of Toledo.
Q. How long a ride is it from the Michigan Central depot to the North Toledo depot?
A. A street-car ride of about 15 minutes.
Q. Isn't it clear to the other side of the town?
A. It is not a great distance, it is the other side of Toledo.
Q. The Michigan Central business is quite near the business center of Toledo?
A. No; it is on one side of the town and the Pennsylvania
466 is on the other. The old station is right at the bridge, but the new station is further up; I should judge half a mile further up.
Q. Which way?
A. Nearer Detroit.

Q. It is further out of town than it used to be?
A. Yes, sir.
Q. About half a mile further up?
A. About half a mile.
Q. How far is the North Toledo depot from the old station ground where the Island house was?
A. I should judge about a mile and a half.
Q. Across town?
A. Yes, sir.
Q. And the Michigan Central depot has been moved back up towards Detroit about half a mile?
A. Yes, sir.
Q. In the old station they did not have any freight depot alongside?
A. Yes, sir.
Q. Has it moved that back?
A. No, the freight-house is there yet, and the Island house is the freight-house.
Q. Name another city where that is done?
A. We do our business in Jackson in the same way, and our freight-houses in Chicago are right alongside of the depot.
Q. The Illinois Central yards?
A. Yes, sir.
Q. You are doing business on the Illinois Central grounds?
A. No, sir, we have property of our own. We go in on the Illinois Central track.
467 Q. That property, the Illinois Central, was acquired about the time the Michigan Central acquired its property here?
A. Yes, sir.
Q. Do you know where the freight business is done in the city of New York?
A. No, sir.
Q. You did not know it was done at the river side?
A. No, sir.
Q. You have spoken of Chicago; where is the Dearborn Street depot freight business done?
A. I am not very well posted in the streets.
Q. Or the Canal Street depot?
A. I could not tell you that.
Q. You have said, in answer to Mr. Baker, that as soon as you made connection with the Canada Southern, then, as I understand you, the Great Western and Grand Trunk were taken out of the Michigan Central; do you mean to be so understood?
A. If my memory serves me right.
Q. You acquired the Canada Southern connection in 1878.
A. 1881.
Q. After you acquired the Canada Southern connection, the Grand Trunk did not buy the Great Western at the same time?
A. I don't remember when the Grand Trunk did. If I remember rightly, we did not have the Grand Trunk trains in the Detroit depot after we acquired the Canada Southern road.

Q. Did you have the Grand Trunk trains in the depot until the Grand Trunk bought the Great Western and D. & M.?

A. I think we did.

468 Q. If that was later than the time you bought out the Canada Southern, you still continued then in the depot after you bought the Canada Southern?

A. If my memory serves me right, we did not have the Great Western in our depot after we acquired the Canada Southern.

Q. Did you have the Great Western and Grand Trunk in your depot until the Grand Trunk had bought the Great Western?

A. I could not say as to that.

Q. Did you have the Grand Trunk in your depot until the Grand Trunk bought the Great Western?

A. I think we did; I am not positive.

Redirect examination by Mr. BAKER:

Q. You say you are not very familiar with the freight business in New York?

A. No, sir.

Q. You know, do you not, as a railroad man, from the character of the freight that goes to New York, it would be necessary to go to the water's edge?

A. All their through freight. I suppose they have a city freight business the same as we have.

Q. You would naturally expect that the freight business would be located on New York harbor. They would have some freight facilities there?

A. Yes, sir.

Q. The foreign freight and the shipments of freight would naturally go to the water's edge?

A. Yes, sir.

Q. The Michigan Central has always done a very large through business, and it has been done with a slip in these yards?

469 A. Yes, sir.

Q. Did you ever do any business down at Grosse Isle?

A. The Canada Southern did, not since the Michigan Central acquired it. When there has been a blockade here we have done our business at Grosse Isle.

Q. Was that before the Michigan Central acquired control of the Canada Southern?

A. We have done it since.

Q. Have you made it a business to use that?

A. For the purpose of carrying over through freight, not since we have had our slips finished at Detroit. We had to put in slips to fit their boats.

Q. I suppose it would be practicable, if there were any necessity for it, to take the freight business down all to Grosse Isle, and take it all through that way without bringing it to Detroit at all?

A. It is a longer route.

Q. But you could haul it around there?

A. Yes, sir.
Q. I suppose you could take it around to Toledo?
A. We have had to do that in blockades.
Q. During the war, you remember the soldiers had to go around there because of the neutrality of England, that would not let us take troops through Canada?
A. I was very young at that time.

Recross-examination by Mr. DICKINSON:

Q. You say the Central yard is required because of the landing of steamers; how much land does the Canada Southern use as freight yard on the other side of the river?
A. I could not tell you; we have a very large yard.
Q. How much do they actually use for the yard?
470 A. We have quite a yard there that would hold probably a thousand cars.
Q. How many acres in it?
A. I do not know what the acreage is.
Q. Are there five with your tracks in it?
A. Yes, sir.
Q. Will you swear there are ten?
A. Yes, sir.
Q. How much is there there?
A. I could not tell you just what the size is.
Q. It is all right there, any one can see when they cross over?
A. No; our yard lies from the river right up into Windsor, up the hill.
Q. How many acres are there there?
A. I could not tell you what the acreage is.
Q. You run the freight up the hill there?
A. Yes, sir.

LEWIS F. PHISTER, sworn for petitioner.

Examined by Mr. BAKER:

Q. What is your business?
A. Real estate.
Q In Detroit?
A. Yes, sir.
Q. How long have you been in the real-estate business?
A. About six years.
Q. You have a knowledge of real-estate values in Detroit?
A. Yes, sir; generally.
471 Q. Do you know the property known as the Backus planing mill and box factory?
A. Yes, sir.
Q. That property has a frontage on River street of 238 feet, on the north side of the street, and it is bounded on the east by the Michigan Central railroad, I would like to know what, in your judgment, is the market value of the land, suppose it were vacant

land and in the market for sale, for manufacturing or any other purpose for which it could be used; what do you think could be realized for it at the River Street front?

A. About $150 a foot.

Q. You think you could get that for it?

A. I think so.

Q. Halfway back to Fort street?

A. Yes, sir.

Q. What would the Fort Street front be worth?

A. I think about the same value.

Q. There would not be very much difference?

A. I should not think so.

Q. It is proposed to build an elevated road along River street in front of that property that will leave the street open so that traffic can go on up and down the street. To what extent, if any, would the construction of a road along River street affect the market value of that piece of land as a piece of real estate?

A. I gave an opinion on that once before, that I did not think it would hurt it any. I don't think I should change my opinion now. I have viewed the property. I do not think it would be any damage to the property for the business it is used for.

472 Cross-examination by Mr. DICKINSON:

Q. How long have you been in this city?

A. Nearly 16 years.

Q. Been in the real-estate business all the time?

A. No, about a third of the time, for the past six years.

Q. You bought and sold property in this neighborhood?

A. I have sold property there.

Q. Whereabouts?

A. On River street, between the railroad and Twelfth street.

Q. Sold to the union depot company?

A. No, sir.

Q. What was that property?

A. It was what has been recently used for the graphite works. The place belongs to Boynton.

Q. Below Backus'?

A. Yes, sir, about 100 feet, or a little less, east of Twelfth street.

Q. Did you sell it?

A. Yes, sir.

Q. How deep was it?

A. Somewhere in the neighborhood of 148 or 150 feet, I think.

Q. Any building on it?

A. A factory.

Q. What did you sell that for per front foot?

A. About $80.

Q. Buildings and all?

A. Yes, sir.

Q. You sold it to whom?

A. To John A. Russell, I think, was the buyer.

Q. When?

473 A. About two years ago.

Q. Did you know of the sale of the corner lot on Twelfth street?

A. I heard of it shortly before that time.

Q. What did that sell for?

A. My recollection is that it brought considerable more money. It is a larger piece and runs through from River street to Fort street.

Q. Is the Fort Street front worth as much as the River Street front?

A. I should not say there was much choice between them.

Q. What did the corner sell for?

Mr. BAKER: I object to that. It appears what it was sold for and the circumstances under which it was sold.

A. I don't recollect what it was sold for.

Q. Any other sales down there?

A. None that I made myself; I know of some other sales.

Q. Do you know of the sale of the D., L. & N. to the Michigan Central, 160 feet front?

A. I recollect reading of it.

Q. Do you know the price?

A. No.

Q. Who sold the graphite front?

A. The party for whom I sold it had it on contract, M. P. Thatcher. The title was in George C. Langdon and some other party.

Q. Thatcher held it on contract?

A. Yes, sir.

Q. Was the contract pledged?

A. No, not exactly pledged.

Q. How was it?

474 A. He had it on contract, and it was rather what we would call a forced sale.

Q. Langdon failed, too, didn't he?

A. Not that I know of at that time.

Q. Wasn't he embarrassed at that time?

A. I don't think this sale benefited him any.

Q. How was it a forced sale?

A. Captain Thatcher was unable to keep up the contract, I think, and was somewhat in arrears and very anxious to sell it. It was not exactly a forced sale, but it was in the market, and was sold a little less than we would have sold it if he had been in easy circumstances.

Q. How much is the front?

A. I think it is 45 feet.

Q. How deep, do you say?

A. I think somewhere between 140 and 150.

Q. Did it go halfway through the block?

A. I think a little more than half; I have not refreshed my memory on it, but that is my recollection.

Q. You don't think this would injure the property at all, this elevated road?

A. That is my opinion on it.

Q. Are you familiar with the effect of elevated roads for trunk lines?

A. The only ones I know of are the New York roads.

Q. You are not familiar with the effect of trunk roads elevated upon trestles by property?

A. No, I cannot say that I am.

Q. Never had any experience with them?

A. No; we have not got that far.

Q. Do you know anything about the Backus property?

A. I know where it is located.

475 Q. Do you know anything about the kind of mill it is?

A. Yes, sir.

Q. Have you been inside the mill?

A. I have been in the yard; I have not been through the mill.

Q. Do you know what kind of business they do?

A. No.

Q. You have never seen the operation of elevated roads except the New York passenger roads, and you testify to this that you are very clear it would not be any injury to the property, although you have never been in the mill and never had seen the operation of the road?

A. I testify that is my opinion of it.

Q. Did you know that this kind of business created such a fine dust that they were obliged in their business to provide a dust-room for the dust?

A. I know there is something of that nature.

Q. Did you know that that was highly inflammable, so that a man smoking would explode it?

A. I know that smoking is not allowed.

Q. So that a spark would explode it, did you know that?

A. I presume any fire.

Q. Did you know it was highly explosive?

A. Yes, sir.

Q. Do you know how close the proposed elevated road would run to the building?

A. Yes, sir.

Q. How close to the property?

A. The tracks would come within 25 or 30 feet.

Q. You know there were to be tracks and switches in front of it?

A. I know there are to be tracks.

476 Q. How many?

A. Two tracks, I suppose.

Q. Did you know how many railroads were to run over there into the depot?

A. Three or four roads, I believe.

Q. Simply from your observation of the elevated roads in New York you think it would be no injury to this property?

A. I don't think it would in this elevated case.

A JUROR: Do I understand you the valuation is merely on the bare real estate?

A. Yes, sir.

Q. Your damages would be merely for taking the ground, regardless of the buildings on it at present?

A. I could say why I form an opinion that it would not be any damage. I could not see from my inspection of the ground and the trestle that it would interfere with the traffic of teams, and I was assured by different parties that the insurance risk would not be increased by the construction of that road. Based upon that fact I thought it would be no real practical injury to the property.

Q. For instance, if the ground was bare, without any buildings, do you think you could sell the property for as much money per foot after that railroad ran overhead as you could today; and for what purpose?

A. That is a very problematic thing. There might be some party that wanted that property for a purpose where an elevated railroad would be perhaps a benefit instead of an injury.

Q. How could it be a benefit?

A. The fact that it would have another line of road.

Q. How could you use an elevated road?

A. They could put switches from the property.

477 By Mr. BAKER:

Q. Have you seen other elevated side tracks in other cities?

A. I have observed side tracks in New York.

Q. An elevated side track is just as feasible as a surface track?

A. I suppose so; I take it for granted that anything is feasible nowadays.

Mr. BAKER: I now propose to read in evidence the testimony of DAVID BEVERIDGE, which was taken in the case against Kidder *et al.*, Mr. Beveridge being absent in Europe.

The testimony is as follows:

Q. What is your business?

A. Inspector of buildings for insurance companies.

Q. Whereabouts are you located?

A. Detroit.

Q. How long have you been here?

A. Three and a half years.

Q. How long have you been in the insurance business?

A. Over 20 years.

Q. What are your duties as inspector?

A. To examine the different hazards in buildings and the method of construction of buildings.

Q. For what purpose?

A. For the purpose of reporting to the companies to establish an insurance rate.

Q. You go and look at the property, make a survey of the property, and recommend a rate?

A. Yes, sir.

Q. How many companies do you do that for?

A. Three.

Q. Are they prominent companies?

A. A. The Michigan Fire and Marine, the Detroit Fire and Marine of this city, and the Grand Rapids Fire Insurance Company.

Q. Any other companies use the same rates?

A. They buy our reports, quite a number of other companies.

Q. Any other companies outside of the State buy your reports?

A. Yes, sir.

Q. That is you furnish them a report for a consideration?

A. Yes, sir.

Q. You have done this for the last two years in this city?

A. Two years and a half.

Q. I suppose you know the property along the north side of River street where the Michigan Central railroad crosses?

A. Yes, sir.

Q. On the north side of that street, and situated adjoining the premises of the Diamond Match Company on the one hand and the Peninsular stove works on the other, is a piece of property with a frontage of 140 feet on River street, and upon it is situated a flouring mill some small distance back from the street line. The Fort Street Union Depot Company propose to build an elevated road in that street on which three railroad tracks will be maintained, and the tracks will be at an elevation of about 24 or 25 feet, or a little higher, and the elevated road, the nearest it will come to the flouring-mill building is 30 feet at one end and 35 feet at the other. The building does not stand exactly square with the street, that is the end of the ties, which are nine feet wide, will practically represent the outside of the cars, so that we can say that the locomotives and cars will run within 30 feet of the building at this elevation. There are some windows on the side next to the elevated road, and on the lower floor are doors by which ingress and egress are obtained; and it is proposed to operate the road with improved engines and fire-boxes, and all the modern first-class appliances in regard to fire, and you will tell us whether or not there would be any increase in the fire risk because of the operation of such a railroad in front of a flouring mill in that way?

A. There would not.

Q. So that if this mill were insured at the present time, upon the completion and operation of such a road, there would be no increase in the rates on the part of the insurance companies?

A. There would not, if the conditions are as you have stated.

Cross-examination by Mr. DICKINSON:

Q. You have been a witness before for the union depot company?

A. Yes, sir.

Q. Did you testify that the rate would not be increased in the Backus case for running through their lumber yard?

A. Yes, sir.

Q. Did you know that afterwards the rate was doubled on them since the railroad went through?

A. I do not.

Q. You have heard that since, have you not?

480 A. No, sir.

Q. You testified that the rate would not be increased?

A. I testified that it would not be increased on account of the elevated railway.

Q. Have you ever insured a flouring mill?

A. Yes, sir.

Q. Are they considered extra hazardous?

A. Yes, they are more than that, they are considered specially hazardous.

Q. You always put a clause in the policy providing that there should be no open light used, precisely as in a powder magazine?

A. I have never known of insuring a powder magazine.

Q. Have you seen a policy on a flouring mill?

A. Yes, sir.

Q. Do you know that that is the rule about powder magazines, not to use open lights?

A. I suppose so.

Q. What is the reason you put a clause in policies on mills of this description, that no open light should be used?

A. Because there have been a great number of explosions which have occurred in flour mills.

Q. The dust of a flour mill is very explosive?

A. Yes, sir.

Q. It will ignite from an open light?

A. It will in summer when it is very hot.

Q. You base your testimony on Mr. Baker's statement about the provision against fire from a railroad?

A. Yes, sir.

Q. You understand that a number of roads are to use these three tracks in front of this flour mill?

A. No, sir.

481 Q. How did you understand it?

A. I understood that there were three tracks for the Fort Street union depot.

Q. Did you understand that all roads are expected to come in there?

A. I do not know how many roads are coming in there.

Q. You think there would be no extra rate charged where four great trunk lines run through there with the standard locomotives, carrying freight and passengers?

A. If the conditions are as Mr. Baker stated.

Q. What are those conditions?

A. That they shall have all the modern appliances of shutting

down dampers and burn coal, and also carry out the ordinance of most cities, that sparks shall not be emitted.

Q. If that is done you do not think that the rate would be increased?

A. No, sir.

Redirect examination:

Q. The special hazards connected with the flouring-mill business arises from the nature of the work that is done in the mill?

A. Yes, sir.

Q. And the provision in regard to not carrying an open light is to avoid igniting the dust or gas that is in the mill?

A. Yes, sir, any dust that may be floating around in summer; it is more or less dangerous, especially in summer. It is doubtless so in winter, but the explosions that have occurred from dust have generally been in summer.

Q. I suppose it is a gas that forms?

A. Yes, sir.

482 Q. What do you mean by a provision against an open light?

A. Any open light, whether it is an open kerosene lamp or an open candle, or any light that is not protected by what is called the Davy gauze.

Q. Take an ordinary lamp that has to have ventilation, how do you get a cover on it?

A. By having any cover on it. The lamp which is generally used with safety is the Davy safety lamp, or they are using now a great deal the incandescent lamp and electric light.

Q. Is it practicable to use an electric light that is wholly inclosed in a glass tube in mills of this kind?

A. Yes, sir, the millers are preferring them. All the large mills of Minneapolis are equipped with those.

Q. So that the companies insist upon such a provision in the policies so as to secure a light of that kind?

A. So as to secure a safe light, simply not an open light.

Q. You testified in the case of A. Backus, Jr., & Sons in regard to their planing mill, where the union depot proposes to go in front of their property?

A. Yes, sir.

Q. And you testified if the road was properly operated in front of their property it would not increase the fire risk?

A. It would not.

Q. You were not here in 1882 when the railroad was open through their yard at the foot of Eighteenth street?

A. No, sir.

Q. You know nothing about that?

A. I was not living in this city at that time.

483 Q. Suppose a man has a lumber yard in this city on the lines of railroad, where he simply stores lumber on each side of the track, and a railroad is opened through there, a right

of way is acquired, 60 or 100 feet from the yard on which a railroad is operated, would the companies increase the fire risk if it was known that that railroad was to be properly operated?

A. They would not increase the fire risk, but if they saw that railroad were in the habit of running their engines carelessly, they would increase the rate, and then if a fire occurred through negligence, they would pay the insured, and take subrogation of the railway company.

Q. As I understand, if a railroad is operated properly in the vicinity of a lumber yard, the companies do not regard it as an increase in the risk?

A. Not if there is no emission of sparks. If there is any class of engines running backward and forward, whether a freight engine or passenger engine, and will emit sparks, they will increase the rate if they saw the ordinance was not carried out.

Q. As an expert, do you understand that engines can be and are properly run?

A. They can be. They are run through the city of New York in that way, and they run through the city of Newburg that way, on the Hudson river.

Q. So there is no practical difficulty in operating a railroad so as not to increase the fire risk?

A. There is none at all.

Mr. BAKER: I desire to read the testimony of Mr. BEVERIDGE given in the former trial of the Backus case:

Q. What is your business?

A. Inspector of buildings for insurance companies.

Q. How long have you been in the insurance business?

484 A. About 20 years.

Q. How long have you been inspecting property in Detroit?

A. Three years and a half.

Q. This case the respondents, Absalom Backus and the other persons interested, own a piece of property on River street. It is a brick planing mill and box factory. It is proposed by the Fort Street Union Depot Company to build an elevated road in that street, where the superstructure will carry the engines at about the height of the second story, or between the second and third stories, and his main building is situated about forty feet from the superstructure; that is, there are six feet in the street for the sidewalk, and there are about 33 or 34 feet beyond that. On one part of the property there is a brick building that is nearer to the street; I should think it was between two and three feet of the street line and from eight to ten feet from the superstructure, but that building has a solid wall, and has no windows in it. The gable end is solid from the roof to the ground. Along the street, between the main building, which is 40 feet from the superstructure, is an open shed. The fence along the street is an ordinary board fence about 12 feet high and a shanty roof to it, but it is all open on the inside, and that has windows in it. I show you a photograph of the property. As a

man familiar with this business, I desire to know whether or not the construction and operation of an elevated railroad along River street, as I have described, the road to be operated in compliance with the statutes and ordinances, with all the skill that is known to the art of operating a railroad at the present time, in regard to dampers and spark-arresters and so on, being operated in that way, would
485 the insurance companies charge any additional fire risk because of the construction and maintenance of such a railroad?

A. If operated in the manner in which you have described, so that sparks would not be emitted, there would be no increase in the risk.

Q. You have occasion to inspect a great deal of manufac-ing property and saw-mill property all over this part of the country?

A. I have inspected all of the manufacturing places in Wayne county.

Q. What do the companies take into consideration, as far as the operation of the road is concerned?

A. In a city it is generally considered that the city ordinances will have such an effect upon the speed of the railway, and also on the emission of sparks, that they never increase the rates of insurance on buildings for an elevated railway, unless they see that the particular railway is breaking those ordinances and increasing the hazard from the emission of sparks.

Q. What is the practice of the companies in regard to claiming the benefit in their policies of the common-law liability of the railroad companies for neglect upon their part?

A. They have no clause in them, but in the standard policies used in Michigan, if there was any neglect on the part of the railway company, the railway company would be held liable.

Q. Do you take into consideration the liability of the railway company in fixing the rates?

A. As a rule we do where it passes in front of their property.

Q. To state a case, if a railroad company were negligent
486 and burned up property upon which your companies had policies or risks, do the insurance companies look to the railway companies for damages?

A. The insurance companies, as a rule, would pay the insured company, and then take subrogation from the railroad companies.

Q. So that as the business is transacted, the insurance companies have an interest in fixing their rates and in transacting their business in the way in which the railroad is operated?

A. Yes, sir.

Q. And, as I understand you, if the railroad is operated properly, operated as near as it can be under the existing state of the railroad art, there is no increase of fire risk?

A. There may be increased fire risk, but there is no increase to fire rates for the city if they put in the dampers in such manner, as there is no emission of sparks. They do not consider that sufficient hazard to increase the rate. If the railway is in the habit of breaking that rule, the general hazard would be such that they would doubtless increase the rates.

Cross-examination by Mr. DICKINSON:

Q. Where do you live?
A. In Detroit.
Q. How long have you lived here?
A. Three years and a half.
Q. For whom do you adjust?
A. I adjust for nobody. I am inspector of buildings for the three Michigan companies, the Detroit Fire and Marine, the Michigan, and the Grand Rapids, and for such other parties as I am employed by.
Q. Have you ever inspected the Backus property?
487 A. Yes, sir.
Q. For what company?
A. For no particular company, simply at the call of one of the agents here, James A. Jones, on one occasion, and a second time at the request of Mr. Jones.
Q. Have you made an inspection of the property with reference to the proposed new road?
A. No.
Q. Do you know the kind of business they do?
A. Yes, sir.
Q. What is it?
A. A planing mill and box factory.
Q. Do you consider making of boxes the principal business they carry on?
A. They do a large amount of planing of lumber.
Q. Do you call it a box factory; is the making of boxes one-fiftieth part of their business?
A. I don't know, sir.
Q. Why do you call it a box factory?
A. That is a term we use in the insurance business; the same as we say a planing mill, and sash and blinds, and door factory.
Q. Do you know anything about the rates they charged Backus heretofore?
A. I think so.
Q. Do you know?
A. I am not certain.
Q. Do any of your companies insure Backus?
A. I don't know what parties the companies insure.
Q. How did you come to interest yourself to find out what they charged him?
A. I simply make the inspection for those companies.
488 Q. Did the people for whom you made the inspection insure them?
A. The first time I was called by Mr. Jones I think he did insure them.
Q. You don't know.
A. I simply have the belief that he did.
Q. Did you inspect the lumber yard that Mr. Backus has below there?

A. I went through the lumber yard.
Q. You testified that there would be no increased rates there?
A. This was the first time I have been upon the stand.
Q. You did not think the running of the railroad through their lumber yard down there would increase the rates?
A. I have never testified in this case before.
Q. I am asking you whether in your opinion the rates for running through the lumber yard would be increased, if you know?

Mr. BAKER: I object to that, it not being the property involved in this case.
Mr. DICKINSON: I am testing the accuracy of the witness; I insist upon it.

Q. Would you think that the running of a railroad through a lumber yard would increase the rate?
A. I do not think that it would increase the rate if it were run according to the ordinance. If it is run according to the ordinance, so there is no emission of sparks, it would not increase the rate.
Q. Did you ever inspect their lumber yard?
A. Yes, sir.
Q. For purposes of insurance?
A. Yes, sir.
489 Q. Did you recommend any increase of rates because of the railroad?
A. No, sir.
Q. How did it come that they trebled the rates as soon as the railroad went through?

Mr. BAKER: I object to that.

Q. Do you know the rates of it?
A. I am not certain of the rates. I can telephone and find out.
Q. Did they increase the rates by running of the railroad through there?
A. I never did.
Q. Did the insurance company?
A. I am sure I don't know.
Q. You do not do the insuring?
A. No.
Q. The insurance companies charge what they please, and refuse to insure?
A. They refuse to insure when they do not wish the risk, the insurance is not compulsory.
Q. It is not compulsory to take your opinion?
A. Not at all.
Q. You have testified as to the situation of the building; will you please tell the jury what is the situation of the building with regard to this new railroad?
A. As described by Mr. Baker, I judge that it is to be about 39 feet distance from the elevated road; the elevated road is to be on

a level with the second or third story windows, from his description.

Q. Do you know anything about where the machinery in that building is, the dust and sawdust room?

490 A. The dust and sawdust room would be near the boiler and engine room.

Q. Do you consider that that adds to the danger of the situation of this building, that that is on the side of the new railroad?

A. Not if it is a good safe dust-room.

Q. Do you know that dust-rooms like this in planing mills are very inflammable?

A. They are supposed to be.

Q. They will ignite almost as quickly as gas?

A. If there is much fine dust, they have been known to ignite in that way.

Q. Suppose that is now situated away from the Michigan Central road and is nearest to the new railroad, would that add to the increased fire risk?

A. If it is from 36 to 39 feet, as described by Mr. Baker, it will not.

Q. Did you inspect it and know where the dust-room is, without regard to Mr. Baker?

A. I know where the dust-room is.

Q. Where is it?

A. Near the boiler and engine room.

Q. Is it anywhere near the new road?

A. I don't know where the new road is going to be, except from the description given me.

Q. How near is the dust-room to River street?

A. I don't know.

Q. If the dust-room is situated near River street, would you think that the new road would add something to the fire risk?

A. If the sparks would be emitted the whole time, it would add to the fire risk.

491 Q. And it could not be free from it unless it could be transferred to another part of the building, could it?

A. What could not be?

Q. The large fire risk from the dust-room.

A. The large fire risk from the dust-room will be no greater when the elevated road is built than it is now.

Q. No added fire risk from having a new railroad, different from what it is now, come along there within 15 or 20 feet from the dust-room?

A. If it is 20 feet from the dust-room and there is no emission of sparks, there will be no increased hazard.

Q. And yet you say the dust-room in these manufactories is almost as inflammable as gas?

A. It is, under certain conditions.

Q. What are those conditions?

A. A high rate of temperature and very large surplusage of very fine dust.

Q. Is that ordinary in one of these machines that you find working, the fine dust?

A. Yes, sir.

Q. A large amount?

A. Yes, sir.

Q. Suppose the dust-room is but six feet away from the new line of road, will that add anything to the fire risk?

A. The proximity of the dust-room will not increase the rate, provided the railway is run, as I have said two or three times, without the emission of sparks. If there is going to be any emission of sparks on this elevated road, or any other railroad, it would tend to increase the rates.

Q. Do you know of any railroads on which sparks are not emitted?

A. Yes, sir.

492 Q. Where?

A. The West Shore railroad running through Newburgh.

Q. I am talking of Detroit, Michigan; do you know of any railroad that does not emit sparks in entering this city?

A. I notice they generally shut down.

Q. Do you know of one?

A. In going through the city, I notice they do not emit sparks.

Q. Which one?

A. All of them.

Q. You are as positive about that as of anything else you have testified to?

A. Simply from my own observation; my own observation shows me that.

Q. But you think the fire risk would be greater, ordinarily, alongside of a railroad, if the dust-room is 6 feet, than if it were 36 or 40?

A. Not if they did not emit sparks.

Q. If they did emit sparks?

A. If they did emit sparks, of course that would be an additional hazard.

Q. It would be more additional hazard if it were 6 feet instead of 36 feet, as stated by Mr. Baker?

A. It would.

Q. Could that hazard be avoided if now the dust-room was put as far as possible away from where it is now situated, but could not be removed to any other part of the building because the railroad is on that side?

A. If there was only going to be about six feet between this dust-room and this railway, and there was going to be an emission of sparks, it would be admissible to change the location of the dust-room.

493 Redirect:

Q. Are these dust-rooms open from the outside, if they are properly constructed?

A. As a rule, no, sir.

Q. The danger, as I understand you, is from the high temperature, of their being very warm, and a very large amount of fine dust.

A. Yes, sir; all dusts are inflammable and explosive.

Q. It is usual in any well-regulated manufactory to have an inclosed dust-room?

A. Yes, sir.

Recross:

Q. You are accustomed to inspecting lumber in mills, are you not?

A. Yes, sir.

Q. Is the rate higher or lower as the lumber is piled, remote or near the engines and boilers?

A. If they have no clear space from the lumber, it is greater; if they have no clear space from the lumber and the mill, it is greater than if they had a clear space.

Q. How big a space?

A. If they have 200 feet space, it is less than if they have 150, and if they have 150, it is less than if they have 100.

Q. Do not the rates change as the lumber is piled near and far from the mill?

A. They do.

Mr. BAKER: Were you here in 1882, when the railroad was put through their lumber yard?

A. No.

Q. You had nothing to do with the rates that were fixed then?

494 A. No.

Q. You did not come here until three years and a half ago?

A. No, sir.

Mr. Baker then read the petition to condemn lands as follows:

"STATE OF MICHIGAN:

To the circuit cour for the county of Wayne:

Your petitioner, he Fort Street Union Depot Company, respectfully represents:

1. That your petitioner is a railroad corporation organized under an act entitled, "An act to authorize the incorporation of companies for the construction of union railroad depots and stations, with the necessary connecting tracks, and the management of the same," approved June 9, 1881, and the amendments thereto; that your petitioner heretofore to wit, on the 24th day of August, 1889, was duly incorporated by the filing of its articles of association, and annexed affidavit, in the office of the secretary of state, as required by said act.

2. That the capital stock of your petitioner has been in good faith subscribed as required by said act to organize such company, that is to say, the capital stock of your petitioner is fixed by said articles of association at the sum of one million dollars, which was not less than the estimated and probable cost of your petitioner's proposed station ground, depot buildings and railroad tracks proposed to be

laid; that more than 50 per cent. of said capital stock was subscribed upon said articles of association, and 10 per cent. was in good faith in cash paid in to the directors named in said articles, and an affidavit was made and attached to said articles by William W. Crapo and George Coppell, two of said directors, showing that said
495 amount had been subscribed and 10 per cent. in cash paid in as aforesaid.

3. That your petitioner has surveyed its depot grounds and the route of its proposed tracks in the county of Wayne and made a map and survey thereof, by which said depot grounds and route are designated, and that it has located the same according to such survey and filed a certificate thereof, indorsed on such map and survey and signed by a majority of the directors of said company, in the register's office of said county of Wayne, to wit, on the 12th day of November, 1889; that before filing said map and survey, to wit, on the 22d day of October, 1889, your petitioner submitted the same to the State railroad crossing board, consisting of the commissioner of railroads, attorney general and secretary of state, for approval, in compliance with section seven of the general railroad law of this State, as amended by act No. 236 of the Public Acts of 1887, page 294; that thereupon such proceedings were had that afterwards, to wit, on the 8th day of November, 1889, said map and survey was duly approved by said board, and a certificate of such approval indorsed thereon, and said map and survey so certified and approved, now remains of record in the said register's office for the county of Wayne, and to which record reference is hereby made.

4. That the route of the proposed tracks of your petitioner as shown by said map and survey, cross the railroad tracks of the Michigan Central Railroad Company on and within the limits of River street in the city of Detroit, at the point known as the River Street crossing of said Michigan Central railroad; that a ten days' notice was given by the State railroad crossing board to Henry B. Ledyard, the president and general manager of said Michigan
496 Central Railroad Company, of the time when and the place where the board would consider the question of approving said map and survey; that said Michigan Central Railroad Company appeared before said board and was heard in opposition to such approval; that your petitioner requested said board to approve of said map and survey unconditionally, but said Michigan Central Railroad Company objected to any approval of said map and survey, and further insisted that if approved, it should be on condition that an overhead passageway for teams and travelers on foot should be constructed at said River Street crossing, in connection with the superstructure proposed to be constructed over said Michigan Central railroad by your petitioner; that after fully hearing both parties, the said board granted and entered upon the record of its proceedings the following order:

Copy of Order Approving Map.

STATE OF MICHIGAN:

Before the board of railroad crossings.

In Re the Approval of the Map of the FORT STREET UNION DEPOT COMPANY'S Proposed Route in the City of Detroit.

DETROIT, MICHIGAN, *November* 8, 1889.

At a meeting of the board of railroad crossings, held at the Russell house, pursuant to adjournment.

Present: Hon. John T. Rich, commissioner of railroads; Hon. Gilbert R. Osmun, secretary of state; Hon. S. V. R. Trowbridge, attorney general, members composing the board.

In the matter of the application of the Fort Street Union Depot Company for the approval of the map of its proposed line of railroad tracks, between Twelfth and Third streets, in the city of
497 Detroit, county of Wayne, with a crossing of the several tracks of the Michigan Central railroad, in Woodbridge street, near the intersection of Eleventh street, said application now coming up for further hearing of the board, Mr. James F. Joy and Fred. A. Baker, duly appointed and authorized in such behalf, appeared as attorneys for the said Fort Street Union Depot Company, and Mr. Ashley Pond and Henry Russel as attorneys for and on behalf of the said Michigan Central Railroad Company.

Whereupon, the board having listened to the arguments of counsel, and to the statement of the engineers employed by each of the said parties in interest respectively, and to the statements of all other parties appearing before the board and desiring to be heard, and being otherwise fully advised and informed, and having first considered all and singular the premises, on motion of Mr. Osmun, seconded by Mr. Trowbridge, the said map and the said line of railroad as designated and located thereon were duly approved by the board, and the certificate of such approval over the proper signatures of the members of the board duly indorsed on said map.

And it was further determined and ordered by the board with regard to the crossing of the tracks of the Michigan Central railroad in Woodbridge street near the intersection of Eleventh, and that the tracks of the said Fort Street Union Depot Company shall go above those of the Michigan Central railroad at an elevation of at least 18 feet in the clear between the upper surface of the head of the rails in the Michigan Central tracks and the under surface of the girders in the superstructure of the said union depot company's bridge.
And the said superstructure shall be so constructed on River
498 street as to provide a passageway for teams and foot travelers, and in accordance with the plans and specifications to be first submitted to and approved by the commissioner of railroads.

The cost of the part of the superstructure for the passage of teams and foot travelers, and of the approaches thereto, shall be borne by

the two companies in interest, in equal proportions, share and share alike.

JOHN T. RICH,
Chairman of Board.

Attest: W. C. RANSOM,
Clerk of the Board."

That the route of the proposed tracks of your petitioner, as shown by said map and survey, lies upon and along River street in the said city of Detroit, from a point at or near Twelfth street to a point at or near Eighth street, and the terms and conditions under which your petitioner is to construct its said tracks upon and along said River street, have been agreed upon between the common council of the city of Detroit and your petitioner, as shown by the following ordinance, adopted by the common council and accepted by your petitioner:

Copy of Ordinance.

"Whereas, the Fort Street Union Depot Company is a corporation under the laws of this State, for the construction of a union depot on the southwest corner of Third street and Fort street west, in this city, and said company, for the purpose of furnishing access to said union depot, propose to build an elevated railroad in, upon and along River street, from the west side of the Thompson
499 farm to the east line of lot number ten (10) of the Labrosse farm; thence northeasterly to a point south of Fort*h* street, north of Congress street, and west of the west line of Seventh street; thence across Seventh, Sixth, Fifth and Fourth streets, between Fort and Congress streets; and

Whereas, the act under which said depot company is organized provides that the terms and conditions under which said elevated railroad may be constructed in any street shall be agreed upon between the company and the common council, and,

Whereas, the construction of said road may render it necessary to vacate Fourth, Fifth, Sixth or Seventh streets, between Fort and Congress streets, or to change the grade of Sixth or Seventh streets, therefore,

SECTION 1. It is ordained that the terms and conditions for the construction of said railroad along River street shall be as follows:

That is to say, the superstructure of said elevated railroad shall be supported by iron posts not more than 15 inches square or in diameter; that said posts shall be set along the line of the curbing now in said highway, and outside of the railroad and curbing, so that the superstructure will span the entire roadway or paved portion of said highway; said posts shall be not less than 30 feet apart along said curb-lines, except in crossing the Michigan Central railroad, where they shall be so placed as to be most convenient for both roads; said posts shall rest wholly upon solid foundations of masonry, wholly beneath the surface of the street, and such posts shall be of such length that at no point on the line of the said road shall the space between the surface of said River street, or any street

eading into said River street, and the superstructure, be less than 13 feet in the clear; and no posts shall be placed within or
500 between the curb-lines of any street leading into or intersecting said River street, or within the lines of the sidewalk upon such intersecting streets.

In case said roadway shall be constructed across and over any of the said Fourth, Fifth, Sixth or Seventh streets, the superstructure shall be supported either by stone walls, erected on the street lines, or by iron posts not more than 15 inches square, or in diameter, which shall be set so as to span the entire roadway of said streets, and none of which shall be set between the curb-lines of either of said streets, or within the sidewalk lines thereon; the said posts shall rest upon solid foundations of masonry wholly beneath the surface of said streets; and at no point on either of said streets, provided the roadway shall be constructed over either of said streets, shall the space between the surface of the street and the superstructure be less than 13 feet clear, under said structure; and

The superstructure shall consist of iron and steel girders and ties, having an aggregate height of five feet, substantially as shown on the 'cross-section' thereof, filed by said company with the city clerk, with a map showing the route of said railroad along said River street and the location of the posts for the support, and which said cross-section and map are made a part of this ordinance.

Suitable iron plans or shields to catch the ashes and refuse from locomotives shall be constructed upon the tracks of said elevated railroad on and along River street, and over any other street above which said roadway shall be constructed. And the said company shall cause to be properly lighted to the satisfaction of the board of public works the said River street, under said superstructure, and any street crossing over which said roadway may be constructed.

501 SEC. 2. The said company shall keep the posts and superstructure of said elevated railroad in good order and repair, and in constructing the same shall obstruct the streets for a reasonable time only.

SEC. 3. In case the common council should, in its discretion, at any time hereafter resolve and determine to vacate the said Fourth, Fifth, Sixth and Seventh streets, or either or any of them, and take the necessary steps and proceedings to vacate the said streets, or either of them, and the same or either of them should be vacated, the said Fort Street Union Depot Company shall pay all the costs and expenses of such proceedings, and shall pay all damages which may be awarded in said proceedings to any person or persons by reason of such vacation.

SEC. 4. In case the said roadway should be constructed by said company over the said Fourth, Fifth, Sixth or Seventh streets, or over either of said streets, at a height leaving a space less than 13 feet in the clear between the present surface of such street and the superstructure of said roadway, and the common council should, in its discretion, at any time hereafter, resolve and determine to change the grade of either or any of said streets, and the same be

changed, the said Fort Street Union Depot Company hereby agree to pay all the costs and expenses of such change and alteration of grade, and to pay all damages that may be awarded to any person or persons by reason of change of grade, and fully to indemnify the city against any and all claims, awards or judgments that may be recovered against the city by reason of such change of grade.

SEC. 5. The said company shall acquire by purchase or con-
502 demnation, from the adjoining property-owners, the right to build said elevated railroad in said street, as required by the constitution and laws of this State.

SEC. 6. In consideration of the police and fire protection, and in lieu of local taxes, the said company shall, and it hereby agrees to pay to the city treasurer, on or before the first day of July in each year, two and one-half per cent. of the gross earnings of said company, as determined by the State railroad commissioner and auditor general, in pursuance of sections 19, 20 and 21 of the union depot act of 1881. Provided, that if by any change in the constitution or laws of this State, the company shall hereafter be required to pay local taxes, then the company is to be credited upon the percentage herein stipulated, with the amount of local taxes it may be required to pay.

SEC. 7. The said company shall within thirty (30) days after the passage of this ordinance file a written acceptance of the terms and conditions thereof with the city clerk, and shall procure from the owner or owners thereof a deed to the city of Detroit, dedicating to the public use as a street all that parcel of land in the city of Detroit, in the county of Wayne and State of Michigan, from River street to the channel bank of the Detroit river, including between the lines of Twelfth street extended, except the part thereof owned by the Michigan Central Railway Company, and the same is to be kept open and clear for public use, and shall cause said deed to be filed with the controller of the city; and,

Said company shall execute and deliver to the city of Detroit a good and sufficient bond, in the penal sum of $500,000, to be approved by the common council, conditioned for the faithful performance of the terms and conditions of this ordinance, and to
503 fully indemnify and save harmless the city of Detroit, from any and all claims for damages for which said city may be made or become liable to pay, by reason of the construction, maintenance or operation of said railroad or superstructure. This ordinance shall take effect upon the filing of said acceptance, the delivery of said deed and the approval of said bond."

6. That heretofore, to wit: on the 14th and 15th days of June, 1890, the Michigan Central Railroad Company by Henry Russel, its duly authorized agent and general attorney, and your petitioner by William W. Crapo, its duly authorized agent and president, entered into a contract in writing as shown by the following memoranda:

Copy of Letter from Russel to Crapo.

DETROIT, *June* 14, 1890.

W. W. Crapo, Esq., pres. Fort Street Union Depot Company, Russell house, Detroit, Mich.

DEAR SIR: In compliance with your request, I herewith submit to you a memorandum of this company's proposition in respect to the construction of your road through Woodbridge street, in the city of Detroit, across this company's tracks and in front of its premises, as stated verbally in our conference at my office this morning.

First. Your company and this company to comply with the order of the State railway crossing board and of the commissioner of railroads in respect to the crossing of this company's track and the construction of a viaduct for teams and foot travelers in connection with your structure, each company to bear one-half of the cost of construction and maintenance of the viaduct for teams and foot travelers and its approaches; and this company will furnish, without charge, the use of its private property south of Woodbridge street necessary for the construction of a viaduct, and its
504 approaches in accordances with said orders, and will waive all claim for damages arising to this company by reason of the construction of such viaduct and its approaches, and of your company's elevated structure within the limits of said approaches upon, and in front of this company's property.

Second. This company will give to your company the right to cross a triangular piece of this company's private property overhead on the southeast corner of Woodbridge and Twelfth streets, to enable your company to swing out onto Woodbridge street. I am not informed as to the exact measurements of the property which you require, but I understand it is a very small piece. This being so, we will be able readily to agree what compensation, if any, your company shall pay for this right. It would probably, in all event, be a small sum.

Third. As to the abutting damages arising to this company from the construction of your road upon the elevated structure upon and along Woodbridge street in front of this company's property, a distance of about 2,100 feet, as I am at present advised, we will, in the first place, deduct 1,300 feet covered by the viaduct and the approaches, in respect to which this company, as above mentioned, agrees to waive any claim of damages, and for the remaining 800 feet of property fronting on River street, this company will agree that your company may pursue either one of the following three methods:

1. You may proceed at once with the construction of your road upon an agreement that, at the end of either one or two years, as you may elect, allowing sufficient time for your company to complete its road and begin operation, and then from the actual knowledge of the situation, your company is to pay such damages as we

may, by agreement, determine to be fair to this company, or,
505 failing such agreement, as may be determined by three arbitrators, to be chosen in the usual manner; or,

2. Your company may proceed at once by condemnation proceedings at law to have a commission appointed to determine what the damages of this company are in respect to said 800 feet of frontal on River street, and your company pay the damages determined by such commission; or,

3. Your company submit a fair and reasonable offer of what you are willing to pay for this right of constructing and maintaining your road and operating your trains, etc., upon River street in front of the said 800 feet of this company's property, and upon receiving such offer from you I will at once lay the same before the executive committee of this company and advise you promptly as to their action.

In the absence of the president of this company, I am willing, exercising due regard to the rights of this company, to go to the full limit of my authority and discretion in order to reach an agreement with your company so as not to obstruct or delay the construction of your road, and in submitting the foregoing proposition I have done so.

Yours truly, HENRY RUSSEL, *Gen'l Att'y.*

P. S.—It must be distinctly understood that the question of the amount of compensation, which this company may be entitled to receive by reason of the construction and operation of your elevated road in front of said 800 feet of its property on River street, is not in any way to be affected by this company's consent to the construction without compensation of your structure and said viaduct and approaches in front of the rest of its property.

H. R.

506 *Copy of Letter from Crapo to Russel.*

SAGINAW, MICH., *June* 16, 1890.

Henry Russel, Esq., general attorney Mich. Cent. Railroad Co., Detroit, Mich.

DEAR SIR: The propositions and offerings named in your letter to me of June 14, are hereby accepted in behalf of the Fort Street Union Depot Company.

The railroad bridge over your tracks, and also the viaduct, in their general character, I understand, are to be the same which are embraced in the plans which were considered by us at our last interview, subject to such modifications in details as shall be acceptable to both parties and approved by the railroad commissioner.

In reference to the damages arising to your company I understand all claims are waived on that portion of Woodbridge or River street extending between the two approaches of the viaduct, estimated by you at 1,300 feet, but the exact distance is to be determined by actual measurements, on adoption of the plan for the work.

It is the preference of this company to determine as soon as practicable the amount of damages which it may be required to pay, and as I am assured by you that condemnation proceedings at law, and the appointment of a commission, will not be regarded as a hostile or litigious method of reaching the question in dispute, I shall direct the attorney of the Fort Street Company to proceed as expeditiously as practicable to take the necessary steps to this end.

The two companies having reached an agreement upon the main points which have been at issue, I am confident that the construction will be attended by the exercise on both sides of such
507 accommodations as will secure to you as little inconvenience, and to us as little delay as the character of the work will permit.

Yours truly, WM. W. CRAPO,
President Fort Street Union Depot Company.

7. That afterwards, to wit, on the 15th day of July, 1890, the Michigan Central Railroad Company and your petitioner agreed upon a plan for the construction of a viaduct or elevated railroad for the use of your petitioner and of passageways for teams and foot travelers, over the tracks of said Michigan Central Railroad at said River Street crossing, with this exception, that the Michigan Central Railroad Company preferred and insisted that abutments should be placed across said River street on each side of said crossing so as to close said River street underneath the viaduct or elevated railroad of your petitioner, thereby compelling all teams and foot travelers to use said overhead passageways designed for their use, and conferring upon said Michigan Central Railroad Company the entire and unobstructed use and possession of said street crossing; and your petitioner preferred and insisted that said abutments should not be built, and that the street should be left open under your petitioner's viaduct or elevated railroad, so that the drivers of teams and vehicles, and foot travelers, could pass along said street and cross said Michigan Central Railroad tracks on the street level, and underneath the viaduct or elevated railroad, or pass over said tracks on the passageways for teams and foot travelers, as they might at the time of passing prefer.

8. That afterwards, to wit, on said 15th day of July, 1890,
508 your petitioner, as required by order of the State railroad crossing board approving said map and survey, submitted a plan for the construction of said overhead crossings to the Hon. John T. Rich, commissioner of railroads, for his approval; that notice was given to the Michigan Central Railroad Company of the application for the approval of said plan; that thereupon the Michigan Central Railroad Company also submitted a plan therefor; that the only difference between the two plans was, that one provided for closing the street with abutments, and the other left the street open; that both companies were fully heard by the commissioner upon the merits of said plans, and after such hearing the said commissioner did approve of the plan so submitted by your

petitioner, and indorsed his approval thereon and filed the same, so indorsed, in the office of the commissioner of railroads, and he also delivered a duplicate original of said plan and indorsement to your petitioner, and the same is now in its possession, and is made a part of this petition.

A copy of said plan as so approved is herewith filed and served.

9. That your petitioner has also prepared and adopted a plan for the construction of its proposed viaduct or elevated railroad in said River street from a point near Twelfth street to a point near Eighth street, and said plan at said River Street crossing conforms with the crossing line so approved by the railroad commissioner. Said plan is also made a part of this petition, and a copy thereof is herewith filed and served.

10. That the Michigan Central Railroad Company is the owner and in possession of all the property on the south side of River street between Third and Fourth streets, and extending from
509 River street to the channel bank of Detroit river, except the westerly one hundred and fifty feet of the Woodbridge farm, and the easterly 11 feet of the Longnon farm, and the title to which strip of 160 feet in width, is — the Detroit, Lansing & Northern Railroad Company, but subject to the rights of the Michigan Central Railroad Company, which is in possession of said strip under said contracts and agreements existing between the two companies, and by virtue of which, as your orator has been informed and believes, and charges the truth to be, the said Michigan Central Railroad Company has an equitable right to acquire said title.

The Michigan Central Railroad Company is also the owner and in possession of all the property on the north side of said River street and extending westerly from Tenth street to the lot or parcel of land owned by Mary Specht, and adjoining the tracks of the Michigan Central railroad, as the same is shown by the plan for the construction of said viaduct or elevated railroad hereinbefore mentioned, and which property of the Michigan Central Railroad Company has a frontage on the north side of said River street of 520 feet more or less.

The Michigan Central Railroad Company is also the owner and in possession of a parcel of land on the north side of said River street and lying between the property of said Mary Specht and the property of A. Backus, Jr., as shown on said plan, and which parcel has a frontage on River street of 17 feet more or less.

11. That your petitioner desires to build said viaduct or elevated railroad and to construct the same according to the terms and conditions, and in full compliance with the ordinance agreed upon between the common council of the city of Detroit and your
510 petitioner, as aforesaid, the order of the State railroad crossing board, the crossing plan approved by the railroad commissioner, and the general plan designed and adopted by your petitioner as aforesaid; and your petitioner also desires to comply with, and to fully execute and perform its contract with the Michigan Central Railroad Company, as contained and expressed in the letters aforesaid, and it hereby offers and agrees to join with the

Michigan Central Railroad Company, in the construction of said passageways for teams and foot travelers, and the approaches thereto, and pay its half of the cost and expense thereof.

12. That your petitioner seeks to acquire under this petition, in the county of Wayne, and from the Michigan Central Railroad Company, the following real estate, property and franchises, that is to say:

I.

The right of way to construct and maintain said viaduct over the triangular piece of land situated at the southeast corner of River street and Twelfth street, the posts to be set as indicated on the plan adopted by your petitioner, and the superstructure to be at least fourteen feet in the clear above the tracks of the Michigan Central Railroad Company.

II.

The right of way to construct and maintain said viaduct on River street, in accordance with said ordinance, and the plan adopted by your petitioner, in front of the property of the Michigan Central Railroad Company, situated on the south side of River street,
511 and extending from the east line of Twelfth street to the westerly end of the westerly approach to said passageway for teams, and also extending from the easterly end of the easterly approach to said passageway for teams to the point where said viaduct will pass wholly out of said River street, the intention being to cover and describe the frontage of the Michigan Central Railroad Company on River street, mentioned in the letter of Russel to Crapo as eight hundred (800) feet, as distinguished from that part of the frontage within the limits of the approaches to said passageway for teams, and mentioned in the letter of Russel to Crapo, and the letter of Crapo to Russel, as thirteen hundred (1,300) feet.

III.

The right of way to construct and maintain said viaduct on River street, in front of and upon the property of the Michigan Central Railroad Company, and within the limits of the approaches to passageway for teams, in accordance with said ordinance, the said order of the State railroad crossing board, and the plan for said crossing approved by the railroad commissioner, coupled with the performance by the Michigan Central Railroad Company of all the duties, liabilities, obligations and promises, which it is now legally bound to perform, whatever the same may be, under the order made by said board, the plan approved by said commissioner, and the contract of agreement between the two companies expressed in said letters.

13. That all of the real estate, property and franchises set forth and described in the preceding paragraph of this petition are required by your petitioner for the purposes of its incorpora-
512 tion, and the taking thereof is necessary for the public use; that the union depot and station grounds proposed by your

petitioner, and the proposed railroad tracks connecting therewith, are a necessary public improvement, and public necessity requires that all of said real estate, property and franchises, and all of the estate, title and interest of the Michigan Central Railroad Co. therein, as herein described and set forth, should be taken for said improvement, and for the use and benefit of the public.

14. That your petitioner has not been able to acquire title to the said real estate, property and franchises, and that the reason of such inability is this, that your petitioner has been unable to agree with the Michigan Central Railroad Co. for the purchase thereof; nor has your petitioner been able to agree with the Michigan Central Railroad Co. upon the question whether the contract and agreement between the two companies, as expressed in said letters, is still a valid and binding contract, and one the Michigan Central Railroad Co. is legally bound to perform.

15. That your petitioner has acquired from the Detroit, Lansing & Northern Railroad Co. the right to construct and maintain said viaduct and passageway for teams and foot travelers in front of the strip of land one hundred and sixty (160) feet in width, the title to which, as hereinbefore stated, is in said company, but said right has been so acquired subject to all of the legal and equitable rights of the Michigan Central Railroad Company in and to said strip of land.

16. That the Michigan Central Railroad Company claims and pretends that the contract between it and your petitioner, contained and expressed in said letters, is not now a binding contract,
513 because the plans mentioned in the letter of Crapo to Russel provided for closing River street with stone abutments on each side of the crossing, and that your petitioner has therefore violated the contract by securing the approval of a plan by the railroad commissioner, which omits said abutments and leaves the street open.

In answer to said claim and pretense, your petitioner submits and shows:

1. That your petitioner has been informed and believes and charges the truth to be that the plans mentioned in said letter as having been considered by said Russel and Crapo, did not provide for stone or other abutments, which would close said street at said crossing.

2. That said Russel and said Crapo both understood and believed that said plans so considered by them, did not provide for closing said street with abutments.

The understanding and belief of said Russel is alleged upon information and belief.

3. That if the contract, as expressed in said letters, and as understood by said Russel and Crapo, does provide for abutments, the omission thereof on the plan so adopted and approved, is merely a modification in details within the meaning of said contract, and as to which, in any event, the decision of the railroad commissioner, in approving said plan under the power reserved to him by the order of State railroad crossing board, approving your petitioner's

map and survey, is conclusive and final, and binding upon both companies.

Prayer.

Your petitioner prays that an order may be granted by the court appointing three disinterested and competent freeholders as
514 commissioners, under the constitution and laws of this State to ascertain and determine the public necessity for taking said real estate, property and franchises for the purposes of your petitioner and the public use and benefit, and to appraise and determine the damages or compensation to be allowed to the Michigan Central Railroad Company as the owner of, or party interested in the real estate, property and franchises so proposed to be taken.

FRED. A. BAKER,
Attorney for Petitioner.

STATE OF MICHIGAN, } ss:
County of Wayne, }

On this 20th day of September, 1890, before me, a notary public in and for said county, personally appeared Fred. A Baker, the person who signed the above and foregoing petition, and made oath that he is the attorney for said petitioner, and signed said petition on its behalf; that he has read said petition and knows the contents thereof, and the same are true of his own knowledge, except the matters and things therein stated to be on information and belief, and as to those he believes the same to be true.

WALTER BARLOW,
Notary Public, Wayne County, Michigan.

To the Michigan Central R. R. Co.:

You will please take notice that on Monday, the 6th day of October, 1890, at the court-room in the city hall, in the city of Detroit, at the opening of court on that day, or as soon thereafter as counsel can be heard, a petition, of which the within and foregoing is a true copy, will be presented to the circuit court for the county of
515 Wayne, and at which time and place you are required to show cause, if any you have, against the prayer of said petition.

Detroit, Sept. 20, 1890.

FRED. A. BAKER,
Attorney for Petitioner.

Mr. DICKINSON: You remember, when Mr. Joy was on the stand, you agreed to bring in the agreement between the union depot company and the Michigan Central?

Mr. BAKER: The letters that I read in that petition constitute the written agreement between the two companies.

Mr. Baker then read the answer of the Michigan Central as follows:

In the Circuit Court for the County of Wayne.

In the Matter of the Petition of the FORT STREET UNION DEPOT COMPANY to Condemn, as Against the Michigan Central Railroad Company, the Right to Construct its Tracks over River Street from Twelfth Street to Eighth Street, and over a Triangular Piece of Ground Belonging to the said Michigan Central Company at the Corner of Twelfth and River Streets.

The said Michigan Central Railroad Company answering said petition:

First. Denies each and every of the allegations in said petition contained, except as hereinafter otherwise appears.

Shows and says, with reference to the alleged agreement between said Fort Street Union Depot Company and this respondent, that subsequently to the making of the order by said State railroad crossing board, as set out in said petition, the commissioner of railroads of said State made an order, of which the following is a copy:

516 "STATE OF MICHIGAN:

"OFFICE OF THE COMMISSIONER OF RAILROADS.

"To the Fort Street Union Depot Company and the Michigan Central Railroad Company:

"Whereas, in the judgment of the undersigned commissioner of railroads in and for the said State of Michigan as aforesaid, the construction of the proposed viaduct of the said Fort Street Union Depot Company along the line of River street, in the city of Detroit, in the interest of the public safety, and that of the employés on your respective roads, will necessitate the construction of an overhead passageway for the use of teams and footmen at the crossing of the said Michigan Central tracks in said River street near Tenth, therefore, by virtue of the authority in me vested, as commissioner of railroads as aforesaid, by the provisions of section 17 of act No. 79 of the Session Laws of 1873, and the several acts amendatory thereof, it is hereby ordered and directed that in the construction of the said Fort Street union depot viaduct along the line of River street, as proposed by the said company, the posts or supports of the said viaduct east of the Michigan Central tracks, upon the south side of said viaduct, shall be set so as to conform in alignment with those upon the south side of the viaduct and west of the said Michigan Central tracks.

"There shall be constructed upon the south side of said viaduct over the tracks of the said Michigan Central railroad a passageway for teams, to be not less than twenty-four feet in width, with the necessary approaches to the same, of not exceeding four per cent. grade, and the posts or supports of the said viaduct to be so set as to afford safe and convenient access from the street under the viaduct to said approaches at either end of the same.

517 "There shall also be provided on the north side of said viaduct, a sidewalk for the use of footmen over the tracks of

the said Central railroad, to be reached by safe and convenient stairways from either side of tracks below. And such sidewalks shall be of such width as the ordinances of the city of Detroit shall require, and shall also be provided with safe and sufficient railings to insure the safety of people against falling from said sidewalks when passing along the same.

"The plans for the said viaduct, with the said passageways hereby ordered to be erected, will be submitted to the commissioner of railroads for his approval before the same shall be adopted, and the structures put in course of construction in accordance therewith.

[SEAL.] "Given under my hand and the seal of the department at Lansing, this 30th day of April, A. D. 1890.

"JOHN T. RICH,
"*Commissioner of Railroads.*"

And this respondent is advised and submits, that the terms of the said order necessarily contemplated a change of grade of said River street, at the point where it crosses the tracks of this respondent, and required the construction of an overhead passageway for teams and footmen, so as to avoid all further use whatever of the dangerous grade crossing at that point; and this respondent shows that the negotiation between the said union depot company and this respondent, resulting in the letter, in said petition set forth, from Henry Russel to said W. W. Crapo, and the reply of the said Crapo thereto, were had in contemplation of the terms of said order, and that the plan referred to in the letter of said Crapo to said Russel, showed abutments across said River street; and that by
518 the said agrement, as witnessed by the said correspondence, and as understood by this respondent and by said Russel, abutments were to be constructed across said River street, on either side of the tracks of this respondent, so as to avoid the use of said street at grade; and this respondent shows and avers that the subsequent application by said Fort Street Union Depot Company to the commissioner of railroads, for the approval of plans omitting said abutments and permitting the further use of said street at grade, and the approval of said plans by said commissioner of railroads, were in disregard of said agreement, and that the said agreement thereupon ceased to be binding upon this respondent; and this respondent is advised and submits that this court has no jurisdiction in this proceeding, to entertain and determine the controversy that has thus arisen between said Fort Street Union Depot Company and this respondent, as to whether or not said agreement is binding upon this respondent.

And this respondent is advised, alleges and submits, that it is, in this proceeding, entitled to litigate the rights of the said Fort Street Union Depot Company, to entertain this proceeding to condemn the property of this respondent in like manner and to the same extent as if said alleged agreement had never been made; but in case it is conceded or decided by this court that said alleged agreement is not binding upon this respondent, and that this respondent is therefore entitled to have its damages and compensation for the construction

of the road of the said Fort Street Union Depot Company along River street assessed in like manner and to the same extent as if said alleged agreement had never been made, this respondent hereby waives any and all objections to the maintenance of this pro-
519 ceeding by said Fort Street Union Depot Company, and consents that the only question to be tried herein shall be the question of the amount of damages to be awarded to this respondent.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
By H. B. LEDYARD, *President.*

HENRY RUSSEL,
Attorney for Respondent.
ASHLEY POND, *Of Counsel.*

Mr. BAKER: The court upon the preliminary hearing, appointed three commissioners, Mr. Frank J. Hecker, Mr. George H. Barbour, and Mr. Michael W. O'Brien, and they took testimony about as we are taking it here, a big volume of it, which Mr. Dickinson can introduce in evidence, if he wants to.

Mr. DICKINSON: You can put it in if you want to.

Mr. BAKER: No, I do not care to put — in. After they had heard the testimony, they made this report to the court, which I will read.

Mr. Baker then read report of commissioners as follows:

520 "STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
THE MICHIGAN CENTRAL RAILROAD COMPANY, Respondent.

To said court:

We, Frank J. Hecker, George H. Barbour and Michael W. O'Brien, inhabitants and freeholders of the county of Wayne, duly appointed and sworn as commissioners in this cause, to ascertain and determine the necessity of taking for the public use, to wit, for the purpose of constructing and operating a union railroad depot and station grounds in the city of Detroit, in said county, with the necessary connecting railroad tracks and accommodations, all of the real estate, property, franchises, rights, easements and privileges described in the petition in this cause; and to ascertain and determine the compensation or damages which ought justly to be made by the Fort Street Union Depot Company to the Michigan Central Railroad Company therefor, do respectfully certify and report, that we met at the office of James F. Joy, in the Hammond building, in the city of Detroit, on the 30th day of October, 1890; that the Fort Street Union Depot Company appeared by F. A. Baker, its attorney, with James F. Joy as counsel, and the Michigan Central Railroad Com-

pany appeared by Henry Russel, its attorney, with Ashley Pond, as counsel; that we then proceeded to hear the proofs and
521 allegations of the parties, and also proceeded together to view the premises proposed to be taken, and for that purpose we continued our sessions from day to day until the 23d day of December, 1890, when said cause was submitted to us by said parties; that we caused the testimony and the arguments of counsel, given before us, to be stenographically reported and reduced to writing, at the request of the parties, and the same are hereby returned and filed.

After said cause was submitted to us, having maturely considered the proofs and allegations of the parties, and the arguments of the counsel thereon, all of us acting together, we did ascertain and determine that public necessity requires that said real estate, property, franchises, rights, easements and privileges, should be taken for the public use, to wit, for the purpose of constructing, maintaining and operating said petitioner's proposed railroad tracks, as provided for in the plan of structure submitted by said Fort Street Union Depot Company and approved by the commissioner of railroads, which plan it recorded in the office of the commissioner of railroads of the State of Michigan, and which provides for an elevated structure for railroad tracks, and as part thereof, an elevated viaduct over the tracks of the Michigan Central railroad for teams and foot passengers, as is more fully set forth in the ordinance of the city of Detroit, granting to said Fort Street Union Depot Company the right to use and occupy River street from Eighth street to Twelfth street, and in the order of the railroad crossing board of the State of Michigan, dated November 8, 1889, approving the route selected by said Fort Street Union Depot Company, and determining the place and manner of crossing of said petitioner's railroad across the said respondent's tracks, and in the order of the commissioner of railroads
522 of the State of Michigan, dated April 30, 1890, requiring said Fort Street Union Depot Company to erect its structure at the said crossing of respondent's track in such manner as to provide an overhead crossing for teams and foot travelers in connection therewith, and in the order of said commissioner of railroads, dated August 5, 1890, approving the plan of structure submitted by said Fort Street Union Depot Company as required by the said order of said railroad crossing board and of said commissioner of railroads.

And thereupon we did further ascertain and determine that the compensation which ought justly to be paid by the Fort Street Union Depot Company to the Michigan Central Railroad Company for the said real estate, property, franchises, easements and privileges, describing the same separately, as in the petition as amended in this cause, is as follows:

I.

The right of way to construct and maintain said viaduct over the triangular piece of land situated at the southeast corner of River and Twelfth streets, the posts to be set as indicated on the plan

adopted by your petitioner, and the superstructure to be at least fourteen feet in the clear above the tracks of the respondent.

The compensation and damages to be paid by the Fort Street Union Depot Company to the Michigan Central Railroad Company for the above right of way as ascertained and determined by us is the sum of two thousand nine hundred ($2,900) dollars.

523 II.

The right of way to construct and maintain said viaduct on River street, in accordance with said ordinance and the plan adopted by your petitioner, in front of the property of respondent, situated on the south side of said River street, and extending from the east line of Twelfth street to the westerly end of the westerly approach to said passageway for teams, and also extending from the easterly approach to said passageway for teams to the point where said viaduct will pass wholly out of River street.

The compensation and damages to be paid by the Fort Street Union Depot Company to the Michigan Central Railroad Company for the above right of way, as ascertained and determined by us, is the sum of eight thousand two hundred and fifty ($8,250) dollars.

III.

The right of way to construct and maintain said viaduct on River street, in accordance with said ordinance, and the plan adopted by your petitioner, in front of the property of respondent, situated on the south side of said River street, between the easterly end of the easterly approach and the westerly end of the westerly approach to said passageway for teams.

The compensation and damages to be paid by the Fort Street Union Depot Company to the Michigan Central Railroad Company for the above right of way, as ascertained and determined by us, is the sum of fifteen thousand seven hundred and fifty ($15,750) dollars.

524 IV.

The right of way to construct and maintain said viaduct on River street, in accordance with said ordinance and the plan adopted by your petitioner, in front of the property of respondent, situated on the north side of said River street and extending from the westerly line of Tenth street westerly to where the tracks of respondent's railroad cross River street, and which, in the testimony, is called the flour-shed lot.

The compensation and damages to be paid by the Fort Street Union Depot Company to the Michigan Central Railroad Company for the above right of way, as ascertained and determined by us, is the sum of one thousand six hundred and sixty ($1,660) dollars.

The total compensation and damages awarded by us is the sum of twenty-eight thousand five hundred and sixty (28,560) dollars.

Compensation for damages to said respondent resulting from the

construction of the said viaduct for teams and foot passengers is not included in this award.

Given under our hands this 29th day of December, 1890.

FRANK J. HECKER,
GEORGE H. BARBOUR,
M. W. O'BRIEN,
Commissioners."

Mr. BAKER (to jury): You have expressed a desire to see this engine operated down there in the night-time. We would also like to have you see it in operation in the daytime, and if it is convenient for you all, we would like to have you go there say
525 at half past seven tonight, at the Twelfth Street depot, and we can stay there and take a trip out on the road.

Mr. DICKINSON: I prefer that you (the jury) carry out the suggestion made by yourselves on Friday, that without notice to either counsel beforehand, you tell that you will go the afternoon of the day you intend to.

Mr. BAKER: You can fix it to suit yourselves. The jury will understand that I don't want to interfere with their duties. All I can say is that Mr. Joy is here, and intends to leave town early this week, and he desires to go with us to see the engine. If you cannot do it tonight, we would like you to go tomorrow.

Mr. DICKINSON: How long will Mr. Joy be away?

Mr. BAKER: I don't know, perhaps until the latter part of this week. The engine is there, and we would like you to go tonight or tomorrow night, and if you want to consult among yourselves, you may retire to your jury-room and say when you will do it. If you don't want to go now, you can wait until Mr. Joy comes back, but he takes a great deal of interest in this case, and he would like to be there with us.

Mr. DICKINSON: We would like to have Mr. Joy there, but we would like the jury to determine for themselves.

Mr. BAKER: If you do not want to go tonight or tomorrow night, wait until the latter part of the week, until Mr. Joy gets back, but it is for you to say when you will do it.

Foreman Lesher says the jury would like to retire and consult about the matter. The jury then retire and remain out of the court-room about ten minutes, and then return, and the foreman then says:

Foreman LESHER: Some of the jurymen cannot go down
526 this evening, on account of previous engagements, so that we have decided to go down next Monday evening, and leave the city hall at half past seven.

Mr. BAKER: Mr. Joy will be back then.

Mr. DICKINSON: Will you let us see the engine in the meantime, Mr. Baker?

Mr. BAKER: It is engine No. 35; it will be in operation down there all the time. Anybody who wants to go and look at it will

be welcome, and we shall only be too glad to have them go and see it.

Then adjourned to Tuesday, June 23, 1891, at 2 p. m.

JUNE 23—2 p. m.

CHARLES H. ELLIS, recalled for petitioner.

Examined by Mr. BAKER:

Q. Can you tell us what the grade is of the elevated railroad in front of the property of Mr. Backus?

A. Four and one-tenth of a foot to the hundred, that is 22 feet to the mile.

Q. And west of that is where it is 50 feet to the mile?

A. From the point just east of Twelfth street the grade descends going west.

Q. East of the Backus property?

A. From the Michigan Central crossing, it is level going east, as far as Seventh street, and then there is a little grade.

Q. Will it be practicable to have cars stand on these tracks in front of the Backus property?

A. I think not.

527 Q. You could not use a track, where the grade is 22 feet to the mile, for a yard, for store room?

A. Cars would not stand there without the brakes on them. It is estimated the cars will stand on a grade of about 11 feet to the mile, and even on that grade a slight wind will start them.

Q. Is it practicable to build elevated side tracks along this elevated railroad for the use of the adjoining property?

A. Yes, sir.

Q. Is it a common thing to have elevated railroad tracks—that is, has it frequently been done?

A. Yes, sir; most all the coal business of the country is done on elevated trestles.

Q. Have you made a plan of side tracks that could be put in on Mr. Backus' property as it is now situated?

A. Yes, sir.

Q. Does that show a side track where the cars would stand alongside of his mill?

A. Yes, sir.

Q. With the switch at the east end?

A. There is a switch at the east end of the property near the railroad viaduct, switching out of the railroad viaduct, going west onto the Backus property.

Q. So that a train that came up on this railroad could back cars right in onto it?

A. Yes, sir.

Q. Did you make a plan with a switch west of the property?

A. Yes, sir.

Q. That throws the side track more to the easterly part?

A. Yes, sir.

528 Q. The first one, the side track, would be right alongside of his mill. How many cars could you store in front of his mill?

A. Four easily, and it would hold five.

Q. You could have three right in front of the mill, could you not?

A. Yes, sir.

Q. Where they could stand as long as he wanted them to?

A. Yes, sir.

Q. And on the other side track they could stand over against the open shed he has there?

A. Yes, sir.

Q. Mr. Backus has a lumber yard at the foot of the old union depot grounds, at the westerly side?

A. Yes, sir.

Q. And he now hauls all his lumber up to his mill by teams?

A. Yes, sir.

Q. And with the construction of this elevated railroad, would it be practical, by putting in this side track, to handle all his lumber by cars?

A. It would be practical to handle the lumber between the yard and the mill.

Q. By cars?

A. Yes, sir.

Q. So you do away with the use of a large number of teams?

A. Whatever he hauled on the cars he would have to haul by teams.

529 Cross-examination by Mr. DICKINSON:

Q. Which way is the old union depot property on this plat as it is presented?

A. West.

Q. This would be the switch that you have put in?

A. I have two plans.

Q. The switch running in there along the front of the Backus property, the switch would come in just below?

A. Yes, sir.

Q. Whose property is this?

A. That is the Backus property.

Q. You say that the lumber for the Backus mill could be run in on the main track of the elevated structure?

A. Yes, sir.

Q. How many tracks below the Backus property are there?

A. Two.

Q. So that I understand you that it is proposed, as a legitimate and a proper thing, with this elevated structure to run cars loaded with lumber on the elevated railroad track?

A. Not that I know. This shows the practicability of it.

Q. It would have to run on the main track on here to get on the switch?

A. Yes, sir.

Q. The switch could also be used for the stove works, could it not?

A. A switch could be used.

Q. And a switch could be used for the Union mills?

A. Yes, sir.

Q. And yet all that freight connected with the switch would have to go on the main track with the elevated road?

530 A. Yes, sir.

Q. Is it proposed to do such a freight business over the main track?

A. That I don't know anything about.

Q. All those things that came up would have to go in front of Backus'—taking stoves out and so forth?

A. If they did that business.

Q. You would have to go up on the main track in front of the mill.

A. Yes, sir.

Q. Is that proposed to be done?

A. I don't know that it is.

Q. Do you know that it is a legitimate proposition to put a side track in here at one of the places?

A. It is perfectly practicable?

Q. Do you know whether it has been suggested?

A. Not that I know of.

Q. These would have to come in on Backus' property on the trestle-work, either way it came?

A. Yes, sir.

Q. And would have to be all located on this property?

A. Yes, sir.

Q. Would there be any grade in from the main track?

A. Just as they choose. It could be on a level, ascending or descending.

Q. How much can it descend?

A. For practical use it would not have much of a grade.

Q. Will you please tell me whether you have measured the height of the Backus building.

A. I have.

Q. What was it?

531 A. It was a month or two ago. My impression is that it was some 45 or 48 feet.

Q. What is the height of the top of the rail above the roadway?

A. About 25 feet in front of the mill.

Q. How high is the smokestack of the engine?

A. Fourteen to 16 feet.

Q. How high is the car from the rail to the top of the car?

A. Twelve or 13 feet.

Q. So that the cars would run in there about 36 feet from the bottom?

A. About 36.

Q. And the height of the building is how much?

A. About 45 feet.

Redirect by Mr. BAKER:

Q. You simply testify to what the engineering possibilities are?
A. That is all.
Q. Is it practicable from an engineering standpoint to put in a side track for the use of the Union mills and the match company and the Peninsular stove works, similar to this one that has been shown here?
A. Yes, sir.
Q. And in that way all that manufacturing property along there could be furnished additional railroad facilities?
A. Yes, sir.

Recross by Mr. DICKINSON:

Q. I would like to know what the grade is from the union depot property in going out from the union depot.
532 A. It is a level grade from the corner of Third street going west to the end of the depot building. Then from there the grade rises.
Q. About how much?
A. It rises from an elevation of 22 between three and four feet.
Q. How far?
A. The distance from that point to Seventh street. That would be about 700 feet.
Q. It rises in the distance of 700 feet about three feet and a half?
A. Yes, sir.
Q. From Fourth to Seventh?
A. Yes, sir.
Q. How much above the present grade would it be as you cross Fifth?
A. Between five and six feet, to my best recollection, above the present grade of the corner of Fifth and Fort.
Q. Do you know how Backus could use your switch? Does he not have facilities now, and does not every railroad, connected with every other road? Don't you understand that the law requires connections to be made with the switches he already has?
A. I have a dim recollection that one railroad crossing another is obliged to make connections if demanded.
Q. Do you know of any trouble Backus has of shipping over the Wabash or any other railroad in the country?
A. No, sir.
Q. On your plat, which is considered the Backus front?
A. That is marked west line of Backus property, and this is marked east line of Backus property.
533 Q. Could you make a turn or a side track in there that would run by the side of his building?
A. It could be done but it would not be a practical thing.
Q. All the way you could do would be to put a switch in there between his building and the present structure?
A. That is a practical thing. I have not tried a line in there. It

is possible to get in there by crossing other properties, but not to turn on this corner.

Q. Didn't you testify on the former trial that you could make that in there?

A. I don't think I did.

Q. Did you make any such switch as this in front of it?

A. No, sir.

Q. How would this switch benefit him more than the road itself?

A. Mr. Backus can judge of the benefit.

Q. Could he not get on this track just about as easy as to get on this elevated structure?

A. Yes, sir, or a line could be run parallel to that. It would hardly be a nice thing to let the cars run on the main track.

Q. How near does your proposed switch come to the building?

A. Ten feet.

Redirect by Mr. BAKER:

Q. Is it not usual to put in side tracks alongside of buildings and other property?

A. They are usually clamorous for them.

Q. It is not usual to run a side track on a sharp curve right around into the building?

A. Not unless there is a very urgent need of it.

534 Q. They usually put in their side track so that the cars cannot stand alongside of a building?

A. Yes, sir.

Q. Is it practical to put in a side track so that cars can be loaded and unloaded from Backus' factory just as it is, so as to connect it with this elevated road?

A. Yes, sir.

Recross by Mr. DICKINSON:

Q. You said that is used for coal cars?

A. Yes, sir.

Q. That is where there is a coal chute?

A. That is practical and the common way of handling coal.

Q. Is that what you mean as having seen elevated switches?

A. That is what I had reference to in regard to handling coal.

Q. Did you ever see an elevated switch for ordinary freight anywhere?

A. Yes, sir.

Q. Where?

A. In Cincinnati.

Q. Where?

A. The Kentucky Central has an elevated freight depot. All their freight is elevated from the ground up.

Q. That is an elevated freight depot?

A. Yes, sir. And the Pennsylvania Central in Philadelphia, before their Broad Street terminal was so crowded with passenger

trains, handled their freight in that way, all lowered from the street up.

Q. The track is elevated at Cincinnati, and the freight depot itself is elevated?

535 A. Yes, sir.

Q. The Backus property is not elevated, is it?

A. It is, three or four stories high.

Q. The business is not carried on upstairs, is it?

A. Yes, sir; we went through the mill together, Mr. Dickinson.

Mr. BAKER: The very first thing they do in that factory is to elevate the lumber?

A. Yes, sir.

Q. Did you see the operators sliding the boards, commencing at the bottom and putting it up to the top?

A. Yes, sir.

Mr. DICKINSON: The freight depot in Cincinnati is built itself on an elevation, is it not, set up on trestles like?

A. Simply because the grade was such.

Q. It is set up on trestles?

A. Yes, sir.

Q. Do you think that is any criterion for service of business in manufactories which are now at grade?

A. Not necessarily.

Q. You mean you can serve any place upstairs?

A. Yes, sir, or downstairs.

Q. Where in the country does an elevated structure serve business concerns from an elevated railroad. You do not mean to say they do that in Cincinnati except at the freight depot?

A. I have not covered the whole country. I mean to say it is possible and very easy to do.

Q. Do they in Cincinnati serve any manufacturing or business place from an elevated railroad?

A. I do not know that they do.

Q. Will you tell me any place where any elevated struc-

536 ture serves business places at an elevation, from an elevated road?

A. Not exactly like this. There are places where we have to build elevated roads to reach business.

Mr. BAKER: Mr. Dickinson knows where they do it. They do it in Minneapolis.

Q. Do you know anything about Minneapolis?

A. I am not an expert as to the business there.

Q. Mr. Baker has said they serve the mills from elevated structures. Do you not know from hearing the testimony on that point that they do not permit a locomotive to run by on any of these roads, but they do it by stationary engines?

A. I did not hear the testimony.

Redirect by Mr. BAKER:

Q. Is there any practical difficulty in making a side track that will carry a locomotive?

A. No, sir.

Q. You have seen Mr. Backus' mill, and you are a civil engineer?

A. Yes, sir.

Q. Do you know whether or not it would be just as practicable to elevate that lumber from the second floor as he does it with a machine which carries it up, would it be just as practicable to do that from the second story as from the first?

A. Yes, sir.

Q. Or from any other story where the cars were?

A. Yes, sir.

Q. In fact, in unloading a car, it would be handier to shove it down hill than up?

537 A. Yes, sir, that seems to be the preference. Lumber mills in Oscoda, all the tramways are on an elevation.

Q. So that they can pile it easy and carry it up further?

A. Yes, sir.

Q. With this lumber yard at the foot of Eighteenth-and-one-half street, would it be practicable to load cars there and to haul them up and put them on this side track and feed Mr. Backus' mill in that way?

A. Perfectly.

Recross-examination by Mr. DICKINSON:

Q. Do you think your cars would wait on the track while Backus made his inspection and selection of lumber which was to go up and come down?

A. The cars would be on the siding at his pleasure as long as he pleased.

A JUROR: About what grade is there at Eighteenth street?

A. They are on the surface there.

Mr. BAKER: And he loads and unloads lumber there now, does he not?

A. Yes, sir.

Q. If he wanted to shove it up to the mill all he would have to do would be to send it right on?

A. Yes, sir.

Mr. DICKINSON: Do you mean to be understood that they unload a foot of lumber at the mill?

A. They use to, years ago, unload there.

Q. They have a connection with the F. & P. M. tracks?

A. Where?

Q. By their side tracks?

A. With the Michigan Central, yes, sir.

538 Q. And from that with the F. & P. M.?

A. That is at their mill.

Q. With all those facilities they have good side tracks?

A. I suppose so.

Q. Do they unload a stick of lumber at their place from the car
A. I don't know that they do.

A JUROR: You think it would improve their situation by having this elevated road?

A. I cannot testify as to Mr. Backus' business in his mill. I know, from observation, that his teams are going daily from his lumber yard up to his mill. I know that this railroad runs from the lumber yard to the mill. It could do that business, what is being done there, every day, by a long string of teams, and his teams stand in the street there continually. The cars could stand the same way on his property.

A JUROR: They could not load on the car without first bringing it on the truck?

A. I don't know how that is. I am only saying they could draw it from the lumber yard. The matter of loading the car is a matter of detail.

Mr. BAKER: With the exception of calling Mr. Lothrop for the purpose of showing what advice he gave to Mr. Mulliken, we rest.

Mr. DICKINSON: I desire, in connection with this switching business, to show that all roads are bound to furnish connections with other roads in this State and every State.

Mr. BAKER: There is no doubt but what the Fort Street Union Depot Company is bound to put in these switches, if they ask for them.

Mr. DICKINSON: That is not the point.

539 Mr. BAKER: That is a part of it.

Mr. DICKINSON: I read from section 3355, Howell's Statutes, as follows:

"All railroad corporations shall grant equal facilities for the transportation of passengers and freight to all persons, companies or corporations, without discrimination in favor of any individuals companies or corporations; and shall, at all points of connection or intersection with the roads of other corporations, unite with such corporations in establishing and maintaining suitable platforms and station-houses for the convenience of passengers desiring to transfer from one road to the other, and for the transfer of baggage or freight whenever the same shall be desired by either corporation, or ordered by the commissioner of railroads; the expense of constructing and maintaining such station-house and platform shall be paid equally by such corporations. Such corporations, connecting or intersecting as aforesaid, shall also, whenever desired by either of them, or ordered by the commissioner of railroads, so unite and connect the tracks of said several corporations, as to permit the transfer from the track of one corporation to the other of loaded or unloaded cars designed for transportation on both roads. No railroad corporation shall in any manner discriminate in its rates of freight tariff from the same place to the same place in this State in favor of any individual, company or corporation doing business over its line of road, and shall grant the same rights and privileges to all shippers, subject to the same rates and classification, without rebate or any other

special privilege or rate, not extended to all other shippers in the same class who ship a like quantity or quantities. Any railroad corporation refusing to comply with any of the provisions of this section shall be liable to a penalty of not exceeding $500."

Mr. BAKER: In that connection I will call your attention to a provision in the union depot act, section 3489, which is as follows:

"Any corporation organized under this act, at any village or city, requiring tracks of considerable length to connect other rail-
540 roads with its station grounds, and where there may exist or spring up business establishments, manufacturing or otherwise, needing, or which may be fostered and promoted by easy access to railroads, shall have the right and authority to build side tracks to accommodate the business of all such establishments, and shall provide the necessary power and rolling stock for such purpose, charging only reasonable rates for the transaction of all such business."

Mr. DICKINSON: I now propose to read some sections of the statute, from the union depot act. We have a very strenuous contention here that they could not take the Michigan Central property along their yard. I never have contended, and I do not think that they could, without further legislation, take the Michigan Central property from the junction to Detroit on their right of way for another railroad. Let us have no question about the distinction. You could not take the Michigan Central property from the junction, the right of way, or any part of it, without legislation, providing it might be so taken. You cannot take it without there be a general act providing you should take it. By the constitution you cannot have any special legislation. You could not have a special act providing that any new company, naming it, could take the Michigan Central property, naming it. You can have a general act, providing that any company could take such and such property, under such circumstances.

Mr. BAKER: If you cannot take the right of way, how can you take the depot grounds?

Mr. DICKINSON: Mr. Baker asks me why, if you cannot take the right of way of the Michigan Central, or its railroad tracks, why can you take its depot grounds? That is what I am going to show you. This union depot company was organized, with the
541 statutes just as they have been read to you today, containing this very careful provision:

SEC. 3463. "In case any such company is unable to agree for the purchase of any real estate, property or franchises required for the purpose of its incorporation, it shall have the right to acquire the title to the same in the manner and by the special proceeding prescribed in this act, but there shall be no power, except for crossing, to take the track or rights of way of any other railroad company without the consent of said railroad company."

Leaving the inference clear that they may take anything else but the track or right of way.

Now I read you, in connection with that, this provision, and you will see how the two, and how the whole body of the law is in har-

mony. There is a provision which will protect the Michigan Central without new legislation, from taking its right of way, along its main track, from the junction in here, along its present route. You could not take up its track, you could not take up its right of way. The express provision of the statute prohibits you from taking its track or right of way.

I now read the section which I claim gives the power to condemn the right of way in this case over the grounds of the Michigan Central Railroad Company. The section is as follows:

SEC. 3357. "When any part of the land of any railroad company in this State, in or adjacent to its depot grounds, is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company organized as aforesaid needing such land for the purpose of a depot or terminal facilities to acquire the same in the same manner as may now be done for such purpose from individuals. The question of actual use and of necessity for
542 the aforesaid purpose by said railroad company owning and not using said land shall be determined in addition to other questions as provided by law in cases of condemnation of lands for the purpose aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals."

It is very clear that this matter of the use and occupation of the grounds and of the need of the railroad company for such grounds are questions which must be determined by a jury, called as you are called. They must pass upon the question of whether this is the best route. They ask the Michigan Central for the privilege of occupying the grounds, and if they fail to agree they take it before a jury. How long do you suppose it would take a jury to determine it?

Mr. BAKER: Before the gentleman puts in any testimony, I desire to call attention to this section. He has made two arguments upon it, first in opening the case, and in anticipating the testimony of Mr. Lothrop he has made another argument. I will take this occasion to reply to what he has said upon this subject, so that you can hear the testimony upon the other side with a full understanding of our position in regard to it.

Mr. Dickinson contends that we ought not to go upon River street, because it is physically possible to build the same kind of an elevated road through the Michigan Central property, either along the margin or somewhere through it; but, of course, as far as the legal question is concerned, it would be immaterial where you went. If you could go in one place, you could go in another, if it were advisable under all the circumstances.

As I stated to you in the opening of this case, there was
543 an absolute legal prohibition upon our doing it. You could not do it, no matter how badly we wanted to. There is no power until the legislature of this State acts, by which one railroad

company could go through the property of another railroad company, whether they went on an elevated structure, on the surface, or in any other way.

Mr. Dickinson called attention to a provision in the general railroad law, and the same provision in the union depot act, in which the power to condemn land is expressly limited, as far as other roads are concerned, to a right to cross. I will refer to that. You must remember that the powers of a corporation are all determined by the act under which it is incorporated, that they have no powers by implication; their powers must be granted to them by the legislature, and defined in the act. This act confers upon union depot companies the right to condemn land under certain circumstances. Section 6 of the act is in these words:

"In case any such company is unable to agree for the purchase of any real estate, property or franchises, required for the purposes of its incorporation, it shall have the right to acquire the title to the same in the manner and by the special proceeding prescribed in this act."

And then it has this provision:

"But there shall be no power, excepting in crossing to take the track or rights of way of any other railroad company, without the consent of said railroad company."

In other words, you can cross the Michigan Central, but you cannot go along their property longitudinally. You cannot take their tracks and rights of way, except for the purpose of getting across.

That is what that statute means. Mr. Dickinson says there
544 is a difference between their right of way from West Detroit down to this yard, but it must be evident to any jury that the Michigan Central track does not stop at this street. The Michigan Central tracks come a half mile further this way. There are four or five main tracks, and there are a large number of side tracks, and in order to come along there on that property at all, you would have to go longitudinally along their property, so that this statute actually prohibits, in so many words, it says right out, that we shall not do that, in just so many words, that you shall not take their tracks or their rights of way.

There is a statute, to which the gentleman has referred, under which, under certain circumstances, land can be taken; but let us see what those circumstances are, and see if they have any application to this case.

"Whenever any part of the land of any railroad company in this State, in or adjacent to a depot ground is not in actual use for depot or other purpose pertaining to the operation of a railroad."

The first condition that is insisted upon by this statute is that it shall not be in actual use. You cannot touch it. You cannot proceed to step under that statute if it is in use. That is what the statute says, in just so many words, and there is no ingenuity that can be exercised or used by learned counsel to mislead a jury in regard to that. The language is just as plain as it can be expressed in the English tongue.

"When any part of the land of any railroad company in this

State in or adjacent to its depot ground is not in actual use for depot or other purpose appertaining to the operation of a railroad, and'—

There must be something else even then, gentlemen of the jury—

545 —"and such land is not needed by said railroad company," that is, if it is vacant, if it is unoccupied, if it is not used, before you can take it, it must be made to appear that they do not need it, in the immediate future. Suppose the Michigan Central had a strip of land there 100 feet wide, running right along the street or through their yard, running down to Twelfth street, and we should proceed to condemn that strip of land, under this section, all they would have to do would be to show that they had purchased that property and acquired it for a purpose connected with that railroad company, and that in the extension of their business and the development of their business they would need it, and we would be stopped there, just as absolutely as we are stopped now, where the proof is that they are in the actual use and occupation of every foot of that property. That is, I say, if it were vacant property, so that as far as the situation was concerned to the outward eye, it was perfectly sensible that we should take it, where apparently they did not need it, because they did not use it, even then we could not condemn it, if they could make any showing to the satisfaction of a jury that they needed it in their matters, in the development of their business, that they needed it for their use. If it is not in use, and if it is not needed, it shall be lawful for any other railroad company, organized as aforesaid, that is, organized under the general railroad law, the union depot company is not organized under that act, so that this section does not apply to it; but suppose it did, "it shall be lawful for any other railroad company, organized as aforesaid, needing such land for the purpose of depot or terminal facilities, to acquire the same in the same manner as may be done for such purpose from individuals."

That is, suppose you had a case where the property was

546 vacant, it was not in use, just as the north half of the old union depot grounds are at the present time, suppose there was a strip of land there, the Michigan Central had no tracks on it, and they did not use it, and we could show that they did not need it, then we would file a petition in this court; commissioners would be appointed, or a jury would be impaneled, and they would determine two questions. Suppose the Michigan Central came in and said they did use it, or came in and said, "Although we do not use it we need it," then this statute provides how these questions shall be settled, the question of actual use and of necessity for the aforesaid purposes by said railroad company, owning and not using said land (see how the statute insists on the fact of non-user) shall be determined in addition to other questions, as provided by law in cases of condemnation of land for the purposes aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose, as now provided by law, where land is acquired for such purpose from individuals.

What does that mean? My brother made this kind of an argument to you, that we could file a petition to condemn the right of way across the Michigan Central property, and of course we would have to allege that the property was not in use and was not needed, and that we could go on and try that case, and we could get a determination, and from a determination of it we could acquire that property and use it. What is all that based upon? It is based upon the idea that you could get a jury to render a decision against the actual facts. If my brother's argument means anything it means that in his great ability as a lawyer and as an advocate he could take this jury, or some other jury of citizens in this
547 county, and he could get a decision from them that the Michigan Central is not using all that yard down there. That is his theory, that he could take the case as it exists, and he could wrench from the jury in some way a decision that the Michigan Central does not use its property there. Now, gentlemen, suppose he could do that; suppose through his political and personal strength in this county and the interests of the people in this enterprise, he could get such a decision, suppose he could get twelve men in this box to decide that black was white, how long do you suppose it would take the courts of this State to set aside such a verdict? Do you suppose that any corporation like the Fort Street Union Depot Company, or any lawyer that had a head on his shoulders at all, would undertake any such thing? Do you suppose when the Fort Street Union Depot Company was organized in 1889, that Don M. Dickinson or any other lawyer in this city, looking through this statute, would advise the Fort Street Union Depot Company that they could go across the property of the Michigan Central? It would be ridiculous. It is an absolute absurdity, gentlemen. It is only brought in here upon the same theory that he would insist that we should submit such a case to twelve men to try to get them to decide that the Michigan Central did not use that property, and that the Michigan Central does not need it. The fact of it is, the legislature of this State could confer power by a general act. I am obliged to my brother for calling my attention to that. They could not provide by special act, as they did in a case in Massachusetts provide, that one company could condemn a right of way over a portion of the property of another, by a special act. The only way we could have any such statute in Michigan, under our constitution, would be by a general law, which would authorize one rail-
548 road corporation to condemn the property of another corporation, and with all the lobbying ability that is possessed by my friend upon the other side, I undertake to say that such a statute will not be passed in Michigan in the next hundred years. Why? Simply because there would be no safety whatever to any railroad enterprise in this State, because, if we could condemn the property of the Michigan Central, how long would it take Jay Gould, and the capitalists in New York, to get up a corporation to condemn the entire terminal facilities of the Michigan Central, and after they got that condemned, they could get together an amount of capital, and how long would it take them to create another cor-

poration and go right to work and condemn it for that company, because the rule is that where property has been devoted to a public use you cannot condemn it to another public use unless it is authorized by the legislature, and there is some exigency or circumstance that makes it necessary; and the only case that I have been able to find is the case that Mr. Joy called attention to in the State of Massachusetts, where one company owned a small tract of land, another company owned a larger tract of land, and one company desired to enlarge a little, but the company that owned the large tract of land refused to let them have any of it, but they could enlarge their own grounds on the other side, and the legislature, in the exercise of its power, compelled that company to move over a little the other way, so as to accommodate them. There was such a case. But you would not expect the men who organized the Fort Street Union Depot Company to start out and antagonize the interests of the Michigan Central road to any such extent as that; and if we had undertaken to get any such bill through the legislature of Michigan, we would never have succeeded, because there would
549 be no particular sense in crippling the facilities of the Michigan Central railroad. They need those facilities. There is a question here of local taxation, but that is a separate question to be decided by itself; but, outside of any political question of that kind, I would not like to talk very long to the business men of this city upon a proposition to cripple the Michigan Central road. Why, gentlemen, one of the great things that has improved the city of Detroit is the fact that the Michigan Central comes here and has the facilities that it has. We can go on and have a great city when these railroad facilities are furnished. The Michigan Central wants that property to do the business of the city of Detroit, to do the business of the merchants and the people of the city. So that when we come right down to this subject, there can be no possible question in the mind or the brain of any unbiased man but that it is an absolute legal impossibility for us to go across that property, and that if the proposition were seriously entertained by anybody connected with the Fort Street Union Depot Company, they could not carry it through. They could neither get it through before a jury of this country, nor could they get it through the legislature and by the governor's veto in Lansing, because there is no occasion for it.

The general railroad law and the union depot act authorize the construction of railroads along public highways, and the only trouble with the defendants in this case is that they own a piece of property, and they are disgusted because we did not run through it so that they can sell the whole thing. That is the only difficulty with them. There is a route that is practical along there. Of course, if you want a route along the margin of River street, you would get about the same grade, but you would destroy all
550 that property just the same as you would do it, and cause more injury than to go along an elevated structure on River street; and because we did not do it, so that they could sell it out bodily, they come in and fight the enterprise on the question of

necessity. It is a mere cover. What they want is money, and they think that if they get your decision that it is not necessary they could charge the Fort Street Depot Company just what they have a mind to. They could sell that property to them for $250,000 or $300,000 perhaps. That is what they want to use you for, to unload that planing mill onto this company; and they are mad, they are disgusted, because we do not run through it, because we do them as little injury as possible, so that the property can be preserved for business and for manufacturing purposes.

Mr. CHIPMAN: I regret that my friend, Brother Baker, has said some things at this stage of this proceeding which he did say. I had supposed that it would be better to argue all these questions at the proper time.

Mr. BAKER: That is what I suggested to Mr. Dickinson. I do not propose to have all the arguing done on one side.

Mr. CHIPMAN: The only question that was raised by Mr. Dickinson was the question of the construction of this law, and it was very proper indeed that my brother should, as well as he could, reply to the construction which Mr. Dickinson had urged upon you. But he went into other matters, into the motives of the Backuses in resisting these proceedings, as free American citizens, under the Constitution and laws of this country. No man has a right to question the motives of the Backuses in making this resistance. It is their right under the law to simply say, we are opposed to these proceedings; we are opposed to giving up our prop-
551 erty and our rights for this purpose, and saying that they put the petitioners, to wit, the union depot company, in this case, upon a strict compliance with the law. They put them in a position where they must exactly and literally comply with the law, where nothing will be taken for granted, where all the action must be upon their part, where, in contemplation of the law, they must make a perfect case, a case sound in every respect, without a loophole here or a loophole there, without one single item, without one single atom, necessary to show the necessity of this improvement being absent. And it is all idle to say that the opposition of the Backuses is from their interested motives, because it is their right under the law to entertain interested motives here, and to do the best they can in this proceeding. That is what they are here for. They are here to assert their rights, to prevent a great injury being done their property, to prevent a great business from being swept out, to say that that is why they are here, and to make that as a reason to influence this jury is the same as saying if a man owes you money and you go into court and collect that money, that the fact of your going into court to collect it is a reason to be urged against its collection. It is a sort of false logic. It has no foundation in law or in justice or in common sense. Of course the Backuses are interested. They are here to protect their rights, and the law gives them this jury as the guards and defenders of those rights, to see that no injustice is done to them. That is your office, the only function for which the law creates you; and yet my friend stands here and charges it as wrong on the part of the respondents in this

matter, that they come to you and say, We rely upon you to exercise the function which the law devolves upon you. The
552 court is here to do justice, and you are the court, and these men demand justice at your hands. My friend, in reply to that, says that it is wrong in the respondents to demand justice, wrong in them to ask you to do that which the law has created you for.

Mr. DICKINSON: The first question is the proper route.

Mr. CHIPMAN: As my friend, Mr. Dickinson, very properly says, the first question is the proper route. That is the paramount question, and that is the question which the Backuses raise here—not the question of damages, not the question as to whether the proper route would not have carried this railroad through their property, and so have forced the company to buy their property, but whether, in view of all the facts, this railroad should have come near them at all, and as to whether, in view of all the facts and all the necessities of the case, this railroad could not have been put on the other side of the street, and the whole width of that street been left between their property and the railroad structure proposed to be built. That has been their contention, as I understand it, from the beginning—their contention in the former trial of this matter, as I am told, and certainly, as I know, their contention in the present proceeding. Now, in the pursuit of that contention, we have submitted to you a statute, a statute which to us seems to fully cover the ground which we have taken. Mr. Joy, as I understand it, Mr. Ellis, everybody admits that the route over the Michigan Central Railroad grounds would have been preferable to the route over River street, and we cannot for a minute doubt that you will agree with those gentlemen, that your common sense will be the same as the common sense of others, and that you will say that the route which would obviate the destruction of a public street, which would also obviate the destruction of private
553 property, will be a much better route, providing it is as near, which this other route is as near, as the route which the company propose to take up River street. They say they cannot do that, that it is an impossibility. Why? Is it because there is no power in the law to condemn franchises, to appropriate rights of way, to enter upon the grant of another railroad company for the purpose of carrying out the incorporation of this union depot project? The gentleman says that on the very face of it it is a foolish proposition, and he pictures Jay Gould swooping down here and settling over and brooding over all the interests of railroads in this city, bringing him forward as a sort of ogre, jumping from his grounds there at the foot of Twelfth street up to the foot of Third street, and confiscating everybody and everything which he meets in his way. Well, gentlemen, Jay Gould is not such a bad man for the union depot company. He seems to cut considerable of a figure down there in that forty acres they have got below Twelfth street, and he is cutting a pretty big figure in these five acres which they have on Third street, and he is trying to cut his usual figure in carrying ruin and devastation in his path, as he passes by the

property of the respondents in this case. But it is a noteworthy fact that this very section, quoted here by my brother Dickinson, was passed in 1881, the same year that the union depot act was passed, and also that the two acts were the product of the same mighty brain and the same strong hand, to wit, Mr. Joy, the head of the union depot project. Both acts, passed by the same legislature, both coming from the same man, twins, my friends, born at the same birth, christened after the same father, both of them the progeny of this union depot scheme. What did Mr. Joy
554 draw that act for? You know and I know that he is a man that does not act without a motive. What did he put senseless stuff, if the interpretation of my friend Mr. Baker is correct, upon this statute book for? What was its purpose? Do you doubt for a single instant that he had in view the practicability and the possibility of using the Michigan Central grounds in connection with the grounds he acquired, touching them at Twelfth street, for the purpose of getting further up into the city? Have you any question about that? In what other cities in the State of Michigan is there any project of this kind on foot? Where else does any necessity arise for legislation on this point? Can you tell me, can any one show me? It does arise here, and it was born here, came from the same source that the union depot act came from, the same session of the legislature, to wit, 1881. That is a fact worth considering, and that Mr. Joy was right, that you can take part of these grounds for other railroad purposes, was demonstrated by the history of this case.

Almost the first departure from the union depot grounds at the foot of Twelfth street takes the elevated structure of this railroad within the sacred precincts of the Michigan Central Railroad grounds—their 20 acres—cuts off a corner of it, not only crosses their tracks, but goes within the holy of the holies, into the very temple itself, into this mystic and magic thirty-eight acres of depot grounds, around which the mighty protection of the law, according to my friend Mr. Baker, is put. How does this happen? According to my friend's argument you cannot get an inch of it. According to his argument the thing is so absurd, as a matter of fact, that no jury in the world would ever permit it to be taken.

555 Mr. DICKINSON: And according to Mr. Joy the Michigan Central are continuously hostile.

Mr. CHIPMAN: As my friend says, the Michigan Central has been fighting them all the time, and yet, in spite of this, they go right across that ground.

Let us see what further took place. The whole argument is that you cannot go within that ground, that the Michigan Central is hostile, that, as a matter of law, you cannot go into the ground, and, as a matter of fact, they will not let you go. But what else has happened? Why, my friends, we have shown the Michigan Central's rights to that depot up to the middle of the street, and they have received, I think, some twenty-nine thousand dollars damages for taking it. All the rights which they have for depot purposes, for necessary depot grounds, for the full use of their

grounds, are involved in their rights to the use of that street, River street, up to the center of the street, and yet this Union Depot Company have acquired that right from the Michigan Central, have paid them for that right.

Mr. DICKINSON: And they condemned that right.

Mr. CHIPMAN: And they have condemned that right as we will show it, condemned it under the very same law that you are sitting under, and the company are proceeding to build their structure upon the land they have so condemned, and I want you to bear in mind that condemning the right as they did, that this Michigan Central railroad could not defeat the condemnation, but they made them pay a large sum of money, going up to nearly $30,000, for acquiring this right to build this railroad along in front of their property in River street.

Let us go a step further. Here are two distinct invasions
556 of the depot property of the Michigan Central railroad, one by cutting off a corner of it, the other by cutting off its access to River street, as they propose to cut off our access to River street; but here comes another, that is the viaduct, clear inside of these grounds, taking foot after foot of their property alongside of the street there, occupying space which might be used for travel, occupying space within these precincts which my friend says is so wholly and absolutely devoted to their need and their uses for depot purposes that no jury for an instant could take it from them. And yet it is done.

So, my friends, in view of the history of this matter, it is all, I was going to say, nonsense, but it certainly is not law to say to you that this statute does not bear the meaning which my brother Dickinson puts upon it. Let us look at that statute. Tell me what it does mean. What can it mean? I have asked you already, what was it drawn for? Why, it was a sort of Siamese twin as to this union depot act. If the meaning that is contended for it is not the meaning of it, tell me what is the meaning. What case is meant to fit?

"When any part of the land of any railroad company in this State in or adjacent to its depot grounds is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by such railroad company for the purpose of a depot, or other terminal facilities, it shall be lawful for any other railroad company, organized as aforesaid, needing such land for depot or terminal facilities, to acquire the same in the manner as may now be done for such purpose from individuals."

That is very plain, isn't it? Can anything be plainer? This act says in effect, it does not say in effect, it says positively,
557 that where the land is in use or needed for depot purposes that it may be condemned like other land, needed now, needed today, needed this instant, not needed ten years from now. I think the gentleman was in error when he says this term needed referred to what might happen in the future. When it is in use now and needed now, that is the meaning of the law. But when the land is in actual use and needed it cannot be taken. When it is not in ac-

tual use and not needed, then, my friends, it may be condemned exactly in the same manner as your property or Mr. Backus' property, or anybody's else property may be condemned, but with this condition. There are two other facts to be submitted to the jury in this connection, added to the investigation to be made by the jury, to the fact to be inquired into in that case like the present one. In the present case you are to inquire into the necessity of using Mr. Backus' land, and, if necessary, to ascertain what compensation he should receive for the condemnation, but in this case the question of actual use and of necessity for the aforesaid purposes by said railroad company owning and not using such land shall be determined in addition to other questions, as provided by law, in case of condemnation of land for the purpose aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals.

So that, in a case of this nature, you are to make the same inquiry which you make in the case of Mr. Backus, but in addition to that the jury is to answer whether the land is in actual use and whether it is needed by the railroad company for depot purposes. Now, it seems to me, that is very plain. It is as plain as words can make it. And yet my friend says it does not mean anything. He
558 says you cannot do it and you must not do it, and he says if a jury should determine that the land was not in actual use, and by use is meant *bona fide* use, a real use, not a use for the purpose of preventing somebody from taking it, but a real *bona fide* use, and the need is meant a present need, and yet he says if the jury should find that it was not in such use and that there was no such need, that there is no court in the world that would let the verdict stand. It will be a sad day for the people of the State of Michigan if the supreme court of that State ever carry out the threat made by my friend, Mr. Baker, and overturn the verdict of an honest jury in their endeavors to protect the rights of the citizens and of the public in a matter of this kind. The Supreme Court, under such a state of facts, he says, would not sustain the verdict. Mr. Lincoln had a homely way of saying you had better not cross the bridge until you get to it, and I do not think that you gentlemen had better bother with the supreme court until we get to that. One thing is certain, that a judge on the bench, when the case is being tried before him, will not tolerate the lawyer who threatens him with the supreme court. He gives his best judgment uncaring and unapprehensive as to what the result will be. His only aim is to do justice, and so your aim must be to do justice and to act according to the lights which you have before you. I say to you, if it is worth anything to you, if it is worth as much as *much as* Mr. Baker's assertion, I say to you, that the supreme court would not do it, that there is no principle upon which they could do it, that this is a mere question of fact, in a matter which the constitution has given you supreme control over. Further than that, that the constitution has given you more control in a matter of this kind than even

a subordinate court, that it gives a jury in a court of
559 record, because you are judges both of the law and the facts, and your findings on the facts cannot be assailed. In what way can they be assailed. How can the supreme court, as a matter of law, determine the weight of testimony? How can the supreme court determine whether you believe Mr. Backus most or Mr. Joy most, when their testimony is in conflict? And yet this matter of the use and the need of that road there would all be matter of testimony for you to weigh and determine, with such lights as your experience has given you. How, I ask you, could the supreme court overturn your judgment. First, my friend frightened you with Jay Gould. Now he tries to frighten you with the supreme court. Well, my friends, I doubt whether we are any of us going to be frightened about anything. We are going to try an honest way to get at the very right of this matter and at the bottom, the very foundation of this entire proceeding as far as we can, as to whether it is necessary to use this street, and if there is a way which will preserve the street, which will preserve the rights of the public, which will preserve in fact the property of Mr. Backus, a way perfectly accessible to this company, then, my friends, it is your duty to say that they should take that way and not take the street or the property of Mr. Backus. They may thunder to you something about the expense. They say it is very expensive. But you are not here to save expense to the depot company. You are not here to count the subject of expense at all. You cannot, as honest men and good citizens, as jurors under oath here, you cannot become the guardians of their pockets. Your duty is to see that this spoliation, for it is a spoliation, the taking of one
man's property for another man's use against one's consent,
560 that it shall not be perpetrated unless it is absolutely necessary, and the question of cost is not a question to be considered here either one way or the other. If the cost for going in the right way is too much, the gentlemen must abandon the project. If they go through valuable property, they have to pay for that property, and their plea that it would cost them too much, that it would be so expensive that they could not carry on the work, would not justify a jury in letting them rob the citizen of his property which belongs to him. Suppose that mill is all the property Backus has and they go right through it, and it happened to be worth a million dollars, could these gentlemen tell the jury that they must give them the property for $100,000 or $150,000 because if they gave the full value of the property they could not afford so carry on the improvement. So that, my friends, there is only one course for this jury to pursue. Is it necessary to come up that street, not whether the means of the railroad make it necessary, not whether it would cost them more to go somewhere else, but is it necessary, is there no other way, must they take that street or abandon the improvement entirely? We say that under this law, to go upon that ground of the Michigan Central railroad, the Central railroad owns, for depot purposes there, from the face of the earth clear up to the top of the skies. They own not only the surface of the earth, but they own

fourteen, fifteen, twenty-five, thirty feet above the earth, and clear beyond that. Are they using that, and do they need that for depot purposes there. Would any jury with that proposition made to them say that they needed all the earth and 25 and 30 feet above their tracks, and that they were using it at present for depot purposes. Why, my friends, the whole argument is that these
561 elevated tracks, wherever they go are a benefit, benefit Backus, benefit the people who use the street under them.

What damages was the Michigan Central Railroad Company made, according to the theory set up here under the petition? They could run their cars under this elevated structure; it does not cut off light; it does not prevent people connecting and doing their business; even we have had men brought from New York here to prove that; and the whole theory of this case is that these elevated roads, wherever they get benefit, they don't hurt, and above all, that they obstruct nothing; that they interfere with no business whatever. How could this elevated track running up through the center of the road, running right over one of its tracks, interfere with their railroad business? The theory that is puzzling the petitioner about light is absurd. There is plenty of light, according to their theory, the railroad company could not set up here if the light was cut off, and I am astounded that the commissioners who acted in your place, I am astounded that they allowed that $25,000 damages for running the structure in front of the Michigan Central Railroad Co.'s property on River street; I am astonished that the company should demand it; this blessing, this great good, this means of running switches in the air up towards heaven; it is a pity these railroad men could not get nearer to heaven than the top of one of those switches; it is a difficulty to me that they should have the impertinence to say that no damage would come out of that. Now, tell me, as a matter of good sense, is it not practicable? You have seen these premises. Is it not perfectly practicable to go around a track, straight along the River Street line of the Twelfth Street depot, in that forty acres there, and bring
562 it straight along the line of the Michigan Central until they get up to Seventh street up there, and then deflect it by a proper curve up to their depot grounds there? Mr. Joy spoke about running the line in the center of those grounds, and in the center of the ground of the Michigan Central. Nobody proposes that. Is it not perfectly practicable to do that? It may be, and I believe it is the truth, that these gentlemen are unwilling to take the cup that they commend to our lips, that they are unwilling to have the front of their property cut off by an elevated structure, that the union depot company itself are unwilling to have that elevated structure right close up to their fence, inside of their grounds, exactly as we are unwilling to have this structure run close up to our fence. They want to have the full use of their front there, and full access to it for all kinds of business, so that their gates may be always open, so that business may be cheaply and expeditiously done, and it does not suit them and does not suit their pockets to pursue this route along the center of the railroad track, and along River street,

and along the Michigan Central ground, and so they come to y
with this project of River street: everything for the railroads a
nothing for the public; everything for their property and nothi
for Backus' property; they come to you and say, "We want to
there, it is our interest to go there;" whereas, your duty is not
look after their interest, but to look after the interest of the respon
ents here, and not to give them one inch or ell unless they convin
you it is absolutely necessary for them to have it. Now take th
statute, and read it, and see if it does not bear us out in the positi
we take. Tell me what it was made for, if it was not made for
case like this. Tell me if it would not be better for all co
563 cerned for this railroad to go up on the Central grounds, i
stead of going up on River street. Tell me if Mr. Backu
interests are not at least on as important a level as the interests
this company in this proceeding? The law says they should n
take this street unless it is necessary, and we say it is not necessar
and we invite you to that conclusion. We show you the rout
which they themselves or at least their leading men agree would
a preferable route; but they say they will not take it, because und
the law they cannot take it, because they know in advance that
jury, if called, will determine that the railroad are using thei
ground and have need to use their ground.

Now, my friends, I have asked you already, would a jury determin
that? What do they want with their grounds? What busines
have they at all with that immense quantity of ground? They ar
there as an enemy to civilization, they are a hostile foe within th
limits of your city. No other city would tolerate such a state
things. They are standing in the way of progress in this city
Railroads come here to benefit us. The good they do us is inci
dental. They come here to benefit themselves, and above all, m
friends, no improvement can benefit a community which override
the right of the citizen, and which stands in the way of the prope
advancement of that community. They have got the whole rive
front, and it is as much as we and our wives and our little ones ca
do to catch a glimpse of that beautiful river, the scene of the sport
of our youth, to which we resorted for health and pleasure—38 acre
there and 48 acres just alongside of it—and yet we are told that
jury could never be got but would find that a strip of the width o
this elevated structure could not be taken from the air o
564 heaven 38 or 40 feet above the track of that road, becaus
they were in actual use and needed for depot purposes by th
railroad company. My friends, that is an insult to your intelligence;
it is against the facts and it is against common sense. There is a
moving out from that 38 acres of the Michigan Central. The Grand
Trunk has gone out, the Detroit, Lansing & Northern is going out,
the Flint & Pere Marquette are going out, three great railroad cor-
porations have gone and are going elsewhere to do their business.
My friend, Mr. Baker, desires you to believe that any jury who will
be called upon to pass that question would treat it as nonsense, and
that if they did agree to do it, the supreme court would overrule
them. We take a different view.

Mr. BAKER: Mr. Foreman——

Mr. DICKINSON: Are you going to reply?

Mr. BAKER: Yes, sir.

Mr. DICKINSON: I think we must ask the jury to take some action in regard to the order of proceedings.

Mr. BAKER: I have the floor.

Mr. DICKINSON: I suggest that the jury decide, both now and for hereafter, who shall have the opening and the closing argument. It is a matter for you to decide yourselves, gentlemen of the jury. We have no court here except yourselves. The analogies are that we should have the opening and closing. Of course if Mr. Baker goes on we shall have to reply to him.

A JUROR: What is the rule?

Mr. BAKER: I insist upon the right to be heard before this jury.

Mr. DICKINSON: I made a very brief talk——

Mr. BAKER: You made an argument out of order.

A JUROR: Let Mr. Dickinson finish, Mr. Baker

565 Mr. DICKINSON: I just want to say something about the order of argument. Now, we are to have some arguments later on. There is no settled practice, and it is entirely with you, gentlemen of the jury, to order the practice, in the absence of a judge, and there is no judge would interfere with your rule if you make one. The analogies are these: Whenever a person, without any cause or fault of his own, is called into court, he has the opening and closing of the case in the argument. I may illustrate by referring to the old petition of creditors in bankruptcy; they petition to have a man made a bankrupt; he is brought into court, and he has the opening and closing. If citizens make an application to the supreme court for a mandamus against the common council or against any officer of the government, he is called upon to show cause, and the citizen, the man that responds, that has not been at any fault, or does not owe any debt, has the opening and closing. There is no doubt about that, Mr. Baker.

Mr. BAKER: In mandamus cases, the party who has the affirmative.

Mr. DICKINSON: The man that responds.

Mr. BAKER: That depends upon the allegations.

Mr. DICKINSON: And where there is an order to show cause, if in order to show cause, why an injunction should not be dissolved is made, or whether an injunction should not be granted, the respondent has the opening and closing in the argument. The practice in the circuit court, of plaintiffs and defendant, does not obtain here, because we are no defendant, we have done nothing, we are summoned into court to show cause why we should not give up our property. We are not a defendant; we are not at fault, we

566 owe no debt, we have not committed a trespass, we have not infringed any of the rights of the railroad company; we are dragged into court, precisely as a man called upon to show cause in a mandamus case, or a man to show cause why he should not obey an injunction, or why he should not be considered a nuisance; he has the opening and closing in the argument; his most sacred

interests are called up for examination, not at his own solicitation, not by any act of his, not for any fault of his, but because somebody wants him to come in and show about it. That is the order of proceeding, and we submit to you by the analogies, we have the opening and closing. There have been some cases tried, but this is the first union depot company, under the union depot act, that has ever proceeded to condemn, and the practice has not been settled at all, though usually in the cases I have represented heretofore, although I thought the practice was wrong, I have not contended with Brother Baker about it; he has taken it, not because it was granted him or that there was a rule for it, but he has taken it as he would take almost everything there is going if I did not object; he has taken the opening and closing, because I didn't object; but look at the merits of it; look at the manner in which we are brought into court; look at the analogy in cases where people are brought into court without any fault of their own, and I ask you to decide in this case, after the testimony is all in, and now, who shall have the opening and closing. I submit it to you, and will abide cheerfully by your decision, but I think that a party who is dragged into court away from his usual avocations, and called into court to show why he should not give up his own property, ought to have the opening and closing of the argument.

Mr. BAKER: Mr. Foreman, and gentlemen of the jury:
567 The last struggle of a drowning advocate is some question about who shall have the opening and closing——

Mr. DICKINSON: We simply want it decided by the jury. We leave it to the jury.

Mr. BAKER: We come here and leisurely open the case to the jury. The respondents saw fit to make their opening before I put in my testimony; but at the end of my testimony, instead of going on and putting in their testimony, Mr. Dickinson undertook to make another opening, and he gets up and makes a speech to you about this statute, and about the necessity, entirely out of order, entirely unwarranted, so far as the order of proceedings was concerned. I replied to him, as I have a right to do under the law, as I had a right to do under the statute, under which you are sitting; and thereupon Brother Chipman, there being no judge to whom we could appeal here, embraces his first opportunity in this case, to make a stump speech, and now because I desire to reply to his argument, they make a point about who has the opening and the closing. Now, gentlemen of the jury, I do not think that I can change the verdict very much by argument; I do not think I can influence you so that I will carry you off your feet by argument; I do not think it makes very much difference whether I have the opening and closing in this case, but I do insist that at some stage of the proceedings, I shall have my right to reply to each and every argument that is made here, and I hope at some time during the proceedings to exercise that right, and that I will not be cut off by any point about who has the opening and the closing. Brother Dickinson undertakes to state to you that this is a case in which they had the opening and the closing under the practice——

Mr. DICKINSON: I said the practice had not been settled.

568 Mr. BAKER: The practice has not been settled, but the practice in this class of cases has been settled by the general agreement of counsel for at least 30 years. The general railroad law in this State was passed in 1855 or 1857; there have been over a thousand condemnation proceedings from that time to this, beyond question. I have been connected with a great many of them myself; Brother Dickinson has been connected with them, and there has never been a case, gentlemen of the jury, but what the attorneys of the company had the opening and closing. And why? For the very simple reason that they have the burden of proof and the affirmative of the issue. What do I mean by that? I mean by that, gentlemen of the jury, that we filed a petition in this case, in which we allege, first, that it is necessary to take a certain right of way for the public use as a railroad, and we allege that we have not been able to acquire that by private negotiation with the proper owner, for the reason that we could not agree upon the terms that he asked us for the property. We find Brother Chipman getting up here and insisting that it is just such a case as you have to dispose of, viz., that the company has to satisfy you affirmatively of the truth of our allegation that it is necessary to take this right of way along River street. That is the allegation here. It is simply denied upon the other side; and Mr. Backus is in the same position as any other defendant in a case. He comes in and says that it is not necessary, and in addition to that, he says he was not offered compensation enough; so the issue was made up in that way. The issue presents a case where it is incumbent upon the company to satisfy you upon both questions, as to the necessity and as to the amount of damages; so there can be no doubt, gentlemen of the jury, but that, as the

569 representative of the petitioner in this case, I have the opening and the closing. I do not desire to shut off any argument that my brethren wish to make or see fit to make; I do not care whether they make it in the commencement, or in the end; when they feel like making a speech, I am perfectly willing to suspend the proceeding and listen to an argument from them at any stage of the proceeding; but after they have made it, I do insist upon the right before this jury to reply to that speech and to present the best arguments I can to upset and contradict their arguments. So, gentlemen of the jury, I insist now upon the right to reply to the argument made by Brother Chipman; I insist at this stage upon the right to do that; I suppose Mr. Dickinson would merely talk about this statute: I made no objection to it at the time, because we are not proceeding with any great regularity in the conduct of this case; I replied to it, and Judge Chipman desired to make some remarks; he has made them; he has opened a new field of thought; he has advanced new reasons; he has shown his hand and his judgment in this case; and I simply desire at this stage, before we go on with the testimony, to call attention to the argument he has made here, and to point out, if I can, the fallacy

and the falsity of it, and to convince you, if I can, gentlemen of the jury, that my client has the right of this case.

Mr. DICKINSON: There you see, gentlemen, where we land; Mr. Baker will make a speech, Judge Chipman will reply to it, and so we will go on.

Mr. BAKER: If you make another speech, I am going to reply to it.

Mr. DICKINSON: Then where are we going to stop? Of course Mr. Baker will have abundant time to speak hereafter; I do
570 not speak with especial reference to this, but we would want to be heard in reply to his argument.

Mr. BAKER: I have the closing; that is the law that applies to this case.

Mr. DICKINSON: Brother Baker says that for 30 years this has been the practice, under the railroad act; that that has been acquiesced in, but it has never been decided——

Mr. BAKER: There is no doubt about it. You would not contend that you would have the opening and closing.

Mr. DICKINSON: We listen to you so much, that I think you ought to be replied to in behalf of the property-owners; I think that the rights of the citizen would not be sufficiently protected unless when you make an argument here you are replied to. That is my opinion about it; I think you ought to be replied to and your statements fully exploited in reply. However, the union depot act has not been passed for 30 years; it was passed in 1881.

Mr. BAKER: It is identically the same as the practice in the other cases.

Mr. DICKINSON: And no union depot has been formed except this one, that has condemned property, and in which cases Mr. Baker and myself have been employed; and I ask the jury, therefore, to make a ruling, because it is going to apply to subsequent proceedings; we have all got to make a speech later on after the testimony is through, and we should have the closing; the affirmative of the issue does not decide it; it is not so in a bankruptcy case; the burden of proof is on the petitioner, but the bankrupt is given the opening and closing, for he is fighting for his commercial life; so the citizen when he is called upon to show cause why his property should not be taken, should have the opening and closing.
571 He is not a defendant. What has he done? Trespass? No. Does he owe a debt? No. Has he committed a nuisance? No. Violated any law? No. He is a respondent, not a defendant; he should not, on the analogies of other cases, fighting for his rights, be prevented from having the opening and closing. He should have the opening and closing. I should like to have the jury make an order in that regard. If the jury wishes to retire they may do so.

A JUROR: The jury would prefer that you settle it among yourselves.

Mr. DICKINSON: I shall ask to be allowed to reply to Mr. Baker, if he proceeds.

Judge CHIPMAN: Let me call your attention to one thing, the

order of business in court. Now, I am not objecting to Mr. Baker's replying to anything I said, although he did say that I made a stump speech to you——

Mr. BAKER: I did not mean anything offensive.

Judge CHIPMAN: If he has made a stump speech, I am too polite to say so. But you have had more or less experience in court, and you know very well that one gentleman opens, another replies to him, and then the one representing the person who opens, has the right to reply. For instance, if an objection was made to testimony in a court, or if any point of law was raised, the party who raises it makes his argument, whether he is plaintiff or defendant; the party who opposes it replies to it; and then the party who originally spoke has a reply to him. That is the uniform practice in all our courts under that rule. Now, mind you, I want you to hear Mr. Baker now, but for future purposes of this case, under that rule, Mr. Baker would not have any right to reply to me. That is the ordinary practice. Mr. Dickinson made an argument, Mr
572 Baker replied to it, and being on the same side as Mr. Dickinson, would under the rule, the ordinary rule, have a right to reply to him; that is the ordinary practice. And while I do not propose to apply it to this, I wish you would apply it in the future, and I wish also you would carry out Mr. Dickinson's suggestion about the closing of the case. I call your attention to that, because the matter is constantly coming up in this case, I see, and you ought, as far as you can, to pursue the methods of courts.

A JUROR: We would like as much as possible to pursue the methods of courts.

Mr. BAKER: If you desire to do that, the only ruling you can make, after we get through with this argument, when we come to argue this case in the end, if you desire to follow the rules of courts, would be simply to hold that the petitioner, like the plaintiff, has the opening and closing. There is no doubt about the law, nor any question about the position of the parties. As I said before, this argument was an irregular argument.

Mr. DICKINSON: Do you call us a defendant in this case?

Mr. BAKER: Yes, sir; you are the respondent, and the respondent is the same as defendant; that is the meaning of the word.

Mr. DICKINSON: Is there any question where a defendant or person occupying a position, and called a respondent, does not have the opening and closing?

Mr. BAKER: Take the respondent in any case, he is a defendant. We can call Mr. Backus here the defendant, if we see fit. The respondent is the defendant.

Mr. DICKINSON: You call him that in order to get the opening and closing.

573 Mr. BAKER: I do not; there is no doubt about who has the opening and closing.

A JUROR: How shall we decide this question?

Mr. BAKER: You can ask the advice of the circuit judge in regard to it, if you see fit. All I insist upon is that if they make an argument and discuss this case, I shall have a reply, and if the jury

will permit me, I will occupy the half hour between now and five o'clock.

Mr. DICKINSON: I decidedly object to having our rights carried away, like an obstruction on a railroad track, by Mr. Baker in this manner. He will have everything that he can get or you will give him, and I do not like to be run over in this way, and I would like the jury to fix the rule of procedure.

Mr. BAKER: Mr. Dickinson, you have got to stand up and face this case as it is, and it appears by the evidence, and you cannot, by mere argument, sir, you cannot by claiming the closing, or a mere trick upon the order of proceeding, stifle this case as it is here before this jury.

Mr. DICKINSON: No, sir; I do not think we stifle or want to stifle this case, but we will have an orderly proceeding.

Mr. BAKER: We will, but at the same time I shall present the case of this company, and I shall present it in such a way, I hope, gentlemen of the jury, as to dispel the arguments, the delusions and the hallucinations that have been brought into it by my learned friends, with the utmost respect and deference for them; I have known them for years; they are doing what they can for Mr. Backus, but they have no right to do anything more than what professional gentlemen should do in a case of this kind, and I have no
574 right to do anything more than what a professional gentleman and lawyer should do in presenting such a case to a jury; and I will leave it to you, gentlemen of the jury, whether I talk about this case and whether I present it so that you can understand my position and the position of the company in regard to this company, and in regard to the issue that you are called upon to decide. Judge Chipman says that Mr. Backus opposed this enterprise. Of course he has a right to oppose it; he has a right to come before this jury and insist that there is no necessity for the union depot, that there is no necessity for going up River street, that there is no necessity for going through his property or any other property. He has a right to antagonize the enterprise, as he has from the commencement of it down to the present time; but because he has that right, because he has a right to come in and contest it, it does not follow that a jury sitting here to pass upon his rights and the rights of his company are to agree with him in that antagonism and in that hostility. He has a right to question the necessity of using the property, the street in front of his property, for the purposes of this elevated road; but the question whether it should be used or not, under the law and the constitution of this State, must be left to a variety, a number of tribunals, and a number of jurors or commissioners. You are a part of that system, you are one of a number of juries that have been called, and the question presented to you for decision, or that will be finally presented to you for decision, is whether or not this property along River street, a right of way for the construction of an elevated road, is taken for the public use and benefit under the union depot act and the constitution and laws of this State; and upon that question I claim, gentlemen of the jury, there can be but one intelligent decision upon the facts that

575 are already in evidence. The only contention that they make here in regard to this route is, that we ought to go along the Michigan Central property. They probably do not remember that Mr. Backus, when he was advocating before the railroad crossing board and in other places, thought they ought to go between River street and Fort street, so as to go right through his property; they do not remember that, but that will appear here in due time. They shifted their ground, and finally they come before this jury and they insist that we should go upon the property of the Michigan Central Railroad Company, and Brother Chipman comes in here and makes an argument to convince you that is so, and the first proposition that he makes in regard to it is this: That Mr. Joy, under the testimony—and there is some intimation from Mr. Joy to that effect—drew both these acts in 1881.

Mr. DICKINSON: What did you state was the first ground?

Mr. BAKER: That Mr. Backus wanted us to go between River street and Fort street, so as to right through his property.

Mr. DICKINSON: I have nev heard of it.

Mr. BAKER: I said that Mr ackus said so. You do not know anything about it. I say that J dge Chipman says Mr. Joy drew both these acts. Now, did my brother fully comprehend what kind of an argument he made there? You have seen Mr. Joy upon the stand; you have heard his testimony, that he was educated for the bar, was the general counsel of the Michigan Central for years, was president of it afterwards, has been in railroad business all his life, and he is undoubtedly one of the best railroad lawyers in the Northwest, if not the best, because that has been his business; he is a
576 trained lawyer, has practiced his profession in this city, of the old firm of Joy & Porter; many of this jury will remember the firm; he was the general counsel of the Michigan Central railroad from its organization down to the time he became the president of the company; he went to Chicago, built the Burlington & Quincy, built all these lines in Michigan that are ancillary to the Michigan Central, using his legal knowledge and information all these years in the aid of the performance of his duties in these trusted capacities; and Brother Chipman comes here and says that Brother Joy got this act passed; that Mr. Joy framed this statute, got it through the legislature, and then is such a fool that he does not use it to condemn a right of way across the Michigan Central property; although he got this statute passed, and evidently knows what it means, Brother Chipman insists that Mr. Joy is in this ridiculous position, that he got this statute passed which would enable him to condemn a right of way across the Michigan Central, and then does not use it, although, as it appears in this testimony, he has not been connected with the Michigan Central since Mr. Vanderbilt purchased that road; has held opposing and hostile interests, and has been engaged in a controversy with the Michigan Central ever since the old union depot was organized and started down to the present time; that the best railroad lawyer in the Northwest would get such a statute passed, and then he would come to use it to condemn a right of way, he does not use it, he just simply says, "Why, I cannot con-

demn a right of way across the Michigan Central, although I got this statute passed for that very purpose." Gentlemen of the jury, does any such argument convince you that the statute means any such thing as my bretheren contend?
577 And Brother Chipman appeals to you and says, "Why, what does it mean if it does not mean that we could condemn a right of way across the Michigan Central?" It happens, gentlemen of the jury, that the city of Detroit and the Michigan Central railroad yards are not the only ones in the State of Michigan; there are very many cities and many railroad yards, and undoubtedly in some of these cities the company have got the title to property that is unoccupied, and in some of these cities, undoubtedly, there is property that they do not use and there is property that they do not need; and this is necessarily a general law, which applies to the whole State of Michigan, and therefore the legislature has said that if there is any such property in any city or village in this State, any property in or adjacent to a depot ground that is not in use, and is not needed for the purposes of the company owning it, that it may be taken and condemned under this statute, if it is needed for some other company, so that there can be no possible question as to what this statute was designed to do, there can be no possible question as to its objects and purposes. It is just as plain as the English language can express and make it.

Another argument that he makes, gentlemen of the jury, such as it is, to convince you that we have the right to go across the Michigan Central property, is the fact that we have condemned the right to take a triangular piece of land, having a frontage on Twelfth street of about 29 feet; he says, "Why, gentlemen of the jury, they have actually condemned that, and if they have done that, why cannot they condemn all the rest they want;" and they ask that as a knock-down argument. It happens, when we come to the proofs in this case, that it appears that that property was
578 acquired under a contract with the Michigan Central Railroad Company, by which they agreed, in so many words, that we could condemn that triangular piece, and in which they agreed in so many words that the posts for the viaduct for teams could be put on their property; their agreement, signed by Henry Russel, as the general attorney and acting president of the Michigan Central Railroad Company, just exactly what we claimed it was, just exactly the state of facts as would authorize us to go on and leave that question to a jury and have it decided. It was done simply because the Michigan Central Railroad Company was willing it should be done; it merely takes off a triangular piece of ground, and deprived them of the use of a track, upon which two freight cars could stand; that was the evidence; it is 29 or 25 feet, something like that, on Twelfth street, and if it was squared, it would be about equal to a lot; it runs out some 250 feet, but if it was squared it would be equal to a lot of about 250 feet back on Twelfth street, with 25 or 29 feet in front, and the jury just allowed them a hundred dollars a foot for it, $2,900. And still my brethren come in here and make an argument that we should forcibly take

their property, because they have consented we could take that triangular piece. Nothing could be more misleading. I would not question the motive of our distinguished friends, but it is a little wonderful that my learned friends would argue seriously to a jury of this kind that because the Central consented to our taking that small triangular piece of only 29 feet on the corner of that street, therefore we had a right to take a strip for our elevated road right across their entire frontage. And in that connection, gentlemen of the jury, Brother Chipman had occasion to refer to the damages, as if the sum of $28,560 that was allowed there was some enormous verdict that could be explained only
579 upon the theory that the damages were very large; and he made an appeal to you that was based upon the enormity or size of that verdict. Now, what does it mean when you come right down to it? In that $28,560 is $2,900 for that triangular piece, a hundred dollars a foot for what would be 29 feet on Twelfth street if it was squared up, 150 or 200 feet; the rest of the verdict is made up of three other items; one is an item of $1,660, or $10 a foot for 166 feet of frontage where the flour shed is, property that, as far as the frontage upon the street is concerned, as far as the situation of the property with reference to the elevated road is concerned, is identical with the property of Mr. Backus, though it is more valuable property, being on this side of the crossing, and you are not obliged to go over the crossing either way in order to reach it from the central part of the city. And the commission consisted of as intelligent business and as able business men as are in this city, and they awarded the Michigan Central ten dollars a foot. Mr. Backus' award, upon the same theory, would be $2,389. Then, when we come to the property on the south side of the street, we find that the elevated road runs in front of the Michigan Central property for very nearly half a mile, according to the testimony, about 2,300 feet, and they allow for a part of that, for about 800 feet, $8,500, or something like that; and for the 1,300 feet they allow $15,000 and odd, or a total of about $12.50 per foot. That is what Mr. George H. Barbour, Col. Hecker and Michael W. O'Brien allowed the Michigan Central as compensation in this case. And who are they? Col. Hecker is one of the most successful business men in this city, the president and manager of the Peninsu-
580 lar car works, a man who has made a fortune, and made the money himself—he did not inherit it; another is Mr. George H. Barbour, the head of the Michigan Stove Company, another successful business man; and the other is Mr. Michael W. O'Brien, the president of the People's savings bank, who organized and established and built up one of the greatest banking institutions in the Northwest. So that we have, when you come down to what the damages are, the judgment of good men as to what they are, as to the damage the Michigan Central railroad will sustain because of the erection of this superstructure.

Mr. DICKINSON: Did they take sparks into consideration, in estimating the injury to the Michigan Central?

Mr. BAKER: They took everything into consideration, I suppose.

Now, Brother Chipman made an argument to you, in which he said, "I say to you"—that was his language—"I say to you that the supreme court would not overturn a verdict of a jury;" and he desired to pledge his word, as a member of the bar and a citizen here, as against my own, upon that proposition. Now, gentlemen of the jury, I think I can explain the situation that any such case would be in. I do not think anybody who will think a moment about it could be misled upon that subject. If we desired to condemn a right of way across the property of the Michigan Central railroad, we certainly would have to bring ourselves within that statute, and we would have to allege in the first place that the Michigan Central did not use it; we would have to allege in the next place, if it was not in use by the Michigan Central, we would have to allege, not only that they did not use it, but that they did not need it; there is no question about that. Suppose we went to this very jury upon that question. We put in the testimony of Mr. Sutherland that the Michi-
581 gan Central Railroad Company did; the jury went down to look at the property. Do you believe that you would find that the Michigan Central Railroad Company does not use that property? Do you think that any argument could be made to you that would lead you to any such conclusion? Do you believe that my learned friends could convince you of any such thing? But suppose they could, my brethren know, the youngest member of the bar knows, that if a jury decide anything without any evidence before them tending to prove the fact, it must be set aside as an unwarranted verdict; the supreme court would set it aside. If the circuit judge did not do it, the supreme court would do it, and the whole contention of our learned friends is that we could go on and condemn that property, and by hook or crook we could go on and get a verdict, and they would sustain it. The language of my brother was guarded, "That the supreme court would not set aside an honest verdict." I agree on that. But would such a verdict be honest, where twelve men found against the evidence, and found a verdict that the Michigan Central did not use and did not need their property down there, if it was not used. It is absurd, it is the last effort of drowning men, when they undertake to make any such argument before you. It is an appeal to your prejudice, gentlemen of the jury, and Brother Chipman, forgetting that he is before a jury in a court of justice, thinking that he is upon the hustings, says, "Why, it is everything for the railroads, and nothing for the people," trying to arouse your prejudice, trying to excite your political feeling, perhaps, in making an appeal of that kind to you, when it is a naked question, under the issue in this case, of neces-
sity and damage; and he goes on to say that these railroad
582 companies are a hostile force in your midst, an enemy inside of your lines, trying to break down the city of Detroit, trying to destroy your city, trying to destroy your homes and your property and to bring desolation here. He talks to you in that way, to you, a jury of intelligent business men and citizens, who have lived long enough to know that the city of Detroit will be just as big as

the railroads and the territory tributary can make it, and no bigger; men who have lived long enough to know that the greatest city on this continent, to be the greatest city in the world ultimately, the city of Chicago, has been made because it was so located with the railroads terminating there, that they brought the entire Northwest and Southwest and West to its doors. There we have a city that has outgrown the city of Detroit in Mr. Joy's lifetime. In 1846, down to 1851 or 1852, under his testimony, and no one will doubt its correctness, the city of Detroit was a bigger city than the city of Chicago then was; and you stand in the center of the city of Chicago and draw a half-mile circle, and you take in four or five union depots that are not more than half a mile away from the business center of the city of Chicago; and because we want something of that kind here, because we want facilities for these companies here, so that business can go on, my brethren insist that we are obstructing the view of the Detroit river, that our children and our good wives cannot get down to the river. Why, gentlemen, there will be enough river left for us all; but of what use is it to be here when we cannot have money and means to enjoy the river; what use is it to be here at all, unless this city is to grow and develop and be a great city; and can it do so if we are not to have any railroad facilities, or only imperfect and inadequate facilities, and if every
583 time anything is to be done for the improvement and development of the city, the interested property-holders intervene and come in and appeal to a jury and ask them to stop it, because, forsooth, they may sustain some incidental damage, that can be adequately returned to them in the very proceedings in court.

Mr. DICKINSON: We ask you to take the most direct route.

Mr. BAKER: You ask us to take the most direct route! How innocent and childlike and bland you are! You know that if you get a verdict from this jury, that we cannot go through there; gentlemen of the jury, we know it, if they don't; we will be either in the hands of the Michigan Central and be compelled to pay them any price they may ask, or that this entire enterprise will be in the hands of Absalom Backus, Jr., and he can unload, perhaps, his entire property onto this company.

Mr. DICKINSON: Will you take our yard and storehouse, as well?

Mr. BAKER: No, sir; we do not intend to take any of it. What are you here for, gentlemen of the jury? They seem to assume that you are here to stop this enterprise in some way. Is that so? Is not this the situation, is not this the law that exists in regard to a proceeding of this kind? If railroads could be built without exercising the power of eminent domain and condemning property, the supreme court would undoubtedly hold that they would have to buy their property at the best price they could get the owners to sell it for, the same as any one else, any individual would be compelled to do. The necessity of exercising this right arises because of the absolute impossibility to build a railroad, or to allow us even the shortest street by private treaty, because everything has
584 to be done within financial limits, and if you wanted to lay out a street in this city today, and did not have the power of

eminent domain, sooner or later you would come to a property-owner that would want ten or a hundred or a thousand times the value of his property; and it has occurred time and time again, and will occur as long as the passion of avarice and the desire to acquire property exists in the human breast. I do not find any special fault with it; I just simply say it is a fact, and that if you started out to build a railroad down through that property, and you bought the first piece, and after a while you got the next piece, and after a while you got the next one, finally you would come to a man that you could not do anything with at all; he would not sell even; you do not know how obstinate men are sometimes; they would not even fix a price; and if they did fix a price it would be beyond anything anybody could pay for it. That being the fact, it is recognized by the constitution, it is recognized by our laws, and if we desire to lay out a canal, or highway, or railroad, or plank road, or anything of that kind, that must be continuous in its line, the power of eminent domain is conferred for the purpose of enabling the property to be acquired for its reasonable worth, that amount to be determined by a jury of intelligent citizens, freeholders, that are called for that purpose. Nothing could be fairer or more just.

One word more, as it is five o'clock. We have already shown you that we have gone on and acquired the union depot grounds; we have acquired the right of way down to River street; we have acquired substantially all the right of way along River street, but that of Absalom Backus. Now, the whole object and purpose of the power of domain would be frustrated if at that point a jury
585 would agree with Mr. Backus that he would not or should not sell his property at all. Suppose we laid down another route, and we went along acquiring property, and finally we found a jury that said, "Why, you cannot go across this piece, we do not think it necessary, we disagree with everybody else that has ever sat in the case, we think you ought to go somewhere else;" why, you could never build a railroad under existing laws if jurymen acted on that theory. So that when you come to consider your verdict in this case, you should consider the whole enterprise, what has been done, and what remains to be done, and what is reasonable and just under the circumstances. Perhaps, gentlemen of the jury, if any of you had been on the State railroad crossing board you would have said, "Why, you had better go through the route of the Michigan Central, or you had better go through Backus' property;" but we had to submit this route to that board, and that board had a right to decide where we would cross the Michigan Central, and that board decided we should do it at River street, and that is the first step we had to take; and there is the State authority, the railroad commissioners, that represent the people of this State, including the city of Detroit, putting us in River street by his official or semi-official act. In the next place, we had to go to the common council of this city before we could go any further on this street; and the common council agreed in an ordinance with us by which we could go along that street. In the next place, we had to acquire the right of way from abutting property-owners.

As the Michigan Central owned the largest amount of property along that street, and had any amount of money to fight us with, and was hostile to the enterprise, as hostile as anybody could
586 be, we commenced a case against the Michigan Central to see how that would come out. They preferred three commissioners instead of jurymen, and three commissioners were appointed under the law, and we tried the case for about two months, and they fought us step by step and inch by inch, but finally the truth prevailed, and they found that it was necessary to go along this property, and they assessed the damages on the north side at ten dollars a foot, and at about twelve and a half dollars a foot on the south side. We applied to have the verdict confirmed, and the circuit court of this county confirmed the verdict, and within sixty days I took a check to the Michigan Central to see if they would accept it instead of appealing or further contesting it, and I was agreeably surprised to find that they accepted the money and had given up the fight. In addition to that, gentlemen of the jury, it was necessary to acquire the right of way from the property-owners on the north side of the street, and we commenced the necessary proceedings. Brother Dickinson appeared before a jury of twelve men in behalf of Kidder & Piper, the owners of the Union mills. We contested that case inch by inch, as we are contesting this case, but in the end the truth prevailed, the right prevailed, and the award was made that public necessity justified the taking of this right of way along that highway, and the damages were assessed at $21,250, and it has been paid. In addition to that, there were a large number, or quite a number, of properties along there, owned by Mrs. Barbara Steadley, Mr. and Mrs. Ruhlman, Mrs Catherine Harpfer, and we tried case after case, with the same result, that in the end, no matter how much they objected, or criticised the efforts of this company in this enterprise, a ver-
587 dict was given that it was a public necessity, and the damages were assessed? In the case of a piece of vacant property that had no business or building upon it, it was assessed at $31 a foot, or, under the evidence, about one-third of the actual value of the land itself. This is the situation of this enterprise. And my brethren appeal to you as to your power; they ask that, because you have the power in this box to bring in a verdict and kill this enterprise right here, you ought to do it; they think that if they can convince you that you have the power to do it, you will do it, that you will just squelch us without any further proceeding. We have everything else but Absalom Backus, but his rights are so almighty sacred and so dear that he must not submit to the same inconvenience that all these other people must submit to, and take what he is reasonably entitled to and no more. That is the issue, gentlemen of the jury, that you are called upon to determine in this case; and some time in the course of the proceedings I hope all of the facts will be brought out, and you will be in full possession of every element that should enter into your deliberations, and you can go out and consider your verdict, and will bring in one that at

least will be satisfactory to your own consciences and your own judgments.

Mr. DICKINSON: They will not go out on the facts as you have stated them in the last fifteen minutes.

Adjourned to Wednesday, June 24, 1891, 2 p. m.

588 JUNE 24, 1891.

Mr. DICKINSON: I shall not at this time refer to some of the very extraordinary statements of facts made by Brother Baker. I shall reply later, at length. I only think it leads to repetition. Therefore, with your permission, we will proceed with the testimony.

EDWARD H. MARTINE, sworn for respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?
A. New York city.
Q. How long have you lived there?
A. Forty-nine years; born there.
Q. What is your business?
A. Real-estate broker and appraiser.
Q. You are a brother of Judge Martine, of the court of general sessions?
A. Yes, sir.
Q. And formerly district attorney of the city and county of New York?
A. Yes, sir.
Q. How long have you been engaged in the real-estate business?
A. Over twenty-five years.
Q. Where is your office?
A. No. 60 Liberty street, New York.
Q. How far is that from Broadway?
A. Directly opposite the Real Estate exchange.
Q. About what amount of real estate do you handle in the course of the year, buying and selling?

589 A. I have done as high as a million dollars a year; when I say that, I mean I have bought and sold that amount of property.

Q. You do a regular real-estate agency business?
A. Yes, sir.
Q. Will you please state whether you have had anything to do with the valuing of property in the city of New York?
A. I have been employed by the city of New York as one of the appraisers of property from the north line of New York, Yonkers, down to Thirty-fifth street, land taken for the new aqueduct; also land taken for the new park in the Twenty-third and Twenty-fourth wards. I have been employed by them to appraise armory sites, about a dozen school sites in different parts of the city, and various other matters which I get now.

Q. I suppose you are engaged in the appraisal for the city at the opening of Convent avenue?

A. I was.

Q. Are you familiar with the real estate that is situated on the lines of streets that are now traversed by elevated roads?

A. Yes, sir.

Q. Will you please point out the principal lines of elevated railroads in the city of New York upon the map which you have brought with you, and which is upon the wall?

A. The first line is what is called the Third Avenue line, which runs from the Battery to Front street, to Chatham square, up the Bowery to Third avenue, to One hundred and twentieth street.

The Second Avenue line runs parallel to it, down to Twenty-
590 third street, and then east from Twenty-third street to First avenue, down First avenue to a continuation of First avenue, Houston street, to Allen street, and through Allen street, and joins the Third avenue and goes down Third street. Then we have the Sixth Avenue line on the west side of the city, which is at the South ferry and crosses Battery park and runs north to Greenwich street, through Greenwich street to Ninth avenue at Fourteenth street, and continues up Ninth avenue to One hundred and tenth street, east to Eighth avenue, to about One hundred and fifty-fifth street. The Sixth Avenue road also commences at the Battery and runs on the Ninth Avenue track until it strikes Church street to Murray, through Murray west one block to West Broadway, on West Broadway to West Third street, and then to Sixth avenue, on Sixth avenue to Fifty-third street, and then Ninth avenue to One hundred and fifty-fifth street, which is also the continuation of the Sixth Avenue road on Sixth avenue.

Q. Will you state whether in your business your attention has been called to the effect upon real estate and rental values of elevated roads in New York?

A. Yes, sir.

Q. Will you tell the jury how high in the clear the elevated roads in New York are above the roadway, on the average, through the city?

A. They are generally about 21 feet from the under side of the structure to the roadway. There are one or two exceptions on the upper part where it goes nearer the street, but only for a block or two in any instance.

Q. And there is nothing I believe carried on the elevated roads except passengers—no freight carried on the elevated structures?

A. With one exception, what we call the Northeast Rail-
591 way of New York, which starts from One hundred and fiftieth street in connection with the Sixth Avenue road, which has one baggage car, which carries trunks and such things, but not freight, from Fifty-third street to Eighth avenue and to One hundred and fifty-fifth street to connect with the Northern road.

Q. Point out on the map where it connects with the Northern road.

A. At this point.

Q. That is one baggage car?

A. One baggage car.

Q. In any other place in New York do the elevated railroads carry anything but passengers?

A. No, sir.

Q. The engines are very much lighter than the locomotives of the trunk lines?

A. Yes, sir.

Q. And the cars?

A. They are.

Q. Do you know what coal is burned in the locomotives of the elevated roads?

A. Hard coal.

Q. Do you know whether, from the elevated road as it now runs in the city of New York, burning hard coal, as it does, there is any danger from fire. Do you know of any fires burning awnings or anything of that sort?

A. There have been several occasions where the canvas awnings have burnt up.

Q. Will you take the east side of New York, take the Third Avenue line that runs through Pearl street and the Bowery. Pearl street, before the elevated road, was a leading business street, was it not?

592 A. It was.

Q. What class of businese was done there?

A. South of Wall street there was a cotton trade generally, largely. Above that, Maiden Lane, tobacco, and above that hardware and iron-work.

Q. Pearl street was known as Cotton street, the lower part?

A. What we call Hanover square, below Wall street.

Q. How wide is Pearl street at this point formerly occupied by the cotton goods?

A. About 50 feet in the narrowest part. Below there there is a place called Hanover square, about 50 feet wide.

Q. The cotton dealers were about Hanover square?

A. They were. In fact, they took the cotton exchange originally in the narrower part.

Q. Hanover square is little more than a widening of the street?

A. Nothing more than the west side is cut off diagonally and makes it larger at one end than the other.

Q. At this point, except at Hanover square, the street was 50 feet wide?

A. It varies. Pearl street, from Quincy street to Wall street, is 50 feet, with the exception of Hanover square, spoken of.

Q. That includes the sidewalk?

A. Yes, sir. Wall street to Maiden Lane 50 feet, the same to John street and Fulton, Fulton to Beekman 37 feet wide, Beekman to Ferry 43½.

Q. At the point where Pearl street is 50 feet wide, what is the number of tracks in Pearl street?

A. Two tracks.

593 Q. When was the elevated structure put upon Pearl street?

A. It was commenced in the fall of 1877, in November, and was finished in June, and cars were running in August, 1878.

Q. Will you state whether at Hanover square and below, at this point which you have spoken of as devoted to cotton business—this is in the principal business part of New York?

A. Pearl street was the leading business street east of Broadway.

Q. Will you state what effect, if any, the construction and the running of the elevated passenger cars upon this structure, what, if any, change it created in business?

A. It has made a change.

Q. What is that change?

A. Smaller dealers have got on the street. For instance, one building, formerly a storehouse, was turned into a tenement-house, which is a very rare thing and of a cheaper character. And buildings, instead of being rented to one tenant, are rented to several, in lofts and apartments.

Q. Business has got to be miscellaneous and of a cheaper character?

A. Yes, there are small eating-houses and the depots for western lager beer firms. One little tailor has got in there in a place occupied by a cotton broker, and there are some insurance brokers and customs-house brokers, and things of that kind.

Q. Do you know of any instance in your own knowledge of the changes in value on Pearl street by reason of the elevated road?

A. I do.

594 Q. Will you give the jury some instances that are within your knowledge on Pearl street?

A. Do you want the selling and rental value?

Q. Anything in your own knowledge.

A. 87 and 89 Pearl street, between Quincy slip and Old slip, granted in 1873, for $9,450.

Q. What was it occupied for?

A. An office building, called the Armitage building. I think I may state the reason why I made the comparison in 1873. In 1873 we had good times before the panic. In the following fall the failure of Jay Cooke & Co. produced the first thing in the panic, and in New York prices ran down until 1877 and 1878, and after that prices rose, and in streets outside of elevated railroad streets downtown specially, prices went up from 25 to 33½ per cent. beyond the 1873 prices, and I compare good times now with good times then.

A JUROR: Has that anything to do with the elevated road—the times?

A. It has this to do with it in making my comparison.

Q. You are speaking of the times?

A. The times were good in 1873, and they were bad in 1877, at the time the elevated railroad was built, and I want to show how property in New York has risen, how it compares one good time with another. It would not be fair to compare it to 1877, because everything has risen since then.

Q. This property, 87 and 89 Pearl street, what was the rental?

A. That is the Armitage building, an office building, it rented for $9,450 in 1873, and in 1887 and 1888 for $5,415.

Q. Right in that connection, in 1873, real estate soon after that became depressed, did it not?

595 A. It did.

Q. When did it recover?

A. Its recovery was commenced in 1879 and 1880, and prices got back along in 1885, and have continued, generally speaking, to rise since then.

Q. Will you go on and make any other statement within your knowledge as to the effect upon Pearl street?

A. 173 Pearl street, a building used for manufacturing tin cans, that property rented in 1873 for $3,000. It rents now for $1,500; 174 and 176 Pearl street, store on first floor, offices upstairs, the building in 1873-'4 I had for sale; the price was $60,000, renting for $6,000 a year. It was sold in 1882 for $29,000, and the present owner gets $3,800 rent.

A JUROR: What is the height of that building?

A. A five-story building.

Q. In 1882, at the time of this sale, had property, other than that where the elevated railroad ran, risen in value, and did it continue to rise?

A. It had risen some in 1882.

Q. It certainly was equal in value to what it was in 1873?

A. Not quite. About 1885 property generally would be.

Q. Go on.

A. No. 175 Pearl street, four-story and attic, brick store, rented in 1873 for $3,000; it is now renting for $2,000 a year. 179 Pearl street, four-story warehouse, rented in 1873 for $3,000; it rents to-day for $1,500. 182 to 186 Pearl street was sold in 1872 for $77,000, and in 1882 was sold for $60,375. The southeast corner of Maiden Land and Pearl street rented in 1877, the year before they commenced to build the road, for $5,100; it rents now for $3,350.

596 Q. Are the tenants the same or as permanent as before?

A. They are not.

Q. They shift, do they?

A. They move oftener, create more vacancies than they used to.

Q. In giving the rental value, the rents received, when rented, does that state the whole loss, covering the time that the stores are vacant, changing tenants?

A. It does not, because in the Armitage building, where the rent was over $5,000, the actual collections were less than $3,400 in one year.

Q. Go on, if there is anything further that you know of your own personal knowledge.

A. 138 Pearl street, running through to Water street, in 1874 the property rented for $9,550, and the rent now is $5,175.

Q. That is what is charged?

A. That is the rent-roll.

Q. Do you get the same class of shifting tenants for that, frequently changing?

A. Yes, sir; that is an office building; 144 Pearl street in 1873 rented for $5,950; the rent now is $2,834; 102 Pearl street rented in 1873 for $2,200 a year; it rents now for $1,200; 306 Pearl street, from 1872 to 1875, rented for $2,250; in 1888 and 1889 the rent was $1,600; 130 and 132 Pearl street in 1872 rented for $12,000, and rents now for $5,625; that is an office building; 244 Pearl street, from 1872 to 1877, rented for $2,500, in 1890 it rented for $1,750; new front put in the store; 46 Pearl street in 1873, rent $2,750, in 1889 $2,000; 261 Pearl street in 1873 rented for $3,640, now $2,400;
99 Pearl street, running through to Stone street, in 1873
597 rented for $3,900, in 1889 $1,860; 125 Pearl street, which runs through to Beaver, a building about 80 feet deep, a short block of stores on Pearl street, rent for $600 a year, and the stores on Beaver street for $1,200, the same depth of stores. One building divided in the center with a wooden partition to make two stores. The rents formerly were higher on Pearl street, and less on Beaver; 160 Pearl street, north of Wall, in 1873, rent $4,500; in 1889 $2,650; 280 Pearl street, in 1873 $2,200, now $1,600.

Q. That is so far as Pearl street is concerned?

A. Yes, sir.

Q. Will you please state to the jury whether or not in the vicinity of Pearl street, away on streets off from the elevated railway, or on streets over which the elevated railway does not cross, there is not now as compared with 1873, or as compared with 1877 or 1878, either one, a general advance in real estate values, and rental values?

A. There has been an advance, especially downtown, where this Pearl street is situated—a great advance over 1873 prices, which will vary from 25 to 33⅓ per cent., and there are cases where it is 50 per cent. higher.

Q. Does that advance on streets over which the elevated road does not run in this vicinity also apply to the advance in rental values?

A. The rental value has not advanced as fast as the advance in the fee, for the reason that in 1880 the law in New York was changed, reducing the rate of interest from 7 to 6 per cent., which reduced the rate of interest that a man has on his building when rented.

Q. Is it the universal rule in that part of the city, as you have stated it, that advances since 1873 to the present time are from 25 to 33 per cent.?

598 A. Yes, sir; outside of railroad streets.

Q. To what do you attribute the change in the character of the tenants on Pearl street, the depreciation in the salable value of property on Pearl street, and the depreciation in the rents on Pearl street that you have related?

A. To the construction and operation of the elevated railway.

Q. Is there any other reason that applies to Pearl street?

A. None that I know of, sir.

Q. Do you know where the cotton business went to from there?

A. The cotton business in about 1872 went to the lower side of Hanover square. It then moved in about 1885 to their new build-

ing on the north side of Hanover square where the street is 150 feet wide and the elevated railroad is certainly over 100 feet from it.

Q. Go on up the street, can you tell anything of the effect of the elevated railroad above on the same line, the Third Avenue line, say in the Bowery part?

A. The Bowery proper, just where the Bowery commences, the north end of Chatham square is covered over within seven feet of the houses on each side of the street. The posts are set on the curbstone, a part of the uptown track and the downtown track over the walk and over the roadway at the lower end of this structure, which covers the whole street. There are only two tracks outside, and in the center are the station buildings and the platform; about 125 feet north of that there is a clear platform and two more tracks which are in view on either side of the structure. That is where they send trains out, from the Chatham Square pocket. I
599 know one piece of property, No. 13 Bowery, which rented for $5,600, which has been sold within a year and a half or two years for $32,500, which was rented for $2,500 at that time. The owner refused, before the road came, $57,000 for it.

Q. Up the street—can you give us any information further on that line of railroad, along up the street?

A. No. 75 Bowery was rented for $6,500. It now rents for $4,200. That is a four-story store used as a carpet store. The tenant says he will not take a new lease, even at $4,200, when his lease expires.

Q. Does he give any reason?

A. He does.

Q. What?

A. The structure in the street throws a shadow on his building in the afternoon, takes away the light. The running of the trains makes a great deal of noise. Cinders are thrown into the building, steam and smoke, and the flickering light caused by the passing of trains. A man examining carpets has to have a perfect light, and they stop when the trains pass.

Q. At this point, does the structure span the roadway?

A. No, sir, there are only two tracks there. The posts set on the curbstone, partly over the sidewalk and partly over the roadway.

Q. What is the width at that point?

A. I suppose at that point probably 80 feet wide, and lower down, at No. 12 Bowery, it is only about 70 feet wide.

Q. At this point, at the carpet store, the street is 80 feet wide, and there are but two tracks of the elevated structure?

A. Yes, sir. No. 218 Bowery rented in 1871 and 1872 for $5,400. It rents now for $3,200. The same property was sold in 1871 to William B. Astor for $45,000. He sold it in 1890 for $39,000.

600 Q. How wide is the street there?

A. 110 to 115 feet wide.

Q. How many tracks?

A. Two. No. 108 Bowery rented in 1873 for $9,500. It rents now for $5,700.

Q. How wide is the street there?

A. I suppose the street there is probably 80 to 90 feet wide.

Q. How many tracks?

A. Two. No. 309 Bowery, just before the road was built, rented for $1,800. It rents now for $1,200.

Q. How wide is the street?

A. About 110 to 115.

Q. How many tracks?

A. Two. No. 166 Bowery rented for $4,800, now rents for $3,200.

Q. The street is about the same width and the same number of tracks as before stated?

A. About the same. No. 21 Bowery rented in 1872 for $5,000. It rents now for $3,000 and taxes.

Q. The width of the street and the number of tracks?

A. That is where it is covered over within seven feet of the house line. That is about an average of the Bowery. No. 36 Bowery, in 1874, rented for $3,500. In 1889, $2,200. It is covered over with four tracks, and there are no structures on the tracks, no buildings opposite this house.

Q. How high is the track there in the clear from the roadway, all along the Bowery?

A. I suppose it is about 21 feet in the clear.

Q. It has about the same effect following along the line
601 of the elevated road, as you have stated, up Pearl street and up the Bowery on that Third Avenue line?

A. No; when you get north of First street, Third avenue commences. It is so on the whole length of the Bowery, but on Third avenue, which commences at First street and runs north to One hundred and thirtieth street, the avenue there is 100 feet wide. The track is placed in the center of the street with posts in the roadway each side of the horse-car track, and there are two tracks in the center of the street.

Q. There is a highway for teams on each side of the elevated structure uncovered?

A. Yes, sir,

Q. Has it affected the value of the property even there?

A. It has affected it. Property there has not got quite back to the 1873 prices, and has failed to appreciate with the adjacent property.

Q. It is not worth as much into how much as on parallel streets of equal width?

A. In percentages the other streets are worth a third more.

Q. Do you know anything about how it has affected the value of property used for residence purposes?

A. Fifty-third street from Sixth to Eighth avenues was a very good residence street. In 1875, I know a party who bought a house there for $25,000; they rented it for $1,700. When the road ran there in 1878 the party moved out. The owner attempted to rent the house, and the highest offer she ever had was $1,000 a year. She has lived in it herself. I have had it for sale for $15,000, and the best offer I have had is $14,000.

Q. What is the reason?

602 A. The reason is the elevated railroad.

Q. How wide is the street at that point?
A. Sixty feet wide.
Q. How many tracks in the street?
A. Two.
Q. We will come down to the west side of New York. The elevated road on the west side runs through what streets?
A. Greenwich street and Church street, College place and West Broadway and South Fifth avenue.
Q. Can you tell us anything of the influence on rentals and the value of fees in that portion of New York?
A. West of Broadway there has been a large appreciation in real estate value. On Greenwich street the prices have not got back to 1873. Further along, they have done a little better, the obstruction is not so great.
Q. What is the difference between the values on Greenwich street, where the elevated road runs, and the parallel streets where no elevated structure runs?
A. Below Courtland street, for example, the property on Greenwich street has not got back to its old price, whereas lots on Washington street, about 200 feet west, where they sold for $12,000 in 1873, sell for $20,000 now.
Q. There is an advance on the west side of Broadway, a general advance. Does this compare favorably with the other advance, the illustration you have given?
A. Yes, sir.
Q. Except on the streets where the elevated structures are?
A. Yes, sir.
Q. Do they have the same class of tenants that they had
603 before the structure was put there, or the same class of tenants as upon streets where there is no elevated structure now?
A. They have not as good rent, good paying people.
Q. Nor as permanent people?
A. No, sir.
Q. Have you any illustrations of that on that side of Greenwich street, or Church street?
A. The southeast corner of Rector and Greenwich streets the property in 1875 sold for $26,000. The same property was bought in 1885 by the elevated railroad for $22,000. In 1870, 160 Greenwich street, lot 26 by 65, with an old-fashioned two-and-a-half story house on it, sold for $22,500. In 1887, the same man bought the building next door but one, with a lot 25 by 100, with a five-story frame and brick building on the front, and a four-story on the rear, for $20,000.
Q. And that after the increase that you have referred to had taken place in 1885?
A. Yes, sir; in 1887, after the building of the road. The southwest corner store on Greenwich, a piece of property, sold for $50,000 in 1870, in 1886 $48,250. It has not got back. No. 109 Greenwich street, sold in 1873 for $17,800. That had an old two-and-a-half story house which was torn down afterwards. No. 80, same street, lot 24 by 100, almost as large, a four-story brick factory, sold for

$17,600 in 1886. 167½ Greenwich street, just before the road was built, rented for $1,500; in 1884 it was rented for $900, and is rented for that since. 158 Greenwich street rented in 1872 and 1873 for $2,000, which rents now for $1,104.

Q. Now, Mr. Martine, you have given these illustrations; you are familiar with the real estate on all these streets, are you, where the elevated railroad goes?

604 A. Yes, sir.

Q. What have you to say as to the universal lesson of the effect upon property in the city of New York by the passage of the elevated railroad, business or other property?

A. It is detrimental.

Q. What does it do as to values?

A. Depreciates values.

Q. What, in the matter of renting, is the case as you know of finding ready tenants?

A. You cannot get as good rents, and you cannot rent as regularly and to as good tenants.

Q. And the complaint is the elevated road?

A. The very fact of its being there they make an objection to.

Q. What effect does it have also upon Greenwich street with the light?

A. It takes away the light.

Q. Does the structure affect the light?

A. The structure itself takes away the light, absorbs more or less. It is wet under the tracks, the streets are generally wet, and the drippings from the tracks are objectionable. The passing of trains takes away the light.

Q. Do the trains throw cinders, even burning anthracite coal?

A. They do.

A JUROR: What do you mean by the drippings?

A. Especially in winter time after a snowstorm; the tracks are saturated with grease, and when it snows it lays there, and when it thaws you cannot pass under there without an umbrella. If you do you will ruin your clothing.

Q. What is the effect of the dripping of such things upon cleanly business?

605 A. It is an objection to anybody who has a first-class trade.

Q. Of any kind?

A. Yes, sir; in fact in trade people object to it.

Q. To what extent is the flowing of steam from the locomotives an objection?

A. The fact is, on a clear day it carries it straight up and gets between the sun and the house and casts a shadow, and the light flickers, and you cannot work if you are writing. In a cloudy day, or dull weather, the smoke will go down between them and pass up the track and get into the windows of the house.

Q. The entry of steam is a very great objection in a business house, is it not?

A. Considered so by the owners and tenants.

Q. To what extent does the smoke injure the tenants in the building?

A. It sometimes carries gases with it from the engines which are emitted.

Q. With the smoke and soot and cinders?

A. Cinders go with it.

Q. Have they succeeded in any way, in the city of New York, in running passenger trains on the streets, preventing smoke and soot?

A. Not that I can see.

Q. You see it every day?

A. Yes, sir; it is the universal complaint against the elevated structure, one of the complaints.

Q. Although they burn anthracite coal?

A. Yes, sir.

Q. I don't remember if you had anything to do with that
606 building, still you may have had, in which the American Bank Note Company did business, on a street west of Broadway?

A. I did. I was a witness there in two suits they had against the elevated railroad, where they got two judgments of about $120,000 altogether.

Q. Let me see about that.

A. It is on Church street, which is a street parallel to Broadway, directly back of Trinity church; the two railroads in front, the Sixth Avenue and the Greenwich Street.

Q. How many tracks?

A. I think there are three in Church street and four in Greenwich.

Q. Where was the American Bank Note Company's institution?

A. On the west side of Church street, running through to the east side of Greenwich, a large five-story building, 120 by 150 feet deep.

Q. There were two railroads that used the tracks on Church street?

A. No, there are two roads, one on Church and one on Greenwich. The Sixth Avenue road runs on Church street.

Q. How many tracks did the Sixth Avenue have along there by the American Bank Note Company?

A. I noticed three, and I think it has four.

Q. What was the complaint of the American Bank Note Company?

A. The bank note company complained of the loss of light and the flickering light, and the damage caused by cinders. Their witnesses testified that in engraving a plate they wiped it off with a soft cloth once in awhile, and many times cinders have been
607 on the plate, and when wiping it off it scratches the whole length of the plate, that has to be hammered on the underside, and in one case they testified it took a man four hours to make the plate perfect again. They also claimed that their numbering machines would clog with cinders and many times spoiled a note, which was finished all but the number.

Q. That came from the elevated road?

A. Yes, sir.

Q. And they claimed also that it obstructed their light?

A. Yes, sir.

Q. Although it was a seven-story building, and this ran by the second story?

A. It ran a little above the second story. The first story is low.

Q. Do you know about the case?

A. I was a witness in both cases for the owners.

Q. Did they own the building?

A. They owned the building. That was for the damage to the fee.

Q. How much?

A. They got $75,000 in one case and $62,000 in the other. A portion of it was for the damage to the machinery and for this work that I have spoken of.

Q. Was it shown also that the steam entered the building?

A. It was.

Q. Do you know anything about any other special cases where smoke, cinders and steam had injured business?

A. The old firm of Willis & Company, 309 Pearl street, dealers in hides and leather, commenced a suit against the road, and they proved that the warm cinders came in there and got on the leather and made a spot, and they had to sell the hides as seconds; could not sell them as firsts.

608 Q. That was where the Pearl Street road run that you have spoken of?

A. Yes, sir.

Q. Having been born in New York, and in active business, I suppose you are pretty familiar with the entrance of the railroads into New York?

A. Yes, sir.

Q. And within the last ten years, I believe, New York has swarmed up the island pretty well, so that it is pretty densely populated?

A. It is. It has crossed the Harlem river.

Q. Pretty dense population in Harlem now?

A. Yes, sir.

Q. Do you know how the New York Central comes down to the terminal facilities by which it reaches this depot?

A. I do. It comes from the Hudson river and strikes Fourth avenue at the Harlem river, at One hundred and thirtieth street.

Q. From Harlem river how does it come down?

A. For a couple of blocks there is a stone wall, and it drops into an open cut, down till you get to One hundred and sixteenth street, and from there it runs on a stone viaduct.

Q. How high?

A. Commences about five feet high, and runs 38 or 40 feet high, until you get about One hundred and first street, and then from there it goes into an open cut, and at Ninety-sixth street strikes the tunnel, and runs under ground until it gets to Fiftieth street, and then goes into an open cut.

609 Q. For a distance it runs on a viaduct; how high does it run?

A. The highest part is at the lowest end, One hundred and first street, about 38 or 40 feet high.

Q. How is that constructed?

A. That is built of masonry.

Q. On piers?

A. No, solid masonry, with openings in the street to drive through, where it is high enough.

Q. All the streets pass under it?

A. Yes, sir.

Q. That comes down Fourth avenue?

A. Yes, sir.

Q. How wide is Fourth avenue?

A. One hundred and forty feet wide.

Q. How wide is this superstructure?

A. A little less than 60 feet wide.

Q. So that it leaves 80 feet roadway?

A. Roadway and sidewalk. The sidewalk is about 12 feet wide.

Q. It leaves a roadway and sidewalk on each side of the street?

A. Yes, sir.

Q. Over which the New York Central trains pass?

A. The New York Central, Harlem and New Haven.

Q. What effect has that had on Fourth avenue?

A. It has destroyed it completely, so much so that instead of facing the lots on the avenue they are faced on the cross-streets running east and west.

Q. Is the population all about there, away from Fourth avenue, dense?

A. Yes, sir.

610 Q. What is the value as compared with the value upon parallel streets where there is no viaduct?

A. The value is much higher on the other avenue.

Q. This is not utilized at all?

A. I think between One hundred and first and One hundred and fifteenth there may be six or seven houses that front on the avenue.

Q. This viaduct along Fourth avenue that you have told of, does that obstruct the passage of teams under it on the cross-streets at all?

A. With a few exceptions; when it comes down low it does.

Q. I speak of where it is high.

A. You take it up to One hundred and first street and to One hundred and thirteenth street you can drive under it.

Q. The streets are open under it and a passage for teams, so that it leaves 80 feet right of way?

A. Yes, sir; right of way and side track; the side track is about 12 feet.

Q. And a passage for teams without any covered way over?

A. On each side of the viaduct there is.

Q. Why should they not build there?

A. As I say, they have turned the lots around on account of the viaduct being there. It is the usual custom for lots, on what we call an ordinary avenue, 100 feet wide, to be worth 50 per cent. more than the street lots, but in this case they are worth just about

what the street lots are. They are assessed by the authorities the same as the street lots.

Q. Can't they get manufacturers in there to run side tracks from this elevated viaduct; is not that property good for a manufacturing avenue?

611 A. It would if they could get permission from the board of alderman to cross the avenue.

Q. They have not attempted it up there?

A. Not to my knowledge. It has been that way a great many years.

Q. Do you know of any place where, from an elevated railroad, a side track is run in anywhere?

A. The only place where a side track is run in is where they own their own property and store their own cars. That is the only place I know of.

Q. You don't know of any being used from an elevated part of any structure for private business?

A. I don't know of any; in fact I would know if there were one.

Q. Did you ever have anything to do with a planing mill?

A. I did.

Q. Tell the jury what you know about it?

A. On Fifty-third street my father owned land which he sold to a man for $95,000 before the road was built in the street. There was a factory put on there which cost $40,000 to build. My father bought the property in under a foreclosure after the road came there for $60,000. After my father's death my brothers and I sold the property for $75,000 or $78,000.

Q. Including the mill?

A. Yes, sir, and the engine and boiler and a little machinery.

Q. Do you know about the planing mill, have you been through it?

612 A. I have. I rented it as agent for my father and as owner.

Q. Does it have anything to do with its value, the running of the elevated road there?

A. It depreciated its value.

Q. Have you been through the Backus planing mill?

A. I have.

Q. Have you been in any other planing mills except the one you have spoken of and the Backus planing mill?

A. I have not here, but I have in New York.

Q. You know something of them?

A. I do.

Q. Have you gone very thoroughly through the Backus mill?

A. I have.

Q. What have you to say as to what kind of plant it is?

A. I think it is the finest place of the kind I ever saw—the most complete. The machinery is labor-saving and everything.

Q. Well equipped for doing the finest work?

A. I should judge so from the work I saw turned out.

Q. This fine work, such as they do for decorations and fine panel-

work, and that sort of thing, what do you think the effect would be if it had spots on it of any kind?

A. It would be a damage to it?

Q. Suppose the soot, such as you speak of as coming in from the elevated road, should get into their fine machinery?

A. It would clog and injure their machinery in some way and stain their wood.

Q. Scratch it?

A. Yes, sir.

Q. Upon highly seasoned wood that is being worked by this fine machinery that you see in that shape, what do you think
613 the effect would be of steam and soot and cinders pouring in upon this work?

A. It would certainly make them liable to burn up oftener; it would raise their fire-insurance rates, it would be a risk.

Q. What effect would it have upon their fine work to have soot and cinders?

A. It would be a damage to it.

Q. And steam?

A. Steam also.

Q. Liable to stain it, would it not?

A. It would.

Q. With your knowledge of handling a planing mill in New York, suppose, instead of an elevated structure, such as they have in New York for passengers, there should pass by the Backus property an elevated structure, 13 or 14 feet in the clear, spanning the entire roadway, that you see there, from curb to curb, having upon it three tracks with a place in front to switch also, and with a viaduct still beyond the roadway for teams, about 25 feet wide, with a solid roadway for teams, and suppose over this structure of three tracks, with the switches placed as I have stated, there should be drawn the railroad trains of four great trunk lines, with their locomotives, standard locomotives, not like those you see in New York, but the standard locomotive, such as you see coming over the New York Central, being the Canadian Pacific, the Wabash system, the Detroit, Lansing & Northern system and the Flint & Pere Marquette system, using these tracks also in front of the Backus property over this structure, for doing the entire local freight business for Detroit, with those roads running the trains up to a freight depot
614 beyond Backus' toward the city, what have you to say, in your judgment, as to whether a successful planing-mill business, such as you see, equipped as Backus' is, as to whether it can be successfully carried on there, with such a structure in that proximity, and so conducted?

A. It would be only partially successful, it could not be carried on, in my judgment, in the proper manner to have it there with such a structure. A man who is there might stay there because he is forced to.

Q. You don't think any one would buy a mill and go into such a place?

A. Unless he could get it very cheap.

Q. You know that in planing-mill business, and in all business competition is very close?

A. I know that, generally.

Q. If he could only make a partial success, and his margins are narrow, in competing with the planing mills of Chicago, Milwaukee, St. Paul, Indianapolis and Buffalo, do you think he could make a success if he only made a partial success?

A. It would not be what I should call a success; it would be unsatisfactory.

Q. Don't you think the injury to his fine work, when he has established a reputation for making very fine work, in hard wood and soft wood, don't you think it would affect his trade?

A. It would, largely.

Q. And if he had to sell at a discount you don't think he would compete with mills of his own style?

A. No, I think the most profitable work he could do is this fine work, and he would have to do coarser work to keep it up.

615 Q. His mill is equipped for the finest work, is it not?

A. I should judge so.

Cross-examination by Mr. BAKER:

Q. You say you have lived in New York all your life?

A. Yes, sir.

Q. And your business is that of a real-estate agent?

A. Real-estate broker and appraiser my principal business, and agent.

Q. You are a real-estate broker and appraiser?

A. Yes, sir.

Q. And you are also a real-estate witness, are you not?

A. I am and have been in a great many cases.

Q. How many times have you testified in elevated-railroad cases in the city of New York?

A. I have testified in about 100.

Q. Haven't you testified in more cases than that?

A. I don't think I have; it may be a few more.

Q. You have always been called by the property-owners?

A. Not always; the elevated railroad has tried very hard to get me as a witness, but I declined to go.

Q. Then you have always testified for the property-owners?

A. Yes, sir.

Q. How much did the elevated road offer you to be a witness?

A. They did not offer me any price; they sent to me a man in their employ, a lawyer, came to me two or three times and suggested he could pay me as well as I was paid by the other side.

Q. What is this lawyer's name?

A. His name is Smith, I think J. something Smith.

616 Q. Where is his office?

A. I will not say positively, I think it is 167 Broadway.

Q. What is his first name?

A. If you mention to the company Flaxen-head Smith they will know the man.

Q. You don't know what his initials are?
A. I think his name is J. P. or J. B.
Q. How many times did he see you?
A. He saw me three times, twice anyway.
Q. And he did not succeed in getting your services as a witness?
A. No, sir.
Q. What did Mr. Backus agree to pay you to come out here and testify?
A. If I am obliged to tell I will tell.
Mr. DICKINSON: Tell it.
A. My fee is $500, and my expenses.
Q. You say you have a brother in New York who is an ex-judge of the court of general sessions?
A. No, I say judge of the court of general sessions.
Q. How was he appointed or elected judge?
A. He was elected by the largest majority on the ticket at the time he ran.
Q. He was elected?
A. Yes, sir.
Q. You never held any judicial position?
A. I did not, sir.
Q. You didn't run for judge when your brother did?
A. No.
Q. What is the court of general sessions?
A. A criminal court.
Q. A police court?
617 A. No, sir, there is a police justice who sits at the police court.
Q. You say you have been employed by the city of New York?
A. I have, sir.
Q. What to do?
A. As I have stated, to appraise land.
Q. In what kind of a case?
A. The first case was taking land for the new parks in the Twenty-third and Twenty-fourth wards.
Q. You were employed by the city as a witness?
A. I was employed by the corporation counsel as a real-estate broker to appraise that property, and to appear as a witness before the condemnation commissioners.
Q. You went and looked at the property and testified for the city?
A. Yes, sir.
Q. That is your principal business, is it not, giving testimony in this class of cases?
A. It is not; my principal business is selling real estate.
Q. Where is your office?
A. No. 60 Liberty street.
Q. How long have you had an office at No. 60 Liberty street?
A. I have had an office there six years.
Q. A real-estate office?
A. Yes, sir.
Q. Where was your office before that?

A. 999 Sixth avenue.
Q. Near what street is that?
A. Near Fifty-fifth street.
Q. How long did you have an office there?
618 A. Four or five years.
Q. Before that where did you have an office?
A. Before that I had an office at 1339 Broadway, near Thirty-fifth street.
Q. How long did you have an office there?
A. About four years. The building was torn down and I moved away.
Q. Before that where did you have an office?
A. I had an office before that in Thirty-sixth street near Sixth avenue.
Q. Did you do a real-estate business in all these offices?
A. Yes, sir.
Q. Did you do any other business?
A. Appraising, insurance and renting houses.
Q. Were you ever in the soap business in New York?
A. I was in the soap business part of my time, way back in 1869.
Q. Down to what time?
A. About three years, but I was never out of the real-estate business. The soap business I went in at the solicitation of my father, who was in the business, and I saw there was no money in it and luckily I stuck to my real-estate business.
Q. You were in the soap business only a short time?
A. That is all.
Q. Your father was in that business before you?
A. He was.
Q. You at one time had something to do with a planing mill down there?
A. Fifty-third street.
Q. Who owned that planing mill?
A. When my father bought it it belonged to A. G. Serril & Son.
619 Q. What did your father give for it?
A. He gave $60,000.
Q. When did he buy it?
A. I don't remember the year now. It was 1874 or 1875; it may have been 1876.
Q. Your father bought it on a mortgage foreclosure?
A. He did.
Q. What number Fifty-third street is that planing mill?
A. I think it is about 206–'8–'10 and 12.
Q. Between what streets?
A. Between Broadway and Eighth avenue.
Q. Is that planing mill there now?
A. It is not a planing mill now; it is a furniture factory.
Q. Does the elevated road run in front of that property on Fifty-third street?

A. No; it runs on the side of it now, because they have made Broadway the front. It does not front on the elevated railroad.

Q. When your father bought it it fronted on Fifty-third street?

A. It did.

Q. How long had the elevated road been built there when your father bought it?

A. My father bought it before the road came.

Q. That is what I thought; you say the property cost $95,000?

A. I say my father sold the lots for $95,000 to Mr. Serril. He built the building at a cost of $40,000.

Q. The property your father bought for $60,000 originally cost $135,000?

A. A foreclosure sale is not a criterion.

Q. Is not that so; it originally cost $135,000?

620 A. Yes, sir.

Q. And your father bought it for $60,000 before the elevated road was built?

A. His mortgage was $60,000, and there were arrears of interest and taxes; I know it was way behind.

Q. How much did your father give for it?

A. I can't say.

Q. Have you not testified that your father gave $60,000 for it?

A. I did so testify, and I wish to correct it.

Q. And didn't you give this jury to understand that it depreciated to that extent because of the building of an elevated railroad in front of it?

A. If I said so, I didn't mean to say so. As a matter of fact that depreciation took place before the elevated railroad was built. But I stated a foreclosure is no criterion of value. In dull times there are no buyers.

Q. That was sold during the hard times, when mortgages were being foreclosed all over this country?

A. Yes, sir.

Q. What was it sold for subsequently?

A. $75,000 or $80,000.

Q. What year?

A. I think it was in 1883.

Q. When was the elevated road built in front of it in Fifty-third street?

A. In 1878.

Q. Who owned the property at that time?

A. My father.

Q. How much damages did he receive from the elevated road?

A. He personally never received any.

621 Q. How much was paid by the elevated road on account of that property?

A. The elevated road paid the estate about $5,300. The estate got that. I think the lawyer who had the claim got a percentage.

Q. How much was the total amount that the elevated road paid for building their road in front of that property on Fifty-third street?

A. I say the estate got a little over $5,000.
Q. How much did the lawyer get?
A. I don't remember what he got.
Q. Did he get as much more?
A. Oh, no. He got probably 20 or 25 per cent. of the whole thing.
Q. He may have got $1,000?
A. He may.
Q. How was the value fixed?
A. Fixed by the railroad making that offer, and its acceptance by the administrator. The lawyer had charge of it, and I had nothing to do with it.
Q. Were commissioners appointed?
A. No.
Q. Was a jury impaneled?
A. The case never went to trial.
Q. It was settled by the voluntary agreement of the parties at about $6,000?
A. All that I know about it is that my brother wrote me to come and see him and said the railroad had made an offer to settle, and I told him, to do what he thought best. I know he sent me a check for a portion of the money.
Q. As a matter of fact it was settled for something like $6,000 in the aggregate?
622 A. It was.
Q. What did the property sell for?
A. I think it sold for somewhere in the neighborhood of $75,000 or $80,000.
Q. Your father paid $60,000 and some accrued interest?
A. And taxes.
Q. You don't know how much the aggregate was?
A. No.
Q. How long did he hold it?
A. He bought it in 1876 or 1877.
Q. When did you sell it?
A. Six or seven years afterward.
Q. Did he run a planing mill in it?
A. He did not.
Q. Did he rent it?
A. For the first year or so he did not.
Q. What did he do with it?
A. He allowed Mr. Serril to stay there for a while.
Q. What rent did the old owner pay for it?
A. He paid a merely nominal rent; I think it was $1,200.
Q. Your father bought it for something over $60,000, and allowed the owner to stay in it for two or three years?
A. Yes, sir; that was until he could get a tenant.
Q. Did he finally get a tenant?
A. I finally leased the property.
Q. To whom?
A. George A. Shaster.

Q. How much rent did you get for it?
A. $2,500.
Q. How long did he have it?
A. He staid there until 1883, when he bought it.
Q. He carried on a successful business there?
623 A. I don't know; he is there yet; I don't know how successful he was.
Q. He bought the planing mill, paid the rent, and finally bought the property?
A. Yes, sir.
Q. Did he carry on a furniture factory there or a planing mill?
A. A furniture factory.
Q. And he is there yet?
A. Yes, sir.
Q. And he has bought property enough to carry him on to Broadway?
A. He runs through and into Broadway, and that is his front now.
Q. Your father's estate has been paid ten per cent. on the cost of the property as damages?
A. Yes, sir.
Q. You say that you have known of canvas awnings being burned up along the line of the elevated road?
A. Yes, sir.
Q. Do you know of any building being fired by the elevated road?
A. No; I don't think I do.
Q. How many miles of elevated road are there in New York?
A. I suppose there must be 30 or 40—30 probably. Let me see (witness refers to paper). No, I will change that, because one road runs on the same track as another road; probably 20 to 25 miles.
Q. How long have those roads been in operation?
A. They commenced in the summer of 1878. The Second Avenue run a little later than that.
624 Q. They have been in operation about 13 years?
A. Thirteen years.
Q. How many miles have been in operation 13 years?
A. There is Sixth and Third avenues.
Q. There are 15 miles that have been in operation 13 years?
A. Twelve, anyway.
Q. You have lived in New York all those years?
A. Yes, sir.
Q. You have lived on the line of the elevated road?
A. I have.
Q. And you have ridden on the road?
A. I have.
Q. And you have been in the real-estate business all these years?
A. Yes, sir.
Q. Having to do with real estate, with the rental, and sale, and disposal of property, right along, daily, as a part of your business?

A. I have.
Q. Do you mean to tell this jury that, in all those years, with all that experience, you never heard of a building in New York being fired by the elevated road?
A. I don't know of one that has been set on fire by the elevated road.
Q. Pearl street was a street where the cotton men used to do business?
A. Below Wall street.
Q. Will you point out Pearl street on that map?

Witness does so.

Q. How long is Pearl street?
A. It commences on Broadway, and then goes to Thomas
625 street and runs around like a horseshoe, and runs around again there by the Battery.
Q. Is it below the East River bridge over to Brooklyn?
A. Yes, sir, it runs under that bridge.
Q. How far does it extend north or northeast of the bridge?
A. One block in the direct line, and then turns round to the west.
Q. It is one of the oldest business streets in New York?
A. Yes, sir.
Q. And at the lower end of the island?
A. A portion of it, the most of it is.
Q. The most of it, all but one block, is below the bridge?
A. All but one block runs in a straight line; that curves off Broadway; but there are many more blocks.
Q. Did the cotton men have a Cotton exchange down there on Pearl street?
A. They did.
Q. Whereabouts was it?
A. Just below Wall street on the east side.
Q. Did they have a building there where they did business?
A. They were in what was called the Carter & Hawley building.
Q. But that was not a separate edifice like the board of trade, or such a building as that?
A. No, sir, they only, at that time, occupied one floor.
Q. Have they since they were on Pearl street built a building for their own use?
A. Yes, sir.
Q. Whereabouts is it?
626 A. On the northeast side, the side towards Broadway, on Hanover square.
Q. They have built on Hanover square?
A. Yes, sir, on Williams street and Beaver.
Q. Just point out Hanover square on there (the map).

The witness does so.

Q. Does Pearl street run into it?
A. Pearl street runs into it and through it, and continues on.

Q. So that the Cotton exchange is still located near Pearl?

A. Yes, sir.

Q. It is now located on a square through which Pearl street runs?

A. It is 100 feet or more away from the elevated railroad.

Q. That is, there is an open square there?

A. At the south end of the square it is about 160 feet wide, and they are 50 or 60 feet from the railroad.

Q. You have given us a large amount of testimony here as to what property rented for in 1873 on Pearl street. How did you find out what it rented for?

A. I looked up the recorded leases; property I had on my book of sales, knowing the rental, cases I have been on, cases I have heard in court, and announcements made at public auctions of what property has been offered for sale at, and many other ways we have of finding out.

Q. How do you get it right down to the dollar all the time?

A. One hundred seventy-four and 176 I had to rent—no, I won't say to rent, I mean for sale, from the owner, and I verified it by seeing the tenants, and the rents of the other premises I got from the owner, Mr. Eno.

627 Q. How do you remember?

A. I don't remember, this book here is full of Pearl street.

Q. What book is that?

A. That is a compilation of my own.

Q. What have you in that book?

A. I have got the sales and rentals on Pearl street.

Q. Have you all the property in New York in that book?

A. No, sir; New York is too large. This book contains the sales on Pearl street, at the different periods from 1872 down to date.

Q. Why Pearl street?

A. Let me finish my answer. It contains sales on Water street, rents on Pearl street and rents on Water street. It contains sales on Pine street and cross-streets, showing the increased rental values and the increased sale values, and on cross-streets near Pearl street. Why I have it all on Pearl street so as to have all Pearl street in one book, is because I wanted it one place where I can get at it.

Q. What do you use that book for in your business?

A. In cases like this, or in cases where I have elevated-railroad suits on Pearl street, and I use it when I want to get at old values or make comparisons of present values.

Q. Is not that a book made up to use in cases in New York?

A. Yes, sir, I told you so.

Q. And you have paid particular attention to Pearl street, you have confined that book to Pearl street, and the cross-streets that cross it?

A. This book is confined to Pearl street, but I have many more that give other streets.

Q. Have you a book that applies to other parts of New York?

628 A. No, sir, but I hope to.

Q. Do you mean to say that you have been called in so many cases as a witness, that it has saved you time and labor to get up a book like that?

A. I do.

Q. And you have only been called in about 100 cases?

A. I have, in more than that, but that is all that has actually been tried. A great many of them have been settled. I give you the cases I have been actually on.

Q. You testified about the Armitage building?

A. Yes, sir.

Q. What is the number of that?

A. 87 and 89 Pearl street.

Q. Did you ever have that building to rent?

A. I didn't.

Q. How did you find out that that building rented in 1873 for $9,450?

A. I heard the former owner, John Stewart, testify to it under oath.

Q. That is all you know about it?

A. And he told me himself.

Q. Is that all you know about it?

A. And I also have seen a list he made out, and have been told so by the owner, Mr. Wilcox.

Q. Your testimony as to that is entirely hearsay?

A. I heard a man testify under oath, and I believed him.

Q. But it is hearsay?

A. Yes, sir.

Q. How did you find out that in 1888 that only rented for $5,415.

629 A. At that time I went through the building and found that out from asking the tenants, and saw the book of the owner, and heard him testify to it.

Q. So that was entirely hearsay?

A. You can call it that if you want to. That is the way I got it.

Q. Did you hear him testify in 1888?

A. No, sir; I think his case was in 1887.

Q. You think it was in 1887 he testified. How could he testify in 1887 what the rent was in 1888?

A. I said 1887 to 1888. Leases are made from May to May, the year.

Q. So that you got that information in a case?

A. Yes, sir.

Q. Were you a witness in that case?

A. I was.

Q. What was that property worth in 1887 and 1888?

A. In the neighborhood of $50,000.

Q. $50,000.

A. In the neighborhood of that, I say.

Q. Was this case that you tried before commissioners?
A. No, sir; it was before a court and jury.
Q. Where the property-owner brought an action against the elevated road?
A. Yes, sir.
Q. The property was worth at that time $50,000?
A. I say about that.
Q. What was the verdict?
A. He sued for a loss of rent, and I think he got $13,000; that was for six years.
Q. That covered the back rent and future damages?
A. Oh, no, sir; five or six years' back rent.

Q. Is that all?
630 A. I think so.

Q. In those cases that are brought down there, where they recover for back rent, it is for a loss that has already taken place?
A. Yes, sir.
Q. And in the same suit don't they recover the damages for the future?
A. There was a time the railroad would do that, but very rarely. They hang onto all their money as long as they can.
Q. Did they ever commence suit against the railroad company for the future damages?
A. I don't know.
Q. Do you really know what was tried in that case—whether it was past or future damages?
A. It was past damages.
Q. You know that past damages were involved?
A. It was the loss of rental only.
Q. Have you any real opinion as to whether or not that included in the damages that were recovered all the damages that they could ever recover against the company?
A. No; I know to the contrary that rental damages are tried before juries; fee damages are tried in the equity part without a jury.
Q. Has there ever been a case in regard to that property since?
A. Not to my knowledge.
Q. You don't know that the owner ever sued afterwards?
A. No, sir, I don't.

Q. What was that property worth in 1873?
631 A. I suppose that property in 1873 was worth about $75,000 to $80,000.

Q. To what extent did the flush times that followed the war, or the inflation of prices that was involved in a depreciated currency, affect that price?
A. Well, in the business property about 25 per cent.
Q. There was a panic in New York in September, 1873, I believe?
A. Yes, sir.

Q. It depreciated values in New York for four or five years afterwards, didn't it?

A. Yes, sir; down to about 1877.

Q. And it depreciated rentals in New York for about four or five years?

A. It did.

Q. This case was tried in 1887 or 1888?

A. Yes, sir.

Q. Did you testify in that case that all this depreciation was occasioned by the elevated road?

A. I don't remember now what I testified. I am free to say this, that I testified not the way you put it, but I testified that that property would be worth more than it was in 1873 but for the elevated road; that is what I said.

Q. How close did the elevated road run to that building?

A. Probably eight feet, maybe nine, eight or nine feet.

Q. Near what streets or between what streets is this Armitage building?

A. Between the Coenties slip and the Old slip.

Q. How far from the corner?

A. About the center of the block.

Q. How much frontage has this building on the street?

A. Forty-five feet two inches.

632 Q. How wide is the street in front of the Armitage building?

A. About 50 feet.

Q. How wide is the sidewalk?

A. I think the sidewalks are probably four and a half to five.

Q. Is the elevated road at that point on the curb, the posts?

A. Yes, sir.

Q. Is the entire roadway spanned?

A. It is in that block, with the outside of the track about three feet outside of that, with up and down town rails, but Mr. Wilcox got an injunction against the railroad and they had to cut it out of his road.

Q. So that they have two tracks, one on each side of the superstructure?

A. Yes, sir.

Q. Is there any open space between the two tracks?

A. No, sir; it is planked there.

Q. It is planked over entirely?

A. No, sir; but between the two rails where the car runs there is simply cross-ties and timbers that keep the cars from going off the track, but between the north and south bound tracks there are planks with about an inch space between them.

Q. That is, there is planking that occupies space between the two tracks, with openings of about an inch between each plank?

A. Probably about that.

Q. Foot plank, or about that?

A. No, sir; about six inches wide probably.

Q. How far between the tracks; how long are those planks?

633 A. Those planks run lengthwise with the railroad track.

Q. About how wide a space do they occupy there between the two tracks, not between the rails, but between the two tracks?

A. Between four and five feet, I suppose, between the two rails, I mean between the west rail uptown track and the east rail downtown track.

Q. There is space between them?

A. Yes, sir.

Q. And that is planked over?

A. Yes, sir.

Q. Is it planked or covered in any way between the rails?

A. I think there it is only the cross-ties.

Q. Are there any shields or pans that run along there to catch the drippings?

A. I don't think there are any there.

Q. How high is it at that point in the clear?

A. I think 20 or 21 feet, or maybe 22.

Q. That is, from the under side of the girder to the street?

A. Somewhere about 20 feet. I never measured it.

Q. Have you never measured these heights anywheres?

A. No; but I have heard them testified to by the civil engineer of the elevated road; a man I know personally, and I know his measurements are correct.

Q. You know his testimony is correct?

A. As to measurements.

Q. What is his name?

A. Reeves.

Q. He is the engineer of the elevated road?

A. No, sir; he is a young man who is a civil engineer; he does this kind of work and draws plans for them.

634 Q. He is in the engineer's office?

A. I don't know where his office is.

Q. You have heard him testify?

A. I have.

Q. Did you ever hear any question raised in any of your cases down there about the height of it?

A. In what way?

Q. Was the testimony of the officers of the company disputed at all, or of the engineers, as to how high it was?

A. There have been some disputes about it.

Q. You have heard controversies about it?

A. I have.

Q. But you are willing in your testimony to take the testimony of this young man as to the height of it?

A. I say he is about right, yes, sir.

Q. Do you know what the height of the elevated road is between the under side of the girder and the top of the rail on which the cars run, as a usual thing?

A. I should think between 4 and 5 feet, probably near 4; I am not certain.

Q. Which line is it that runs on Pearl street?

A. Both lines; Second and Third avenues.

Q. How near is what is called the Old slip to the Armitage building?

A. (Referring to paper.) Probably 130 or 135 feet.

Q. Is the elevated road at the Old slip the same height as it is at the Armitage building?

A. I think about the same, without measuring it.

Q. And you think that is about 20 feet?

A. It may be a little higher there, because I know there is a double stairway there from the Hanover Square station.

Q. There are plenty of places in New York where the elevated road is not more than 14 or 15 feet high?

635 A. I think there are a few cases. I think there is one at about Twenty-eighth street on Second avenue, and that there is one at One hundred and fourth street and Ninth avenue.

Q. This man Reeves that you refer to is a civil engineer in the service of the company?

A. So he says.

Q. He is a man of truth and veracity?

A. I believe him.

Q. (Showing paper.) Is that his signature?

A. I don't know his signature; I never saw it.

Q. Where does he live?

A. I don't know.

Q. Does he have an office at 71 Broadway?

A. I think his office is the office of the company, at 71 Broadway.

Q. (Showing paper.) Will you look at that statement of the heights of the Second Avenue line at the different street crossings, and see whether it is correct according to your observation and judgment; you will notice by the head there that that is from the top of the tie, from the top of the rail to the top of the street; it includes the superstructure?

A. Well, the lowest here is 18 feet 1 inch.

Q. But that includes the four or five feet that are in the superstructure?

A. With 34 feet it is 39 feet 8 inches, so that the average would be nearer my figures.

Q. I don't ask you what the average is, but if you desire to state it I have no objection.

A. I don't want to state any average, but I see it is generally higher.

636 Q. It is generally higher than 14 feet; but there are plenty of places in New York where it is not more than 14 feet in the clear?

A. I won't say there are plenty.

Q. There are a number.

A. You have not one on this list that is 14 feet.

Q. Yes, you have. How deep is the superstructure between the bottom of the girder and the top of the tie?

A. The lowest you have got here is 15 feet 5.

Q. But you make no deduction there; just look at the head line there?

A. Yes; from the top of the tie.

Q. You would have to take off four or five feet for the girders and ties, would you not, for each one of those?

A. It may be; I don't know; it may be only three feet; I never measured those girders.

Q. It is somewheres from three to five feet?

A. You cannot be accurate in looking up, as to figures; if you are on a level with it you can; I never measured those heights; I have looked at them with my eye.

Q. Certainly; you just give the judgment that any ordinary man will give as to the heights of it, as far as your testimony is based on your own knowledge.

Mr. Baker then shows witness a diagram and asks:

Q. Would you say that that was a correct representation of the superstructure on Pearl street?

A. It fairly well represents it; I don't know that it has this extra business inside here, I don't remember about that; it looks more ornamental there than it really is.

Q. That is, you think this is a handsomer structure than the thing is in reality?

637 A. You cannot see the superstructure that way, because you are at the end.

Q. If you were a builder or had had some experience with drafting, you could judge pretty well from this, could you not?

A. Yes, sir, but as I say, you cannot see that in reality; that is drawn from the end.

Q. This merely represents a cross-section of it?

A. Yes, sir.

Q. And it shows that the distance between the posts is 25 feet?

A. Yes, sir.

Q. And it shows that the distance from the posts to the lot line is eight feet and three inches on each side?

A. Yes, sir.

Q. And it shows that the superstructure, not including the 20-inch plate, if that means 20 inches, is three feet and six inches?

A. Three feet and six inches is there, but I think that includes these heavy girders, one foot high, which are laid each side of the track to keep the cars from running off.

Q. You think three feet six inches includes the bond timber on the end there?

A. I cannot say.

Q. But it is marked there.

A. I didn't make that. I cannot tell you anything about it.

Mr. Baker shows the witness another diagram, and asks:

Q. Does the next map I show you represent the elevated road on the Bowery?

A. What part of the Bowery?

Q. Is there any elevated road in New York that is built on a row of single posts like that?

638 A. Yes, sir, the upper part of the Bowery.

Counsel shows another diagram.

Q. Is there any elevated road on Third avenue built like that?

A. That is about it, yes, sir.

Q. You have referred to Church street in your testimony?

A. I did.

Q. (Showing another diagram.) Is there any elevated road on that street built like that?

A. I won't say positively; it looks like it.

Q. Is there any elevated road on West Broadway built like that (showing another diagram)?

A. It looks something like it, only there is more of it than there is there.

Q. Of course; this is simply a cross-section.

A. But it does not show the street as it really is.

Q. Why?

A. Because on top of that you have got from Franklin street to Chambers street four tracks planked over solid, covering almost the entire roadway. You take the tracks off, take the boards and ties off, and that will look like one section of the elevated road.

Q. That is, that will look like a cross-section of it?

A. That looks like it when they first commenced to build it and got two posts and a girder across.

Q. Does it not represent it as it now is?

A. No, sir, because if you had two sections, and light and shade, you would have it so dark underneath you could not tell it so well.

Q. What makes it so dark underneath?

A. The covering over the track with boards and ties.

639 Q. Do you mean to say the elevated road in New York is all planked over?

A. I didn't say so. I speak of West Broadway, where you spoke of. I said from Chambers up to Franklin street there was four tracks, and almost the entire roadway was covered with boards and ties and tracks.

Q. This represents a part of West Broadway, where there are only two tracks?

A. No, sir; because the further north you get, and above Franklin street, the street is wider in every way, with wider and heavier girders.

Q. I say this represents a part of West Broadway, where there are only two tracks.

A. You don't show here the two girders north and south, that fit into it.

Q. Yes, there is a longitudinal girder there. Does it represent a portion of West Broadway, where there are only two tracks?

A. It represents two posts and one girder; that is all it represents; it does not represent anything else.

Q. But does it not show a cross-section of the elevated road where there are only two tracks?

A. It represents two posts with a girder on them.

Q. And two tracks?

A. I suppose there is a track on top of the girder.

Q. Why didn't you answer it in that way at first?

A. I did answer it.

Q. What made you hesitate so long before answering it?

A. I didn't hesitate at all.

Q. Does not that show a cross-section of the elevated road where there are only two tracks?

640 A. I know that is a picture that does not represent as it actually looks; it is a fact that it represents two posts and a cross-girder.

Q. And a section of it where there are only two tracks?

A. The way it is drawn there, what I mean to convey is this, that the picture and the fact are two different things.

Q. You do not have to tell us that.

A. I want you to know how it is.

Q. (Showing another diagram.) Does the map I now show you show the elevated road in any part of 53d street?

A. It looks like it.

Q. And is that the way it was built by your father's planing mill?

A. No.

Q. How was it built there?

A. The track widened out, I think there; it went nearer the sidewalk; they got switches in below between the planing mill and Eighth avenue.

Mr. DICKINSON: Switches for freight or for the accommodation of passengers?

A. Switches for the accommodation of passengers, and then they had this baggage car for the Northern railroad standing there.

A JUROR: Does the baggage car you speak of stand in front of your father's shop?

A. No, sir, it stands near Eighth avenue.

Mr. BAKER: How wide is Greenwich street?

A. It varies like the rest of them; it varies from 50 feet to 67 feet.

Q. How many tracks are there in Greenwich street?

A. There are four tracks from Battery place, which is the lower end of Greenwich street, to almost Courtlandt street above Liberty, a street south of Courtlandt.

641 Q. So that quite a good portion of Greenwich street has four tracks?

A. Yes, sir.

Q. And it is all planked over?

A. It is.

Q. And it has quite a serious effect upon the light?

A. Yes, sir.

Q. In this case that involved the Armitage building, did you testify that the fire risk was increased on that property?

A. I have no recollection of it.

Q. Did you in any of your cases in New York, testify that the fire risk was increased?

A. I don't think I did.

Q. Not in all the hundred or more cases that you have testified in, you have not testified in a single case that the fire risk was increased by the elevated road?

A. No, sir, I don't volunteer any testimony. When I am put upon the witness stand I answer what the counsel ask.

Mr. DICKINSON: Were you asked about it at all?

A. No, sir.

Q. Are you an insurance man?

A. No, sir; I don't know anything about it.

Mr. BAKER: You are a real-estate man?

A. Yes, sir.

Q. You insure a great deal of property?

A. Not much.

Q. Didn't you testify that you did insurance business?

A. You asked me away back. I did do insurance a few years ago.

Q. When you speak of a man's accomplishments, and he
642 was in the insurance business away back, you expect him to know something about it?

A. You can forget a good deal in a few years.

Mr. DICKINSON: At all events you were asked about the increase of the fire rates?

A. No, sir.

Mr. BAKER: Although you have been right in the business of giving this testimony and have been on the stand in all these cases, you have not given any testimony on that?

A. I have not been asked about that.

Q. You say that the property at 173 Pearl street rented for $3,000 in 1873, and in 1891 for $1,800.

A. Yes, sir.

Q. What was that property used for in 1873?

A. I don't know what it was used for. It is used for mercantile business; I don't know the particular business.

Q. Was Pearl street at that time a retail street?

A. No, sir; never.

Q. Was it a wholesale street?

A. It was always a wholesale street.

Q. Is it a wholesale street now?

A. There is odds and ends there now of different kinds, some wholesale and some retail.

Q. There have been some very radical changes taken place in the location of business in New York?

A. There have been changes.

Q. They are wholly independent of the elevated road?

A. Yes, sir.

Mr. DICKINSON: The retail business is not coming downtown?

A. No, sir; the retail business has fallen away in Pearl street.

643 Mr. BAKER: Is there any retail business in Pearl street now?

A. There is some.

Q. What kind?

A. There is stationers to supply the people there; and there are restaurants, lunch-rooms and retail stores; I don't mean to say dry goods retail, or clothing, or anything of that kind.

Q. It is in the wholesale part of the city of New York?

A. Yes, sir, except Fulton street, running to near the East river, is more a retail street.

Q. What is this particular property, 173 Pearl street, used for now?

A. Occupied by a man who makes tin cans and tea-caddies.

Q. You don't know what it was used for in 1873?

A. No, sir; I know the present tenant has been there a great many years.

Q. How did you find out what it brought in 1873?

A. I am acquainted with the agent who has charge of the property, and he showed me the leases that he made out.

Q. How did you find out what it rents for now?

A. I saw the leases and I heard the tenant testify.

Q. And it was a case in regard to that property?

A. No, sir; the elevated road brought that man to testify that there was no damage to the property on Pearl street, and he so swore, and the agent of that property went on the stand and testified that this man constantly got his rent reduced on the ground that it was injuring his business and he could not stay there.

644 Q. Did the tenant in possession testify that the property along that street was not injured by the elevated road?

A. He did and he did not. In this way, he testified on the direct examination that it was no damage to his business, but on the cross-examination he was asked if he did not tell the agent that it was a damage to his business, and he wanted his rent reduced, and he said, "Well, I think I did."

Q. He got his rent reduced?

A. Yes, sir.

Mr. DICKINSON: What business did he do?

A. He made tin cans.

Mr. BAKER: He was there when the road was built?

A. I think he was.

Q. And he has been there ever since?

A. Yes, sir.

Q. What is the building 174 and 176 Pearl street used for now?

A. It is used as a restaurant and a store, and offices upstairs.

Q. What was it used for in 1873?

A. The same business exactly.

Q. What rent did they pay for it in 1873?

A. It rented for $6,000.

Q. What do they pay for it now?

A. $3,800 or $3,900 I think I said.
Q. Has the same firm got it?
A. Oh, no; I don't think so. The rent now is $3,800.
Q. What is the property, 175 Pearl street, used for now?
A. It is used by a tobacco firm.
Q. A wholesale house?
A. A wholesale house.
Q. Leaf tobacco or fine-cut?
A. A wholesale house in tobacco, in cases and wrappers
d other ways.
Q. What rent do they pay for it?
A. $2,000 a year.
Q. Did the same firm have it in 1873?
A. Yes, sir.
Q. What rent did they pay then?
A. $3,400.
Q. What is 179 Pearl street used for now?
A. I think the same kind of business that is in it—tobacco.
Q. What was it used for in 1873?
A. I don't know.
Q. 182 Pearl street?
A. Storage-house.
Q. Do you know what that was used for in 1873?
A. I am not positive; I know for a great many years it has been
cupied for the same purpose, because the men who own it are in
e storage business and have been for 20 years or more, and I
ink have had it all the time.
Q. Was there any case with the elevated road about 174, 175 and
9?
A. At 175 there was a case; yes, sir.
Q. Were you a witness in that case?
A. I was.
Q. How much front has that got?
A. Nineteen feet nine inches front.
Q. What is the property worth now or when the case was tried;
n you tell when the case was tried?
A. The case was tried probably about a year and a half ago.
Q. What was the property worth then?
A. I appraised it at $30,000 that time, and it was sold for
$30,000.
Q. Since then?
A. No; the contract had been made then, and I appraised it and
dn't know it.
Q. You appraised it at $30,000?
A. Yes, sir.
Q. What was awarded in that case?
A. I don't remember.
Q. Was there any case in regard to 179 Pearl street?
A. There has never been any suit about that.
Q. Or 182?
A. I don't think so; I had nothing to do with it; I don't know.

Q. Were there any other cases, any other of the lots or property on Pearl street where there were cases—the lots that you have testified about?

A. I forget now; I have testified to so many. There was one—261, I think.

Q. Have you a memorandum there showing the amount of your estimates and the awards that were made on all the property, in that book?

A. No, sir; these are simply the facts as regards the selling and renting of the property at different periods.

Q. Have you got the awards marked there, when there were any made?

A. No, sir; the awards are in my papers that I make up for each case separately.

Q. Have you one for each case?

Mr. DICKINSON: Do you mean what he means by awards? He means verdict. You say you have got the awards made up, and you are talking about something else.

647 A. I have the facts here in regard to the sale or renting of property. I make up each case, giving my estimate, by itself.

Q. The question is whether you have the awards in any papers and books?

A. I have not.

Mr. BAKER: Where did you get the fact in regard to the award regarding the American National Note building?

A. I got that from the attorneys, and I also got that from the daily papers published at the time. I don't see the paper here, but I remember the time.

Q. You remember the amounts?

A. I know Judge Truax had $75,000 and Judge Patterson $63,000.

Q. There were two cases?

A. Yes, sir.

Q. And the elevated road went on each side of this property?

A. Yes, sir.

Q. Opposite sides of the property?

A. Yes, sir.

Q. Whereabouts was the property located?

A. It is on the east side of Greenwich street, below Thames, and on the west side of Church street, directly back of Trinity church.

Q. And the entire building is occupied by the American Bank Note Company?

A. Yes, sir.

Q. How high is that building?

A. Seven stories.

Q. How much frontage had it upon the elevated road?

A. I think it has 125 feet.

Q. On each side?

648 A. Yes, sir.

Q. Does that building extend across an entire block?

A. No, sir; it is what we call in the center of the block; it runs through from one street to the other; Greenwich street and Church street both run north and south; the cross-streets run east and west; it is south of the first cross-street; it is probably 75 or 80 feet south.

Q. This is in the center of the block, but it runs from one street to the other street?

A. Yes, sir; it has two fronts.

Q. How much frontage has it on each of those streets?

A. One hundred and twenty-five feet.

Q. How many tracks were built in front of that property on Greenwich street?

A. There are four there.

Q. And all planked over?

A. Yes, sir.

Q. How many on Church street?

A. There are three, I know; I think there are four; there are three anyway; I think there's a switch there.

Q. How high is the elevated road there?

A. I should think 22 or 25 feet.

Q. Just about the ordinary width?

A. I think so.

Q. How many trains a day run there?

A. I don't know; they average there a train every two or three minutes in the mornings and afternoon, and I suppose at other times of the day every four or five minutes.

Q. It is almost in constant use?

A. It is sometimes blockaded.

Q. But it is in constant use?

A. I think in the morning it is probably every two or three minutes; in the middle of the day, five or six.

649 Q. You think they allowed $75,000 on one street and $63,000 on the other?

A. I think so.

Q. How much is that entire property worth running through on both streets?

A. I suppose that property is worth $400,000.

Q. Is not that building worth at least $900,000, the lot and the building?

A. I don't think so.

Q. You are familiar with real-estate values in the city of New York?

A. I have told you what I thought it was worth.

Q. Are you familiar with the value of that property?

A. I know that property cost them a great deal more than that.

Q. Is not that property worth at least $900,000, taking the frontage on both streets, and the building?

A. I don't think so.

Q. Did you testify in that case the value of it?

A. I did; I thought I had the paper with me, but I don't find it.

Q. What did you testify that property was worth?
A. You mean to include this from street to street?
Q. Yes, the entire property?
A. Yes, I am wrong; I think I testified in the neighborhood of $700,000—$650,000 to $700,000.
Q. Didn't a number of witnesses testify in that case that that property was worth from $900,000 to $1,000,000?
A. I don't think any such figures were ever reached by anybody that I remember.
Q. You didn't remember just now very accurately what you testified, did you?
650 A. Well, I was calculating on the wrong frontage; I did not figure on the 25 feet.
Q. That property is occupied by an institution or by a company that makes bank notes?
A. Yes, sir.
Q. That makes very fine, the very finest kind of style of engravings?
A. That is correct.
Q. Where the plates are very delicate work?
A. They do as fine work as can be done in that line.
Q. I suppose they could make us a very fine picture of the Postmaster General to put on a bank note?
A. Yes, sir, or any other gentleman.
Q. Or of a Congressman or a lawyer?
A. Yes, sir.
Q. And they use the entire building in that business?
A. Yes, sir, they do.
Q. And there was testimony in that case showing that the elevated road interfered with the transaction of that business?
A. There was.
Q. It interfered with their work in making these plates?
A. Yes, sir.
Q. And it interfered with their light?
A. Yes, sir.
Q. What explanation have you to make of the fact that they only allowed about ten per cent. of the entire value of it?
A. I am sure I don't know what was in the judge's mind.
Q. You have no explanation to make of it, then?
A. I have nothing to do with the judge.

Then adjourned to Thursday, June 25, 2 p. m.

651

JUNE 25—2 p. m.

EDMUND H. MARTINE recalled.

Cross-examination continued by Mr. BAKER:

Q. When was the elevated road built in Pearl street, New York?
A. It was commenced, I think, about November or December, 1877, and finished in the summer of 1878. The first trains ran on the 26th of August, 1878.

Q. So there was no practical experience in New York, or on Pearl street at any rate, with an elevated railroad until after August, 1878?

A. Not on Pearl street. We had a road prior to that in New York.

Q. Whereabouts?

A. On Ninth avenue.

Q. When was that built?

A. That was opened as far back as 1869. It ran on Ninth avenue and Greenwich street from Twenty-ninth to Dey street, what was commonly called the one-legged railway, for the reason that it was set on posts on the curbstone and ran only on one side of the street.

Q. When was the present Ninth Avenue line built?

A. That was extended one way and another and finally in 1878 or 1880 it was reconstructed and operated as it now is, and as the other roads are run.

Q. Can you tell us what the Armitage building rented for in 1878?

A. $5,175.

Q. In giving your testimony-in-chief, why did you compare the price of rental, or recent rentals, with 1873?

652 A. I did that for the reason that the rentals in 1877 and '78 were low, on account of the depressed value caused by the panic.

Q. Then the depreciation that you have testified to in this case was a depreciation caused by a panic, was it not?

A. And partially caused by the elevated railroad.

Q. How could the elevated road cause a depreciation before it was built?

A. It was commenced in December, 1877, the post holes were dug, the iron-work laid in the street, and it was actually being constructed when the lease was made in May, 1878.

Q. It had not been in operation?

A. It had not.

Q. What did it rent for in 1877?

A. $6,950.

Q. What did you compare that rental with 1873 when it was $9,450 for?

A. I explained that yesterday, that I took 1873 because it was good times and compared with the present times, the last few years, when the times were good.

Q. The rental of 1877, when it was only about $6,000, was a rental that had been fixed before the elevated road was built there?

A. Yes, sir.

Q. And in 1888 you testified it was $5,415?

A. Yes, sir.

Q. So that the depreciation in the rent was less than $600?

A. I beg your pardon.

Q. You have just testified that in 1877 before the elevated road was built, the rental was $6,000?

653 A. $6,950.

Q. And in '88 you testified yesterday it was $5,415?

A. That was the rent-roll if the building was all rented.

Q. So the depreciation was not $4,000, was it?

A. The failure to appreciate was.

Q. But we are talking about the actual change that took place in the rental value; what did you testify that it depreciated $4,000 for?

A. I don't think I made any such statement as that.

Q. Didn't you testify in 1873 that it rented for $9,450, and in '88 for $5,415?

A. I did so, and that is the truth.

Q. And did you not testify to that for the purpose of conveying to this jury the idea that that amount of depreciation had been caused by the elevated railroad?

A. I did not say that. It has been by the elevated railroad, I say it for this reason, the actual depreciation down to 1877 was caused by the panic, the road came there and created a further depreciation, what was commonly called in New York a scare. It recovered from that somewhat, generally speaking, on the railroad streets, but with this weight on it, it has not appreciated with other property, and if it follows other property in adjacent streets where there is no road, it would have gone back to its old rent.

Q. That is the argument you make?

A. It is not an argument, it is a fact.

Q. You have no actual rentals on which to base that on this street?

A. I do not say on this street.

Q. You compare that with some other street?

A. Certainly.

654 Q. In the testimony you gave, you gave actual rentals on this street?

A. I did.

Q. And you showed a depreciation on the Armitage building of about $5,000 unexplained, except that it was the elevated railroad?

A. I have explained it now.

On cross-examination:

Q. Now how much of that actual depreciation occurred before the elevated road was built; figure it out?

A. About $1,500.

Q. It is $5,000 within $300?

A. If you will deduct $5,415 from $6,950, it is a little more than $1,500.

Q. You deduct that from $5,000 and you have $3,500 of depreciation caused by the hard times?

A. Do what?

Q. If you deduct that from $4,000, you have $2,500 of depreciation that was occasioned by the panic and the hard times?

A. Where did you get your $4,000 from?

Q. You testified that in 1873 this property rented for $9,450?
A. Yes, sir.
Q. And in 1888 it rented for $5,415?
A. Yes, sir.
Q. Now you show that $1,500 of that depreciation was after the elevated road was built, which must leave $2,500 of it that was before the elevated road was built?
A. Yes, but you do not allow for the recovery that would have been if the road had not been there.
655 Q. That is something that is imaginary.
A. I don't know why it is imaginary when you go onto adjacent streets.
Q. You have to go on adjacent streets and form an estimate and an opinion?
A. You do not form an estimate; we take actual rents.
Q. Do you show that the elevated road, by an actual depreciation in rentals, depreciated the rent of this property $4,000 a year?
A. The actual depreciation caused by the road is $1,500 from 1877 to 1878, but the failure to appreciate which has kept it down, in many cases it has gone lower yet.
Q. How do you know it would have appreciated if the elevated road had not been built there?
A. For the simple reason that every other street around it has gone up.
Q. What streets did you compare it with?
A. I take Pine street, Maiden Lane and Beaver street.
Q. Streets in the immediate vicinity?
A. Yes, sir.
Q. Do you know what the changes have been in the rentals in property on those streets since 1873?
A. Yes, sir.
Q. Actual changes?
A. Yes, sir.
Q. Have any changes taken place in New York wholly independent of the elevated road that are influenced by other causes, since 1873?
A. What kind; changes of value?
Q. Changes in the fact that they changed the location of their business.
A. There are changes in New York.
656 Q. Has not Pearl street depreciated in value because the cotton men went off the street and went to Hanover square?
A. They are in Pearl street.
Q. But they went to Hanover square, where there is an open space?
A. They were driven off the street by the coming of the elevated road.
Q. How do you know that?
A. Because I have heard them testify to that constantly. I have heard the president of the Cotton exchange testify to it.

Q. Don't you know that they went off that street for other reasons?

A. I do not.

Q. That the elevated road had nothing to do with it, that they wanted better quarters, and they moved to another place on that account?

A. They are in the same neighborhood really that they have been for the last twenty-odd years.

Q. But they went out of this particular location?

A. They are today within 100 feet of where they were from 1872 to 1875.

Q. Then they were not driven off the street?

A. Yes, they went into the square where they were not injured by the railroad.

Q. They built a Cotton exchange?

A. Yes, sir, it has three fronts.

Q. When did they build the Cotton exchange?

A. They moved in about 1885.

Q. Did not the building of the Cotton exchange depreciate the value of rentals on Pearl street?

657 A. No, sir.

Q. Have the rentals and values of all the streets in New York depreciated the same as on Pearl street, all the streets where the elevated road has been built?

A. No, there is a difference.

Q. Is not Pearl street a street where the depreciation, for some reason or other, has been the largest?

A. No, I think Fifty-third street would compare with it.

Q. The residence part of Fifty-third street?

A. Yes, sir.

Q. Is it not true that residence property, especially the better class of residence property, is more seriously injured by the elevated road than any other property in New York?

A. With the exception of office property, which might be compared with it.

Q. The next kind of property most seriously injured, is store property, is it not?

A. Yes, sir.

Q. But all store property is not injured alike?

A. The streets vary so in width, it makes a vast difference.

Q. Is it not true that on a number of streets in New York, the elevated road has actually made the street?

A. I don't say that.

Q. Are there not streets in New York where the elevated road has improved the rentals and brought a large number of people doing business on the street?

A. There are some streets in New York that we may say are benefited, and there are other streets adjacent that are benefited still more.

Q. What streets are benefited in New York by the elevated road?

658 A. The upper end of the island, where the road is not run, has increased largely in value.

Q. But down below Forty-second street?

A. Twenty-third street and Fourteenth street, streets 100 feet wide, have increased largely.

Q. Has Sixth avenue increased in value?

A. Sixth avenue has increased, but Fourteenth and Twenty-third streets have increased more; they have no elevated road; they are both 100 feet wide, the same as Sixth avenue.

Q. There is property in New York that has actually increased in value since the elevated road was built on it?

A. Yes, the business was there before the road came.

Q. What street in New York is injured the most, Pearl street?

A. The lower part of Pearl street is injured the most because they are mostly office buildings; I think Fifty-third street is about as bad as any.

Q. That is where the good residences were?

A. Yes, sir.

Q. What next?

A. The Bowery below Beyer street.

Q. Have you any book made up of the benefits of the increased rentals on any street?

A. Where the road runs?

Q. Yes.

A. The benefits are always included in my estimate of the property. I take everything as I find it, good and bad, and say it is worth so much money, the value of what it sells for proves that.

Q. The New York Central railroad runs some distance in the city of New York on a stone viaduct?

659 A. Yes, sir.

Q. About how long is the stone viaduct?

A. Three-quarters of a mile.

Q. What street does it run in?

A. Fourth, or Park avenue.

Q. How wide is that street?

A. One hundred and forty feet.

Q. How wide is the viaduct?

A. Less than 60 feet.

Q. Solid masonry?

A. Except at the streets.

Q. Is there any passage longitudinally under that viaduct?

A. No, sir.

Q. So that the street is actually built up with stone, except that arches are left for the cross-streets?

A. That is true.

Q. What is the average height of the viaduct?

A. At the highest point it is 38 or 40 feet, and it runs down to 16 feet.

Q. Is it the highest at the lower end?

A. Yes, sir.

Q. Goes into a hill there?

A. It goes into a tunnel at Ninty-sixth street.
Q. What makes the depression there?
A. From One hundred and first street it rises up to a hill going south.
Q. And the trains run on the top of that viaduct?
A. Yes, sir.
Q. Is the viaduct inclosed?
A. No, sir.
Q. You say it is about 60 feet wide?
A. I should think it was.
660 Q. How much street does it leave on each side?
A. About 40 feet on each side.
Q. What sort of property is that along there on each side, residence property, or business property, or what?
A. Down at One hundred and first, One hundred and second, One hundred and third, One hundred and fourth, One hundred and fifth, they are mostly what we call tenement-houses, with very few exceptions, that face on the street, not on the avenue. They are built facing north and south on the cross-streets.
Q. They do not face on Fourth avenue?
A. The avenue has been destroyed by the viaduct.
Q. Did they ever face there?
A. No. The viaduct was built in 1837. There were no houses there.
Q. The viaduct was there before the street.
A. Yes, sir.
Q. They merely laid out a 40-foot street on each side?
A. No, that street was really laid out in 1814.
Q. It was built there a great many years ago?
A. It was.
Q. The 40 feet on each side is practically used as an alley?
A. It is a pretty broad alley.
Q. You say they don't front their buildings on it?
A. No, it has virt ally destroyed Fourth avenue; everybody will tell you that.
Q. How could it destroy Fourth avenue, built 50 or 60 years ago?
A. The very fact that the people do not use it.
Q. There was not much there to destroy. Was there building on that avenue when it was built there?
661 A. There might have been some frame houses. I am not so old as that; I can't tell. There are some very old shanties there, in some places.
Q. How much of the population in New York resides above Forty-second street?
A. I could not tell you that.
Q. Half of it?
A. What really we call the population, they live all over; they live in Brooklyn and Jersey.
Q. People do actually live on the island?
A. I cannot go into figures because I never figured it out.
Q. Most everybody lives above Forty-second street?

A. No; you take it east of the Bowery, all the way down to Chatham square, there are more people there to the square mile than in any other part of New York.

Q. In a tenement district?

A. Yes, sir. The Seventeenth ward, which is below Fourteenth street, has the largest population of any in New York.

Q That is where they are packed in like sardines?

A. There are a great many people there, and they are good rent-payers. A tenement house will pay you a great deal better than a private house.

A JUROR: With an elevated road in front of it?

A. The elevated road runs through First avenue in the Seventeenth ward.

Q. But the people who own their own homes, occupy considerable land, mostly live above Forty-second street?

A. I want to say that a great many people are in the old Ninth ward, on the west side.

Q. The people who live below Forty-second are either very poor or very rich?

662 A. No, sir; Levi P. Morton lives within one block, and Samuel J. Tilden, Cyrus W. Field and Peter Cooper formerly lived there.

Q. The question I put you was whether the people who live below Forty-second are not either very rich or very poor?

A. No, sir. You don't know New York, or you wouldn't say so.

Q. Samuel J. Tilden was rich, wasn't he?

A. Yes, sir.

Q. Mr. Cooper was rich?

A. Yes, sir. If you go east and west in New York, below Fourteenth street, you will find a dense population of what you call poor but respectable, hard-working people.

Q. Did you ever run a planing mill?

A. No, sir,

Q. Did you ever run a chair factory?

A. No, sir.

Q. Did you ever do any manufacturing outside of the soap business?

A. No, sir, very little of that.

Q. Where was your soap factory located?

A. At that time number 74 Robinson street, which is now a continuation of Park place, 102 Park place.

Q. Did the elevated road interfere with the manufacture of soap?

A. The elevated road was a block and three-quarters from it.

Q. Did you go out of it because of the elevated road?

A. No, sir.

Q. If you never carried on a planing mill, how do you know that Mr. Backus cannot carry on his mill just as successfully after this road is built in front of it as before?

663 A. By common sense and by experience that I have had in business, generally, around town in New York. I have seen a number of mills.

Q. You don't know anything about it?

A. I know good work from bad. I have got common sense to know some of the things that would go into the building would be a damage to it and a nuisance.

Q. Do you think that the planing-mill business, as it is carried on at the present time, can be carried on successfully without railroad facilities?

A. Railroads we must have for every business, for everybody. I admit that.

Q. If you were going to locate a planing-mill today, in order to compete with all other planing-mill men, do you think you would locate a mill where the lumber yard that was tributary to it or was to be used in connection with it was a half a mile away?

A. I would locate my mill where I would have the best shipping facilities and as near as I could get to trade centers.

Q. You don't know whether this would increase the fire risk down there or not, do you?

A. I know we can insure a house for one price in New York. I know that when we owned that mill and Mr. Serril was in it, we paid as high as 6 per cent., when you can insure a private house for 10 cents a $100.

Q. Is that the only explanation you have got to make?

A. We had the building insured.

Q. What is the usual rate on planing mills?

A. There is no usual rate. They get all they can, and they are chary of taking them.

Q. Do you know of an insurance company in the world
664 that insures a planing mill at the same rate it does a dwelling-house?

A. I do not.

Redirect examination by Mr. DICKINSON:

Q. Mr. Baker has asked you whether you ran for judge also; and asked you whether your brother was a judge of the police court in New York. Your brother was district attorney of New York, wasn't he?

A. He was for three years.

Q. Succeeded to John McKeon?

A. John McKeon died, and then there was another gentleman appointed for several months.

Q. John McKeon was a predecessor?

A. He was really a predecessor of my brother.

Q. One of the most distinguished men in this country, wasn't he?

A. He was.

Q. Wheeler H. Peckham was another?

A. He occupied the place for a while.

Q. Who succeeded your brother?

A. John S. Fellows.

Q. Also a man of national reputation?

A. Yes, sir; now a member of Congress.

Q. It is quite an honorable position?
A. Yes, sir.
Q. Especially for a Republican to get there?
A. It is.
Q. I think Randolph Martine is a Republican?
A. No, sir; the whole family are Democrats.
Q. He was elected by the largest majority on the ticket
665 when he was elected judge of the court of general sessions?
A. Yes, sir; my brother had 115,000, and Mayor Grace, who was next, had 110,000.
Q. I think the present district attorney, who occupies the position your brother held, De Lancy Nichols, was formally a deputy?
A. Yes, sir.
Q. Your brother is not of the grade of a police justice?
A. No, sir; a police justice is simply justice of a court where drunks and so forth are tried.
Q. The court of sessions is a court of general jurisdiction?
A. Yes sir; a position for 14 years, and a salary of $12,000 a year.
Q. You have been asked about having been in the soap business; you have been called to testify, I think, in a hundred cases?
A. I have actually testified in a hundred of these railroad cases.
Q. You have been called upon to appraise land for people other than railroad suits?
A. Yes, sir, I have in hundreds of cases, estates divided and things of that kind, people come to me about.
Q. Because you keep a record so as to get at the values properly?
A. Yes, sir.
Q. You are trusted to that extent by people who employ you?
A. Yes, sir.
Q. As my friend was rather inclined to slur you, what men are your clients who have actually employed you; I think some of the names would be recognized?
666 A. John E. Parsons, Burrill & Burrill, Sullivan & Cromwell, Peckham & Tyler, John M. Chandler, Platt & Bows, Cannon & Atwater, G. Willit Van Horn, Rockwood & Hale, ex-Recorder James Smith, Charles J. Ridgway, James Demorest, Johnson & Lamb (Johnson is now United States district attorney in Brooklyn), Nelson J. Waterbury, Beekman & Higgon (Beekman is now corporation counsel), R. O. Wilcox, Strong & Cadwalader, Sackett & Lang, Reed & McEwan, Gray & Davenport (now judge of the court of appeals), Sackett & Bennett, W. S. Lowe, A. E. Woodworth, J. P. & E. B. Crowen, Harris & Greenbaum, Whitehead, Parker & Dexter, Charles H. Lee, A. B. & A. W. Mann, Arno, Rich & Woodford, Stewart L. Woodford (formerly lieutenant governor), M. E. Hamilton, Gratz & Nathan, Sydney Smith, John S. Purcel, and a number of others.
Q. By these you have been called in real-estate matters, to appraise property in suits or elsewhere?
A. Yes, sir.
Q. And you had to keep the details in your office so as to be competent?

A. I had; I got the knowledge in every way I could, and kept it.

Q. In the various suits in which you have been called on to testify, and in the various proceedings in which you have given appraisals, has your reputation for truth and veracity or good judgment, your business reputation ever been attacked?

A. No.

Q. In all the cases in which you have testified against the Manhattan railway, has your reputation ever been attacked?

667 A. No, sir; on the contrary, several of the lawyers are friends of mine, and they have told me that they are willing to take my values in cases.

Q. You have to come to Michigan to get that done; you have to get away from home?

A. Yes, sir.

Q. You are not ashamed in having had an interest in the soap business?

A. I would like to state to the jury the reason why I went into the business. I went there to protect my father who had a man with him who was not taking care of him. I went there and took my business with me, and staid there about three years and got out of it. I continued my business all along; that was back in 1879.

Q. Your father sold this property on Fifty-third street, bought it in a foreclosure sale, and sold it subsequently?

A. Yes, sir.

Q. When did you make this settlement of $5,000, or when was it made?

A. I think in 1886 or 1887.

Q. It was not made later than 1887?

A. No, I don't think it was.

Q. When did your estate dispose of that property?

A. In 1883.

Q. How did you come to be getting a settlement for $5,000 three or four years after you had sold the property?

A. A lawyer went to my brother, who was the executor, and told him he thought he could collect something for him on that property from the elevated road. My brother told me of it. I said I

668 would have nothing to do with it, that we had sold that property, and I thought that anything that was there ran with the land.

Q. When was that done by your brother with the lawyer?

A. That was after we had sold it. I told my brother I would have nothing to do with it.

Q. At the time that that lawyer made that arrangement with you, had not the courts of New York decided that there could be no damages recovered, the lower courts?

A. I think so.

Q. Did you know or did your people know that they could recover any damages from the elevated road?

A. I don't think they did at that time.

Q. And you had already sold your property when the settlement as made?

A. Yes, sir. I would like to say here that the settlement was only ade for the loss of rent. There was another collection after that y the present owner.

Q. Do you know anything about that?

A. I know what Mr. Peckham told me.

Q. The lower courts first held that you could not recover against n elevated road?

A. Yes, sir.

Q. Because the city had granted permission to run on the streets f New York?

A. Yes, sir. Until the court of appeals decided otherwise, the ecision of the supreme court was that it was an illegal structure nd had no right in the street until the abutting owners were com-ensated.

Q. So that at the time you made the settlement for the loss of rent, it was from the time after the structure was built, for
669 the time you owned it, and you were not aware or the courts had not yet come to the conclusion that you could recover or damages?

A. No, sir.

Q. You did not, even in that settlement, settle for damages to the ealty, did you?

A. No, sir, the present owner collected money from the railroad fterwards.

Q. Do you know what it was?

A. I know that his attorney told me.

Q. At least you did not collect any?

A. We did not collect, because when we sold we made no reser-ation.

Q. After you had sold the property you could not collect money or the fee?

A. No, sir.

Q. As I understand you, you wanted to get at the depreciation n value during ten years, and you take the year 1873 as the year t which the prices were normal, unaffected by extraordinary com-mercial depression?

A. That is so.

Q. And now you fix the depression by showing that other prop-erty, over which the elevated railroad did not go, have appreciated up to and beyond the prices of 1873, and yet that the property over which elevated structures go have not come up to that value?

A. That is the fact.

Q. In that way, you show that the actual depreciation, as com-pared with surrounding property, as the value was in 1873 as com-pared with the value now, all property where the railway goes?

A. Yes, sir.

Q. Is there any cause for such depreciation anywhere
670 where the elevated railroad goes, except the elevated railroad?

A. None that I know of.

Q. Is there any other place that property on any street depreciates like this, or has depreciated, or has not kept up and got back to the prices of 1873, except where the elevated road runs?

A. With the exception of the extreme end of the island.

Q. I am speaking of the business property.

A. No, sir.

Q. Is it the universal rule, then, as to business property, below Canal street, we will say, or below Fourteenth street, to come up high enough; is it the universal rule that business property, except where the elevated road runs, has appreciated so that it is up to and past the prices of 1873?

A. Yes, sir.

Q. And where the elevated road runs the prices stand still, or are lower than 1873?

A. Lower than in 1873; and they got down to the '77 prices by the panic, and in many cases they have stayed about the same, with a little increase.

Q. I suppose the panic of 1873, and its effects were felt to their extreme in about 1877 or '78?

A. That is the lowest.

Q. So that the universal rule all over the lower part of New York and everywhere was that there was a depression then?

A. Yes, sir.

Q. And when the depression was relieved, this property came right up and went back to the prices of 1873, and passed them, except where the elevated structure went?

A. That is correct.

671 Q. You have been asked whether the rule applies to property near Pearl street, the same depression or the same change. Give me some illustrations west of Pearl street, and in the immediate vicinity of Pearl street, where the elevated road does not run. Give us the names of the streets.

A. No. 76 Pine street, just north of Wall.

Q. Let us know the relation of Pine street; point out Pearl street and Pine street on the map.

A. Pine street is the first street north of Wall street.

Q. Point out Pine street and the place where Pearl street comes.

A. There is Pearl, that green line where the cars run, and this is Pine. Take it away from Pearl street on Pine, that is in the immediate vicinity, property there that in 1874 rented for $980 rents now for $1,650. It is fair to state that that building had about $3,200 expended upon it in 1878; that would add about $320 to the rent. If the property had been in the same condition in 1874 as now, it would make that rent $1,300 and now $1,650. Number 74 Pine street, next door, rented in 1874 for $1,240, in 1888 for $1,400. Number 72 Pine street in 1874 rented for $1,327.50, and now for $1,450. Number 78 Beaver, which is just northwest of Wall, commences at Pearl street. I testified to that yesterday. That is a store on Beaver street; the building is 22 feet wide, 96 feet deep, runs through from Pearl to Beaver. That is where I testified that the

Pearl Street store, one-half of the first floor rents for $600, and the Beaver Street store for $1,200. In Wall street, as compared with 1878 and 1879—that was the lowest period caused by the panic—
1877 was really the lowest period. Water street is below
672 Pearl. Water street is the next street east; it is cut off by the elevated railway from the center of the city; there is no elevated road on it. That rented in 1878 for $1,600; it rents now for $2,200. Maiden Lane is two streets north of Pine; it crosses Pearl. The property in question that I speak of is about 200 feet west of Pearl street. That property rented in 1877 for $3,000; it rents now for $2,750. 184 Water street in 1878, $900; in 1884, $1,800. Water street, corner of Old slip—Old slip is a cross-street south of Wall—Water street is the first street east. In 1887 it rented for $2,500, and now for $3,500. 64 Water street in 1878 was $1,200, now $1,750. 62 Water street the same. Those were testified to by a witness for the elevated railroad. In Williams street, which is the first street west of Pearl, running parallel to it, in 1874 $4,150, now $5,250. 130 Williams in 1880 $4,125, and now $6,000. Beaver street, corner of Hanover, that is about 150 feet from Pearl street west, in 1877 they got $4,500 rent; today they get $6,800. 116 John street, which is two blocks north of Maiden Lane, a building there rented in 1871, '72, and '73, for $1,000; it brings the same rental now, a small building.

Q. Is that about the universal rule, the figures that you have illustrated?

A. Yes, sir; with the exception of some property on Water street, where the fee value has got back, and the rental value has not got back for this reason: if the fee value in 1873 was $10,000, the rental value, 10 per cent., would be $1,000; if the fee value got back, the relation between the fee and rental would be 8 per cent., making $800, showing, if the relation between the fee and rental value had remained the same, the rent would have been the same as
before.

673 Q. The rent has not increased in proportion with the fee because of the reduction of interest by law?

A. Yes, sir.

Q. So that the value of property you have increased and the rent has not correspondingly increased into about two per cent. because of this change?

A. Yes, sir.

Q. Mr. Baker has asked you in reference to property below Forty-second street, and has stated that the people are very rich or very poor. Now, I will ask you if even below Twenty-third street, and even below Fourteenth street, east of Broadway and east of Madison avenue, and east of Fourth avenue, there is not a mass extending over to the business portion of New York on the river, a mass of people, a dense population, who own fine dwellings, of the merchant class?

A. Yes, sir, because that was the residence quarter of the best people of New York, I mean the richest people, at one time. Those

houses are now occupied by working people, who own the houses. They may live in part of it and rent out some of it.

Q. But there is a strong middle class of people, neither very rich nor very poor?

A. I guess a good many of those men are worth a good many thousand dollars.

Q. You call a rich man in New York worth a million, or five hundred thousand at the very lowest?

A. We have got so that a man is a rich man who is a millionaire.

Q. Those men are worth in their thousands?

A. Yes, sir.

674 Q. Those are strong men, medium, and there is a dense mass of population of that class in there east of Broadway?

A. Yes, sir, there is around Tenth street and Tompkins' park very fine houses.

Q. You take it down to Eighth street and Clinton place, and the property north and west of Clinton place?

A. Yes, sir, and go still further off Clinton place, fronting on Washington square. Edward Cooper lives there.

Q. There is a mass of people not very rich, and certainly not poor?

A. Yes, sir: and go west of that, what we call the Ninth ward, below Fourteenth street and west of Sixth avenue, and down as far as Houston street.

Mr. BAKER: Show us a Republican ward in New York.

A. There is a district made up for Robert Ray Hamilton which takes in part of the Twentieth ward. They run from what we call the Tenderloin district into a portion of the Twentieth ward. It was fixed up on purpose.

By Mr. DICKINSON: As the elevated roads have carried people to the north, or there has been rapid transit in New York, property upon the elevated road and on the bystreets accessible to the elevated road has very rapidly and very largely enhanced in value by reason of the elevated road?

A. There are exceptions. If you take the Sixth Avenue road, Sixth Avenue property has advanced between Fourteenth and Twenty-third, west of Central park. It has advanced on Ninth avenue, where the elevated runs, but the lots on the adjacent streets have advanced more.

Q. To what do you attribute the fact that the property on the street bearing the elevated road has not kept pace with the side streets, although on the main avenue?

A. On account of the elevated road being on it.

675 Q. You have been asked about Sixth avenue. Along at Twenty-third street, I suppose Altman was there before the elevated road came?

A. All the present stores came before the road came, with the exception of one, Herrick Brothers, who were on Eighth avenue two blocks west, between Twenty-fourth and Twenty-fifth. There was no trade there, and they bought a piece on Sixth avenue, and a piece on Twenty-second and Twenty-third, and they have the same

front on those. Macy is on the southeast corner of Fourteenth and Sixth avenue and has been there a good many years.

Q. Where does the great traveling public, in going up from the business part of New York, the transient people of which New York is always full——

A. Yes, sir, we claim over 200,000 transient people in New York constantly.

Q. Where do they usually take the elevated roads. All the houses up there that are full of transient people, the Hoffman, the Brunswick, the Albemarle, the Fifth Avenue, the St. James, the Coleman, the Gilsey, and all those houses are within a few blocks?

A. They are between Twenty-third and Twenty-fourth streets.

Q. The transient people usually alight at Twenty-third street on Third avenue, and Twenty-third street on Sixth avenue.

A. Yes, sir.

Q. And then there are a lot of hotels around Union square also?

A. Yes, sir.

Q. And they alight there in great numbers?

A. Yes, sir.

676 Q. On the corner of Fourteenth and Sixth avenue is Macy's?

A. Yes, sir.

Q. And Altman is just above Twenty-third street?

A. Altman is at the southwest corner of Nineteenth street.

Q. And those hold out and always have held from the time of their establishment, more reasonable prices than on Broadway?

A. Yes, sir.

Q. Because their rents are supposed to be less?

A. Yes, sir, it is a well-known fact.

Q. How wide is Sixth avenue at this place?

A. 100 feet wide.

Q. Where does the elevated road run, on the side or in the middle?

A. In the center of the street. One each side are horse-car tracks.

Q. How many tracks has the elevated road?

A. Two tracks.

Q. Since the elevated road how much has the Twenty-third Street property increased in value?

A. It has advanced five times where Sixth avenue has advanced three times.

Q. I suppose the elevated roads have led to the increase of the hotel business in the upper part?

A. They have helped New York greatly.

Q. Since the elevated roads have come, the Astor house has gone down as a guest-house?

A. No, sir, the Astor house is better today than it ever was; it is full all the time.

Q. The St. Nicholas has closed?

677 A. It has been torn down and stores erected. There is another one in Washington place called the St. Nicholas, not so large, near the New York hotel.

Q. But generally the hotel business has gone uptown?

A. Yes, sir.

Q. Some of the best theatres are above Thirtieth street?

A. Yes, sir.

Q. You haven't got any theatres on the elevated road, have you?

A. There are two old theatres, what we call the Old Bowery theatre and the Third Avenue theatre, a variety show.

Q. There is not a first-class theatre on the line of the elevated road?

A. No, sir.

Q. On Fifty-third street, you told me after leaving the stand something about an illustration of church property?

A. On Fifty-third street, before the building of the road, there was a handsome marble church, a Baptist church, that cost $95,000, the lot and the building, and they have sold the property for $45,000 to a colored congregation of the same denomination; the coming of the road drove them out.

Q. Between what streets was it?

A. On Fifty-third street, between Sixth and Seventh avenues.

Q. How wide is Fifty-third street?

A. 60 feet wide.

Q. The elevated road runs in front, in the middle of the street?

A. No, the posts are on the sidewalk. It covers a greater part of the roadway.

678 Q. Do you know of any reason for that depreciation of that property, except the elevated road?

A. I do not. I sold lots on Fifty-third street three years ago for $13,250. They erected tenement-houses, I think. At the same time they were selling lots on Fifty-fourth street, not so good a street originally, for $18,500.

Q. Fifty-third street was formerly a fine residence street?

A. It was. I used to rent a house belonging to my father for $1,500. When the road came I got $700 rent. Today they get $1,000.

Q. Has the class of residence people changed on that street?

A. Yes, sir, there are colored people on the street. Some of those first-class houses are occupied by improper characters.

Q. Anything of the kind ever known as that kind of tenants known before?

A. If it was, it was so quiet that no one knew it.

Q. You have not the slightest doubt, as a resident of New York, born there, and having seen the elevated roads come, and seen the effect of them, that, so far as the streets are concerned in the residence portion, or manufacturing, or offices, wherever the elevated road comes, it has been a blight on property?

A. It has been and it will be, no matter what they are worth there; they would be worth more without it.

Q. I think you said on your direct examination you did not know anything about insurance?

A. I know generally, but not a great deal.

Q. You do not pretend to be an insurance expert?

A. No, sir.

Q. You were not called upon to testify as to fire rates?

679 A. No.

Q. You have not professed to do that here?

A. I have not. I know generally, that is all.

Q. You know nothing of the values of Detroit real estate?

A. No, sir.

Q. You do not know McIntosh; you have not met him in your peregrinations?

A. I have not.

Q. McIntosh is a witness in New York who came out to tell us of the value of real estate?

A. He is not a broker.

Q. You have seen the Backus property?

A. I have.

Q. You have seen its situation with reference to its railroad facilities from the Michigan Central?

A. Yes, sir.

Q. You have seen how it is protected there by a stone wall on that side?

A. Yes, sir.

Q. You understand that that is because of the railroad facilities required there?

A. Yes, sir.

Q. What have you to say as to the relative value of that situation for purposes of manufacturing business and trade there outside of a local trade, the requirements of shipping and so forth, with the corner property on the next street below, on Twelfth street?

A. It is worth a great deal more money, the same piece of property is worth double.

Q. Why?

680 A. On account of its being a little nearer the business part of the city for one reason, and having shipping facilities, its being on the front of a property where the railroad comes, which virtually makes it a corner.

Q. Did you observe anything about the mill constructed there, and whether the business was arranged within the mill with reference to the Michigan Central road, to guard against fire, or any injury from it?

A. I was told by Mr. Backus, that is all.

Q. You think it would be worth double what it would be on the corner below?

A. I did not mean to say that. I mean it is worth 50 per cent. more than that.

Q. As a business site without regard to the mill?

A. Yes, the land itself. If a lot was worth $1,000 on the other corner, it would be worth $1,500 here.

By Mr. LESHER:

Q. I would like to know the nature of the complaints on account of the elevated road.

A. The complaint in New York is the noise, gas, smoke, steam and cinders, the unsightly structure in the street and the loss of light by the structure and by the passing of the cars and the flickering light caused by the cars when passing. You lose the light no matter which way they are going; a car in passing, if the car is between the sun and yourself, it is dark when it comes to the window and when it is so that the light comes between the cars, you have the flashing of the light and in that way you have a flickering light. And another thing, the people will constantly be in the windows when they pass by.

Q. The complaint is according to the occupants of the building?

681 A. Of course. A private dwelling is worse than where it is a store-house.

Q. You have your office in front of the elevated road?

A. No, sir, mine is in Liberty street, in Broadway. I have lived in front of an elevated road, I know its nuisance.

By Mr. DICKINSON:

Q. I find in the reported cases frequent reference to drippings of rain and snow and oil and stuff, on goods passing under it?

A. Yes, sir, it is constant. Of course it is more so in the winter when the snow falls.

Q. I want to call your attention to some parts of your testimony where some mistakes have been made in copying. On page 662 you are made to speak of the Northeast railway. You referred to the Northern.

A. Yes, sir.

Q. You are made to say that it started from One hundred and fiftieth. You said One hundred and fifty-fifth, I think?

A. One hundred and fifty-fifth is the fact.

Q. You are made to speak of "from Fifty-third to Eighth avenue," you mean Fifty-third and Eighth avenue?

A. Yes, sir.

Q. You are made to say in answer to a question how wide is Pearl street at this point, formerly occupied by the cotton men, you are made to say about fifty feet in the narrowest part, below there is a place called Hanover square about fifty feet wide.

A. I said one hundred and fifty feet wide. I think it is really one hundred and sixty-two feet.

Q. You are made to say Coenties street. You said Coenties slip?

A. Yes, sir.

682 Q. You also, in answer to a question at page 671, in reference to the Bowery, you are made to say 108 Bowery rented in 1873 for $9,500 and now for $5,700.

A. It should be 108 and 108½.

Q. At page 700 of the testimony, you are made in answer to the

question, "There is an open square there?" you are made to say at the south end of the square, which is about 600 wide, and it is 50 or 60 feet from the railroads.

A. That should be about 110 feet. I was speaking of the Cotton exchange, which is on the square, and it is about 110 feet from the elevated railway.

Q. At page 706, you are made to answer the question, "Is the entire roadway spanned? A. Yes, in that block, with the outside of the track about three feet outside of it."

A. What that means is outside of the track, what we call a track walk, cross-girders put out, and long ties, and on that ties and a tight railing. On this block it extends the whole length except where I said, in front of the Armitage building; Mr. Armitage got an injunction and got an order of the court, and they had to cut it out.

Recross-examination by Mr. BAKER:

Q. Did you read your testimony all over today?

A. I did, sir.

Q. Did you find any other mistakes?

A. There are other mistakes, but they are merely formal matters.

Q. In giving your testimony as to the depreciation that was caused by the elevated railroad, you compared rentals in 1873 with present rentals on Pearl street and in the Bowery. What explanation have you got to make of the fact that when you come
683 to show the appreciation that has taken place on other streets, you compare the present rentals with rentals in 1878?

A. I gave the facts that I could get. I endeavored to get all the information possible on Railroad street and the other streets, and it shows just what I tried to show you, that a failure to appreciate on Pearl street is shown, and the other streets had appreciated from 1877 and '78.

Q. In most of the cases you have compared present rentals with those in 1877 and 1878?

A. I don't think I did in most of them.

Q. Is it not true that rentals generally in New York, wholly regardless of the elevated railroad, were very much less in 1878 and '79 than in '73?

A. Yes, sir.

Q. Will you tell us what the property number 173 Pearl street rented for in 1877?

A. $2,500.

Q. I suppose the elevated road in New York has depreciated the property there generally, has depreciated the value of Manhattan island?

A. No.

Q. I suppose the elevated road is a blot on the island?

A. I just said to the contrary. I do not want you to put words into my mouth. I want to tell the truth and I want you to do the same.

Q. I am not on the witness stand. Answer the question. It is not a blot on the island at large, it is a benefit?

A. It is a benefit to the island at large, but those whose property abuts on it have to suffer for the men who live uptown.

Q. Are you known in New York as the brother of Judge Martine?

684 A. I think so; I have been his brother 48 years.

Q. Are these cases before him?

A. No, sir, I would not go as a witnes- in any case before my brother; he would not let me either.

Mr. DICKINSON: Were you ever sworn before your brother in your life?

A. No, sir.

By Mr. BAKER:

Q. When did your father buy that planing-mill property?

A. He bought that property after the panic of 1873. My impression is that it was 1876, it may have been '75.

Q. He bought it on a mortgage foreclosure?

A. Yes, sir.

Q. How long a time before that?

A. He owned the land and sold it for $92,000.

Q. When did he sell it?

A. He sold that mill prior to 1873.

Q. About when?

A. I don't remember now, probably along about 1870, I won't say positively about that.

Q. Who built the mill?

A. Mr. Serril.

Q. Your father bid it in on a mortgage foreclosu re for $60,000?

A. He was the only one who bid on it. He bid the face of the mortgage, and there was no other bid, and it was knocked down to him.

Q. What year was that?

A. I think it was about 1876.

Q. When did he sell it?

A. His estate sold it in 1883.

Q. For how much?

685 A. I think $75,000 or $78,000.

Q. When was the elevated road built in front of it?

A. 1878.

Q. Up to the time it was sold by the estate, did the estate make any claim against the elevated road for damages?

A. We never made a claim against the road, except in the way I told you by this lawyer. He came and said he would do it, no cure, no pay.

Q. No claim was made by the estate until a lawyer called your attention to it?

A. No, sir.

Q. And you settled whatever claim you had for about $6,000?

A. Yes, sir.

Q. Did you execute a deed to the company?

A. I don't know; the executors may have done so, I didn't. Two brothers and my sister were the executors. I presume they gave something to release their claim. They could not give a deed for rent, so I know they did not give a deed.

Q. Your action was simply for rent?

A. Yes, sir; and they settled with the present owner for the damage to the fee.

Q. You do not mean to say that the legal rate of interest in New York fixes the rentals there?

A. Yes, sir; the legal rate is six per cent. When money is cheap you can get it for 4 and 4½. When it is dear it goes up to 6.

Q. You testify that the rent has decreased because the legislature reduced the rate of interest?

A. Certainly. If a man who has a mortgage on his property, and is paying 6 per cent. instead of 7, he can afford to take less from the tenant.

686 Q. Is not that due from the fact that money was cheap and not the statute?

A. That cheapened it in the first place.

Q. You can cheapen money by an act of the legislature?

A. Certainly.

Q. How are the rents of buildings fixed in New York?

A. Rents are not fixed. There is a rule that a man wants to get on tenement property 10 per cent. gross rental; on office buildings the same, and on store property he tries to get 8 per cent. Sometimes he does not do it.

Q. That is fixed on the valuation of the ground and the building?

A. It is the property as it is. If it is worth $10,000, he says I want $800 rent for my store, and pays the insurance and taxes.

Q. How much does that net?

A. Five or six per cent.

Q. 175 Pearl street, what did that rent for in 1877 and '78?

A. 1877 it rented for $3,400.

Q. 179 Pearl street, what did that rent for in 1877 and '78?

A. In '77 it was $1,800 and in '78 $1,200.

Q. 182 Pearl street, what did that rent for in 1877 and '78?

A. I have not any rents for that. That building is a storehouse, and has been for years.

Q. 138 Pearl street, running through to Water street, what did that rent for in 1877 and 1878?

A. It rented in 1877 for $7,800.

Q. 144 Pearl street, what did that rent for in those years?

687 A. In 1877 it rented for $3,550.

Q. 102 Pearl street?

A. It rented for $2,000, and rents now for $1,200.

Q. What did it rent for in 1873?

A. $2,200.

Q. No. 306 Pearl street, what did it rent for in '77 and '78?

A. $1,600, and rents now for $1,500.

Q. 130 and 132 Pearl street, what did that rent for in '77 and '78?

A. In 1877 $6,360, and in 1878 it dropped to $4,445. That is the year the road was built. There was a store vacant at the time.

Q. 244 Pearl street, what did that rent for in '77 and '78?

A. $1,380.

Q. 46 Pearl street, what did that rent for in '77 and '78?

A. I didn't say anything about 46 Pearl, because that is not on the line of the elevated railway. That is 246, I guess. 246 rented in 1876, under a lease from '76 to '78, for $1,992.

Q. 261 Pearl street, what did that rent for in '77 and '78?

A. $2,400.

Q. 99 Pearl street, running through to Stone street?

A. In '77 and '78 it rented for $4,000; now it rents for $1,860.

Q. What did it rent for in 1873?

A. It was under a lease at that time. The average was $3,900.

Q. 160 Pearl street, what did that rent for in '77 and '78?

A. $3,350.

Q. 75 Bowery, the carpet store, what did that rent for in '77 and '78?

688 A. In 1878 it rented for $6,500.

Q. Under an old lease?

A. It was a ten-year lease, from 1868 to 1878.

Q. What does it rent for now?

A. $4,200.

Q. When did it rent for $4,200, when did the lease commence?

A. It rented in 1878 to 1882 for $4,000; from 1882 to 1892 for $4,200.

Q. No. 218 Bowery, what did that rent for in 1877 and 1878?

A. I don't know, sir.

Q. 108 Bowery?

A. I don't know what it rented for in those years.

Q. 309 Bowery?

A. That I have not got.

A JUROR: Can you tell us the rent that Macy pays?

A. I cannot, for this reason, Macy leases the ground and he owns the building.

Q. Did he lease the ground before the elevated road came there?

A. Yes, sir; he had been there 25 or 30 years.

Adjourned to June 29th, 2 p. m.

JUNE 29TH—2 p. m.

HERBERT M. WARDLE, sworn for respondents.

Examined by Mr. DICKINSON:

Q. What is your business?

A. Insurance agent.

Q. Whereabouts is your office?

A. Our office is in Chicago, where I travel from.

689 Q. What is your business in Michigan?
A. A special agent.
Q. For whom?
A. For what is known as the Three Armstrong Companies.
Q. Will you name them?
A. The Mutual Fire, the Fire Association, and Armstrong Fire, all of New York.
Q. You are the special agent in Michigan?
A. Yes, sir.
Q. What are your duties?
A. My duties are to solicit business, make rates and inspect.
Q. For those three companies you inspect and make rates?
A. Yes, sir.
Q. And your companies all do business in Michigan under the State law.
A. Yes, sir.
Q. I think you have insured the Backus mill heretofore?
A. Yes, sir.
Q. What is the rate as it stands?
A. Three and a quarter per cent.
Q. Have you been in the Backus mill?
A. Yes, sir.
Q. From your experience in insurance, what effect would it have on rates of insurance, or their being able to insure at all, if there should pass their mill on River street an elevated structure upon which three tracks and switch for changing from one track to another, also in front, the elevated track to extend so that the top of the track would be 28 feet high on the front and in River
690 street, spanning the entire curb, the tracks being laid upon a structure spanning the curb, and the track being 13 to 18 feet in the clear from the roadway over which the track will pass, the trains with the locomotives attached of the D., L. & N., the F. & P. M., the Canadian Pacific, and the Wabash, with all the business that they do with the city in the way of passengers, and also including the local freight business of the two Detroit companies, this business to be conducted to enable these lines to reach the union depot on the corner of Third street, so that all the traffic in the way of passengers and in the way of freight for the two companies that I have stated, the trains being drawn by the ordinary locomotives, with all the care that could be taken and is taken in the matter of confining fires and shutting dampers, all that could be taken in such cases, what would be the effect upon insurance rates, or whether the property would be taken as a good risk by a company?
A. The physical hazard would certainly be increased, and the rate would consequently be increased upon the physical hazard. My idea also would be that it would be what is known as a moral hazard attached to the risk by these roads going past, which does not exist at the present time. An increase of physical hazard and also of the moral hazard might make it undesirable for some companies; for any companies, perhaps.
Q. To insure at all?

A. To insure at all.

Q. Define what you mean in addition to the physical risk, which I understand to be the actual risk of fire from the locomotives; what do you mean by the moral risk?

A. It is taken into consideration by the companies, this moral hazard. The question is whether a risk is more desirable, particularly the sale to other insurance companies.

691 Q. And that is always considered in making insurance?

A. Yes, sir.

Q. You think that many companies might not want to take such a risk on account of the danger?

A. My idea is that there would be a great many that would not take it that would write it now.

Q. From your knowledge of the matter, and your experience, I suppose you could not tell whether your company would take it upon your recommendation or not?

A. I could not say for certain whether they would or not.

Q. If you would take it, at what rate and the increase premium?

A. I should increase it one per cent.

Q. If you took it at all?

A. Yes, sir.

Q. I believe in the insurance business, they do not take risks where they are so hazardous that you would increase it much more than that?

A. No, sir.

Q. If the risk is not good at four and a half per cent. you would not want to take it at all?

A. I think we have not a four and a half per cent. risk on our books in my territory, to my knowledge.

Q. If the risk were such that you would want to charge four and a half per cent. it would be such a one as you would not care to take. You would not want to take any risk that any more would be charged upon at any rate?

A. No, sir.

Q. In your judgment, would the risk be increased to the maximum of your charge, four and a half, if you took it at all?

692 A. It would be increased to four and a quarter if I took it at all.

Q. How much is it now?

A. Three and a quarter.

Cross-examination by Mr. BAKER:

Q. Where do you live?

A. I live in Ionia, Michigan.

Q. How long have you lived there?

A. Since the 8th of March, 1883.

Q. Where did you formerly reside?

A. I came from New York city, there.

Q. You have your insurance office in Ionia?

A. No, sir, I travel from Chicago.

Q. You are a traveling agent?
A. Yes, sir.
Q. Who is your agent in Detroit?
A. We have no agent in Detroit.
Q. Have you any risks in Detroit?
A. Yes, sir.
Q. Who wrote the Backus risks?
A. I did; the policies were written in Chicago.
Q. Did you fix the rate?
A. No, sir.
Q. Has your company a head office in Michigan?
A. No, sir.
Q. Have you an agent here in Detroit?
A. No, sir.
Q. Are you the only agent in Michigan?
A. Yes, sir.

Q. What risks have you in Detroit besides the Backus risks?
693 A. It would take me quite a while to enumerate them. I have a number of them.

Q. How many?
A. I could not tell you that.
Q. All written by you?
A. No, sir.
Q. Have you any risk in Detroit outside of the Backus risk, on a planing mill?
A. I think we had some on the Delta lumber planing mill; we did have; I think we have yet.
Q. Whereabouts is that planing mill located?
A. At Delray.
Q. What is the rate on that mill?
A. I cannot call to mind what it is, but it seems to me somewhere about three and a half per cent.
Q. Don't you remember what it is?
A. No, sir.
Q. What makes you think it is three and a half?
A. As I remember it; of course I cannot remember the rates on all the risks we have.
Q. What makes you think it is three and a half?
A. It is in my mind as I remember it.
Q. Have you any risk on any planing mill that has no railroad connection?
A. I do not call to mind any that does not have some switch-track running in near the mill.
Q. Has a railroad running somewheres near it?
A. Yes, sir.
Q. Have you any risk on any planing mill in Detroit besides the Delta mill and the Backus mill?
A. We have some on the Yeomans and Chesbrough.

Q. Planing mill?
694 A. Yes, sir.
Q. Whereabouts is that located?

A. It seems to me it is out on Fort street.

Q. East or west?

A. On Fort street west.

Q. Is that on a railroad?

A. I think not.

Q. Do you know what the rate on it is?

A. The rate is 3.95.

Q. So that the further you go from the railroad, the higher the rate is?

A. No, sir.

Q. Can you tell me now how much of this 3.25 per cent. that you charge on the Backus property is due to the fact that the Michigan Central railroad runs alongside of it?

A. The Michigan Central affects it altogether in a different way. The Michigan Central does not affect it in such a way as this does.

Q. Then it is true, is it not, that the fact that the Michigan Central road runs right alongside of this property has not increased the rate?

A. I do not say that it has not.

Q. You say it does not affect it, you do not charge anything down there but the risk?

A. The Michigan Central was there long before the rate was fixed.

Q. How much of this rate, this 3.25 per cent., is charged on the Michigan Central?

A. I should say that the Michigan Central going past there was a minimum hazard compared to this.

Q. So that you do not charge anything for it?

A. I would say there was not anything charged for it.

695 Q. The way you estimate it, you do not charge anything for it?

A. I said I did not make the rate on that mill originally.

Q. I thought you said you did fix the rate on the Backus mill.

A. I did not.

Q. Who did fix the rate?

A. I don't know; it was fixed before my connection with the company.

Q. Did you issue a policy on it?

A. Yes, sir.

Q. How much of that 3.25 per cent. was for the increased hazard of the railroad?

A. I said I did not fix the rate.

Q. As a matter of fact, you do not consider the presence of the Michigan Central there, as any increase?

A. I do not consider it as increasing the hazard. It runs by it in altogether a different way. The railroad might run through this street and pass the city hall, but I would not consider it any additional rate.

Q. You went down there and looked at that property?

A. Yes, sir.

Q. The Michigan Central runs right alongside of it with half dozen or more tracks?

A. Yes, sir.
Q. And the property is exposed on that side?
A. Yes, sir.
Q. So that the smoke and sparks and cinders could be blown right into the building, and right onto their lumber piles, and onto the floors and everywhere?
A. Yes, sir.
696 Q. And as an insurance man you do not consider that as increasing the risk?
A. I say it is a minimum hazard.
Q. That is the smallest hazard?
A. Yes, sir.
A JUROR: Do your companies belong to the board of underwriters?
A. No, sir.
Q. Do you ever purchase rates of the insurance inspector here in town?
A. I never purchased any.
Q. You never got anybody here to do any inspecting for you?
A. No, sir.
Q. Do you know Mr. Beveridge?
A. I used to work for him some years ago.
Q. You know that he has been an insurance inspector in this town?
A. I do.
Q. When your companies take a risk you come here and attend to it?
A. Yes, sir.
Q. How often do you come here?
A. I am probably here once a month.
Q. Have you got your rate book in your pocket?
A. No.
Q. What is the rate on a planing mill?
A. It depends on the planing mill.
Q. Suppose it is an ordinary planing mill where they plane dressed lumber by steam?
A. There are a good many things to be taken into consider-
697 ation. First, the construction of the mill, and then the construction of the boiler-house, and then the cleanliness and the protection of it. There are a good many things to be taken into consideration. Planing mills vary all the way from one and a half to ten per cent.
Q. You think this railroad on River street would increase the risk down there because it is going to be elevated?
A. That is one reason.
Q. You think the sparks would be more dangerous the higher up they are?
A. It is according to where they alight.
Q. In setting a fire, would it make much difference which story they went into?

A. That would depend on the material they came in contact with.

Q. Can't you see that the higher the sparks are here, the less danger there is from them?

A. No, sir. Of course, if you got them high enough they would be dead before they reached the ground.

Q. Don't you know that nearly all the sparks from a locomotive go out before the sparks are ten feet from the locomotive?

A. Yes, sir.

Q. So that the further they have to fall the less danger there would be from them?

A. That is the truth. If it were not true, that planing mill would not stand ten hours.

Q. If there was any risk of that kind, the mill would burn up every 24 hours?

A. Yes, sir, unless they succeeded in putting it out.

Q. Do you remember when a mill did burn up there?

A. No, sir, it was before my time.

698 Q. Suppose a locomotive were operated on this elevated road, and they kept their dampers closed, or suppose they emitted no sparks, would it increase the risk?

A. They never did such a thing.

Q. Suppose they did, would the risk be increased?

A. If they would give me an indemnifying bond of $68,000 that they would not emit sparks, I would not increase the risk.

Q. Would it make any difference as to the risk what coal is used?

A. I presume it does.

Q. Don't you know whether it does or not?

A. I never have examined all the coals that are burned.

Q. You are an insurance man?

A. Yes, sir.

Q. Supposed to be an expert on fire risks?

A. I may be supposed to be; I never said I was.

Q. Your judgment—from what you do know about it, does it make any difference what kind of coal is used?

A. In my judgment, it does.

Q. Do you know whether anthracite coal can be used in locomotives?

A. I believe it is used in locomotives.

Q. What is the lowest rate on a planing mill?

A. I have seen them written at one and a half per cent.

Q. Where they were detached from every other risk?

A. Yes, sir, and equipped with automatic sprinklers.

Q. What do you mean by that?

A. It is a device for putting out a fire automatically.

Q. Suppose there is nothing of that kind, suppose it is an ordinary planing mill, and the only protection is the water works of the fire department?

A. The rates vary in different States; in New York State, and in the East, they are written lower than here.

699 Q. In Michigan?

A. In Michigan, the standard brick mill would rate 2.75. That is our standard rate.

Q. Are there any rules laid down by the company as to how you shall fix rates?

A. There are not with me.

Q. You have no instructions?

A. I have my judgment, no instructions.

Q. You have no written instructions?

A. No, sir.

Q. Have you any printed instructions?

A. No, sir; of course I have schedules.

Q. Have you any verbal instructions?

A. No, sir.

Q. What are those schedules that you have?

A. They are planing-mill schedules, and saw-mill schedules, etc. They are seldom used, if at all, and always vary them according to my judgment.

Q. They are instructions that are issued that you do not use?

A. They are not instructions. They are not given to me. They are something that I have gotten myself.

Q. Tell what they are.

A. Charging so much for a smokestack going through a roof, so much for the absence of a stand-pipe, so much for certain construction of the boiler.

Q. Have you got one of those in your pocket?

A. I have. These are not mine; they do not belong to any particular company, and it is something that I probably have not looked in inside of six months.

Q. I suppose you are so familiar with it that you do not have to look into it?

700 A. I do not read it.

Q. Was that issued by one of your companies?

A. No, sir.

Q. Issued by the Mutual Fire Association of Chicago; do they use it?

A. I don't know; it is not used by my company.

Q. Where did you get it?

A. I can't say that; I can't remember.

Q. What did you get it for?

A. I got it for reference. There are some very good things in that book. It may be instructive.

Q. You carry it around for reference?

A. I carry it around.

Q. Do you regard this as good authority?

A. Pretty good, as good as any schedules are. As I say, schedules won't apply to every risk.

Q. Risks vary?

A. Yes, sir, and they vary in different States. The law of hazard is the same, however.

Q. Is there any difference between a furniture or chair factory and a planing mill?

A. Yes, sir.

Q. Which is the more hazardous?

A. It depends altogether upon circumstances. If you take the Standard Furniture Company without any finishing done in it, and construct it the same as a planing mill, the hazard will be about equal. There is almost always finishing done in a building in a furnishing factory.

Q. Would you call Backus' planing mill a standard planing mill?

A. No, sir.

Q. What would you call it?

701 A. It is a little too high for a standard mill.

Q. Too many stories?

A. Yes, sir.

Q. How many stories would there be in a standard mill?

A. A standard planing mill, according to my idea, would be one story high.

Q. Page 36 gives the rates for a standard planing mill, does it not?

A. Yes, sir.

Q. Does it make any difference whether the building is brick or stone?

A. Not in the rate. In brick and frame of course there is a difference.

Q. Is this book correct when it says that the only basis on each $100 of insurance on a standard steam-power planing mill is 2.50?

A. I don't use that as of any authority at all.

Q. Is that correct?

A. I might rate it at 2.50 and I might not, and I might rate it lower, or I might rate it higher.

Q. I do not speak of the other things that enter into it, but they start out with that as a basis.

A. That book does.

Q. And then they add for the others?

A. Yes, sir.

Q. And when they fix the rate at 2.50 they refer to a one-story planing mill made of brick or stone, the framework solid and substantial, the floors heavy, with tight joints grouted, the roof metal or metal rafters, all inside work whitewashed and painted and kept clean and no open lights, and there are provisions about boiler-house and shaving-rooms?

702 A. That would be a standard mill.

Q. If it came within those terms the rate would be 2.50?

A. That is the schedule in that book.

Q. That would be about right, would it not?

A. That would be pretty nearly right.

Q. That would accord with your judgment?

A. Pretty nearly so, but the conditions might vary it some.

Q. If the building were of wood, instead of brick, or partly wood, you would increase the rate, would you not?

A. Yes, sir.

Q. If the building had simply a gravel roof, would you increase the rate?

A. No, sir.

Q. If the rafters were wood, would you increase the rate?

A. No, sir; I know it says so in that book, but I would not increase it.

Q. For each story above one you would add 20 per cent, would you not?

A. I might and I might not; I probably would.

Q. That is the authority here, is it not?

A. Yes, sir; it would certainly increase the hazard.

Q. If you started out with 2.50 and there were two stories, you would make it 2.70, three stories 2.90, and so on?

A. That is what I would by the schedule.

Q. That accords substantially with your judgment, does it not?

A. It depends; of course we could not add twenty cents to every story to every building, because you would get the rate way out of sight.

703 Q. You get them up pretty well anyhow, don't you?

A. Sometimes.

Q. Will you look at that schedule and see how much you add, according to the schedule, from the fact that the railroad runs alongside of the property?

A. There is nothing in any schedule; there is no schedule for railroads; no schedule for any dirt in a planing mill. There is no schedule for a thousand things; there is no schedule for a dozen barrels of naphtha in a building.

Mr. DICKINSON: Any schedule for a powder mill next door?

A. No; there are lots of things that you cannot provide a schedule for, that it would be injustice to the risk, either to the companies or the assured, and, as I say, I do not follow any schedule.

Q. Where is it in this book that you do refer to railroads?

A. It does not refer to railroads in this book, or any book that I know of.

Q. When did your company first insure this property?

A. I first went with these companies on the first of January; on the 29th of December, 1890, the first risk was put on in the fire association.

Q. Have you any risk on the lumber yard below, on Eighteen-and-a-half street?

A. No.

Q. How much risk have you got on the planing mill?

A. Upwards of $60,000; I think $68,000.

Q. In all three of the companies?

A. Yes, sir.

Q. Have you the total insurance on the mill?

A. I believe the total insurance is $88,000.

704 Q. How long prior to the first of January had these companies insured it?

A. I think the first risk was put on by the fire association December, 1890.

Q. You have only had this risk a short time?

A. That company reinsured in the Western Manufacturer at that time.

Q. Did you come down here and negotiate this insurance?

A. The Western Manufacturer was down here at that time. I did not come down then.

Q. I am trying to find out who fixed the rate.

A. That is beyond me to tell.

Q. Did Mr. Beveridge fix it?

A. No, sir.

Q. Can you tell us some way of finding out who fixed the rate?

A. Mr. Backus perhaps can; I cannot. This was in the Western Manufacturer. The Western Manufacturer was represented by D. A. Montgomery & Company, of Chicago. He insured this Backus mill in the Western Manufacturer. When they reinsured the fire association took it at the old Western Manufacturer rate, and that had stood until this time, and is now standing.

Q. You don't know how long that rate had been fixed at 3.25?

A. No, sir.

Q. You think the Delta pay 3.50 and the Yeomans & Chesbrough 3.95?

A. Yes, sir.

Q. Are those the only other planing mills in Detroit that you insure?

705 A. Those are the only ones I call to mind that I insure. I believe the only ones I have in the city.

Mr. CHAREST: If the elevated railroad should pass on the margin of the Michigan Central, would it then increase the risk on Mr. Backus' mill?

A. Which side?

Q. The south side.

A. Closer to the building, you mean?

Q. I mean where the Michigan Central passes now. If they should elevate it on that side?

A. Over the Michigan Central yard?

Mr. BAKER: Put it in this form: It would be 40 feet further away; that is all.

Mr. CHAREST: What I mean to say is this: Here is the building, it passes right on the street, just 24 feet from the building. Suppose it leaves the street clear. On the other side of the street the cars pass. There is a distance of 64 feet; would that increase the rate? You said that the Michigan Central, where it is, does not increase the rate.

Mr. BAKER: There is a yard on the other side he is talking about.

Mr. CHAREST: Allow me, please. Here is the street, we will say; here is the Michigan Central yard; here is the Backus mill where

my hand is. You said that the Michigan Central, passing their cars here, they do not add to the risk?

A. Yes, sir.

Q. Suppose they elevate the railroad on the Michigan Central ground, what difference would there be in the risk?

A. Being 64 feet off from the building, I should not say that that would increase it.

706 Redirect by Mr. CHIPMAN:

Q. Suppose it goes on the inside of the Michigan Central ground?

A. And as far away from the mill as the Michigan Central?

Q. On the other side of the street, 64 feet off.

A. No, sir, it would not increase it.

Q. If it were 64 feet off further than it is now it would not increase the risk?

A. No, sir.

Q. In regard to this book, the schedule, as you call it, what has that to do with you?

A. It has nothing to do with me; I use it sometimes.

Q. Are there any instructions in there that you are bound by?

A. No, sir.

Q. Is it used by your company?

A. No, sir.

Q. Do you feel bound by it in any way?

A. No, sir.

Q. Can you tell the jury how much insurance you have in the city of Detroit, as near as you can come to it?

A. It would be very difficult; I think it would exceed a million dollars, anyway.

Q. How much in this State?

A. Our premiums in this State will be in excess of $50,000.

Q. About what insurance, do you think?

A. Probably over three millions.

Q. You said you considered the situation of the Michigan Central, as it passes that mill now, as being a minimum risk?

707 A. Yes, sir.

Q. Will you tell me what the difference between that risk is, and the risk which will come from the elevated road passing as it is proposed to pass in front of that mill?

A. In the first place, the Michigan Central comes up on a level track; this comes on an elevated track; the freight trains, pulling up the grade, as I understand it, fifty feet to the mile, it makes a pressure on those engines that is not there on the level track, and of course naturally, they puff harder and are more liable to throw sparks. And another reason, it comes by the most hazardous part of the plant.

Q. What do you mean by that?

A. I mean it goes right by their shaving vault, which is the most vulnerable point in their wood-work.

Q. Do you know where their dust shaft is?

A. Yes, sir.

Q. How about that?

A. That is what I mean by their shaving vault.

Q. The body of the mill is between that and the Michigan Central tracks as it is now?

A. Yes, sir.

Q. But this track will come right alongside of it?

A. Yes, sir.

Q. Are there any other reasons that you can give?

A. A spark in that shaving bin and that sawdust is like powder. I have known it to explode and burst a building all to pieces.

Q. Did you ever know of a planing mill or other property being burned by sparks from a locomotive?

A. Yes, sir. If you can know anything of the way of the origin of a fire.

Q. Where?

708 A. About six weeks ago.

Q. Where?

A. Kokomo, Indiana. I went to take a train and the depot was all burned up. I went to the office to buy my ticket and I asked several bystanders what had become of their depot, and they said that previous, some time in May, a freight train had gone past and thrown a spark on the roof, and they were lamenting their depot. This was on a level track. I did not actually see it, but that is what they told me.

Q. Do you know of any instances where losses were settled on the ground of the fire originating from locomotives?

A. Yes, sir.

Q. When and where?

A. I have a list of some.

Q. Explain it to the jury.

A. I have a list of losses that were paid by the companies that I then represented.

Q. Explain it to the jury.

A. I have a list of them. Nov. 26, 1886, S. G. M. Gates, Bay City flour mill, sparks from switch-engine set fire; June 25, 1887, April 23, 1888, United States Rolling Stock Company, Hedgewitch, Illinois; July 27, 1888, George Hazard, Buffalo, New York, sparks from engine set fire to tannery; November 1, 1888, Chicago stove works, passing locomotive set fire to building; November 19, 1887, milling company, Akron, Ohio, switch-engine set fire to tramway and communicated to cooper shop, and came near burning their mill.

Q. You speak of this flouring mill at Bay City; how did the fire communicate there; do you know anything about that?

709 A. No, sir.

Q. Do you know whether it communicated from one of those locomotives provided with a patent apparatus for preventing sparks and cinders on the F. & P. M.?

A. I have been given to understand that all locomotives have patent appliances to prevent sparks.

Q. In insuring, practically, how much reliance do you place upon those appliances?

A. Of course, I place quite a little reliance on them, but I do not think they are infallible by any means.

Q. Do you know whether they are infallible?

A. I know that sparks come from them.

Q. You know of instances in which those sparks have set fire?

A. Yes, sir.

Q. Where you consider it of some protection, you do not consider it an absolute protection?

A. No, sir.

Cross-examination by Mr. BAKER:

Q. You heard of a depot burning up in Kokomo, Indiana?

A. Yes, sir.

Q. Somebody told you it was set on fire by the railroad?

A. They said they saw it set on fire.

Q. What railroad was that on?

A. Lake Erie & Western.

Q. Is that the only depot that you ever heard was fired by a railroad?

A. That is the only one that I remember of.

Q. You travel a great deal, don't you?

A. Yes, sir.

710 Q. You have been a great many miles on the railroad?

A. Yes, sir.

Q. How many years have you been traveling?

A. A little over three.

Q. Mostly in Michigan?

A. All over the United States.

Q. Depots are generally located right alongside of the railroad?

A. Yes, sir.

Q. That is the only one you have heard of being burned?

A. I never inquire about them.

Q. And you were told that by the bystanders?

A. Yes, sir, this came under my immediate notice.

Q. What is that list you read from?

A. This was taken from the books in the office of the Western Manufacturer.

Q. Do you know anything about it?

A. I simply know that the company paid losses on those.

Q. Your companies?

A. Not the companies I am with at present, but the company I was with.

JUROR: Do you estimate losses for the company?

A. No, sir.

Q. Who sent you this?

A. George B. Barr, our assistant manager.

Q. Of what company?

A. Of the companies I am now with. He was formerly secretary of the Western Manufacturer.

Q. Do you know anything about this flouring mill at Bay City, how close it was to the track, or how well it was protected from fire?

A. No, sir, I never saw it.

711 Q. All you know about it is that this man writes you that they paid a loss on a flouring mill where it was supposed it was set on fire from a switch-engine?

A. Yes, sir.

Q. You don't know anything about what engine it was?

A. No, sir.

Q. Or what railroad it was on?

A. No, sir.

Q. That was in 1886, and in 1887 you say it was reported that your company paid a loss on the United States Rolling Stock Company at Hedgewitch, Illinois, sparks from their locomotive setting fire to grass, which communicated to the fence and then to lumber, which caused quite a heavy loss; that was their own locomotive then?

A. It may have been their locomotive.

Q. That is what it says, isn't it?

A. It may have been their locomotive.

Q. Do you know whether they had any appliances on it *it* at all for arresting sparks?

A. As I have said, I have been given to understand that every locomotive has spark-arresters.

Q. How many do you know that has spark-arresters?

A. I understand all of them.

Q. But you know, do you not, that a great many of them have imperfect apparatus?

A. I believe so.

Q. And a locomotive, if it were used in some yard by a rolling-mill company, would be very apt to be imperfect?

A. There was a railroad man very high up who told me yesterday that they could not run 24 hours without some device to protect them from sparks.

Q. You understand there is a great protection in it?

712 A. I say there is.

Q. In 1888 there was a loss in Buffalo, sparks from an engine set fire to a tannery; do you know whether that means a locomotive engine or their engine?

A. I never saw a tannery engine that would throw sparks, because they are built differently.

Q. November, 1888, the Chicago stove works, passing locomotive set fire to building; you don't know anything about that either, do you?

A. No.

Q. You don't know what kind of a building it was, or what kind of a locomotive it was, do you?

A. No, sir.

Q. November 19, 1887, Seberling Mill Company, Akron, switch-engine set fire to tramway and communicated to a cooper shop,

which was destroyed, and came near burning their mill. Do you know anything about that engine, what railroad it was on, or anything of that kind?

A. No, sir; I presume they were all provided with spark-arresters.

Q. These were not taken from the reports of your companies?

A. The companies I was with previous.

Q. Was not that taken from the insurance reports of the United States?

A. No, sir.

Q. Do you swear, sir, that that is not what this language means: "I have culled out from our annual reports a list of fires that were started by railroad companies using coal." What does he mean by "our annual reports"?

A. The annual reports issued by the companies of the fires they paid losses for.

713 Q. Have you one of those reports?

A. No, sir, I can easily get them.

Q. What do these initials mean?

A. G. J. Harr.

Q. Where does he live?

A. In Chicago.

Q. His address is in Chicago?

A. 1005 Home building.

Q. Did you write to him for information?

A. I wrote to him for a list of losses by locomotives, if he knew of any.

Q. Is that all he sent you?

A. He said that was all he had time to look up.

Q. What is his business in Chicago?

A. Insurance business.

Q. How long has he been in the insurance business?

A. I have known him in the business for three years.

Q. You don't know how long he has been in the business?

A. No, sir.

Q. I suppose it would be your opinion that the risk down there would be increased if the Michigan Central tracks that run along the side of the Backus building were elevated?

A. I don't think so, necessarily. It might be to some extent, but not very much.

Q. So that you would not increase the risk, specially, because the railroad happened to be elevated?

A. Well, that would depend somewhat. If it acted exactly like this does it might affect the moral hazard, as I said this one would.

Q. Suppose this road ran along on the surface of River
714 street, would the risk be any less than it would be running on an elevated superstructure?

A. There would be this difference, if it runs up a grade, I don't care how it gets up that grade, it is more liable to throw sparks if it has to run up an elevation.

Q. Do you know what the grade is going to be in front of that property?

A. I know they tell me it is going to be about 52 feet to the mile.
Q. You don't know whether this is so or not?
A. I never measured a mill.
Q. The road is not built?
A. I can only tell you by what they tell me.
Q. So that they have informed you as the basis of your testimony, that the locomotive, when it is in front of the Backus property, will be going up a grade of 52 feet to the mile?
A. So I have been informed.
Q. And you think that would increase the risk over what it would be if they were to run at a level, or nearly at a level?
A. Certainly.
Q. Would the rate be any less if they ran at the same grade, on the surface of the street, or substantially on the surface of the street. I want to find out your opinion as to which would be the greater risk?
A. If they ran up a hill, it is not my idea so much as the sudden elevation that gives the hazard, because the sparks will be just as liable to go into shaving bins, if it was on a surface, of course, but the sudden pull up there makes a difference.
Q. Their shaving bin has a solid wall on the street side, has it not, with the exception of some doors?
715 A. Yes, sir.
Q. There are no windows in it?
A. No, sir.
Q. They use the door to draw the shavings through?
A. Yes, sir.
Q. As a matter of fact, if the engine ran right along the street, the risk of setting fire in that shaving bin would be greater than it will be when the elevated road is built up there, with the bottom of the engine 25 feet in the air?
A. The mere fact of the difference in height, yes.
Q. That would be a protection, would it not, to some extent?
A. To some extent.
Q. That is, before it could get down to this door, the sparks would have to fall a great deal further?
A. Yes, sir.
Q. About 25 feet?
A. Yes, sir.
Q. This is a big building?
A. Yes, sir.
Q. It has a gravel roof?
A. Yes, sir.
Q. Suppose that side of the building is fireproof, except as fire might be set to the shavings, if they were not kept cleaned up around the door. Do you know whether it is fireproof?
A. I suppose that side of the shaving vault is.
Q. It is a solid building on the side, is it not?
A. Yes, but it is not solid on the roof.
Q. That is further back?
A. Yes, sir.

Q. When you come to the open part of the roof, it is not close to the railroad?

716 A. It is close enough.

Q. But still it is some distance back?

A. Yes, sir.

Q. Do you know anything about a dust-room?

A. Something.

Q. Do you know whether or not that dust-room is properly constructed?

A. The shaving vault?

Q. No, I mean the apparatus they have with canvas on it.

A. The dust-arrester?

Q. Yes; do you know anything about the structure of that?

A. Yes, sir.

Q. That dust-arrester, on the end that faces River street, is a solid brick wall, is it not?

A. I think not; I think it is covered with iron.

Q. And the slats that bring the air into the dust-arrester, are they at right angles with the street?

A. Yes, sir.

Q. You say you will increase the rate one per cent. How much of that one per cent. is occasioned by the fact that the road there will go up a grade 52 feet to the mile?

A. Of course, in fixing that rate, I took everything into consideration.

Q. You must have some idea of how you divided it up. It was not all on account of one thing?

A. It was all on account of the whole.

Q. You have fixed it at one per cent.?

A. Yes, sir.

Q. And one of the things that you have taken into consideration is the fact of their going up a grade of 52 feet to the mile.

717 A. Yes, sir.

Q. Would that account for one-quarter of it?

A. Of course it would not be so hazardous if it did not go by in that immediate locality.

Q. I know, but you are figuring on the theory that it will increase the risk one per cent. I want to find out what elements enter into that one per cent., for one reason, to see how far they could be avoided.

A. I suppose they could be avoided by changing the character of their business entirely.

Q. They would not have to change it entirely, would they?

A. Nearly so.

Q. It is possible for them to have a shaving-room in some other place on their large property?

A. It would be very difficult for them to, without destroying their business entirely, or rebuilding their plant.

Q. You think so, do you?

A. I think so.

Q. You mean they could not locate a shaving-room on that

property in any other place without destroying their business, or having to rebuild their plant?

A. Their shaving vault has to be contiguous to the boiler-house, certainly.

Q. Do you think there is any practical difficulty in avoiding the risk connected with the door to that shaving-room?

A. That is a question for Mr. Backus to answer. I cannot say. Of course, I don't know their business. I merely take into consideration the fact of the things as they are.

Q. You do not take into consideration any extra precautions, or anything that would be done to avoid any loss?

718 A. If there were any way that they could conveniently do it.

Q. What do you think they would have to do about that shaving-room to avoid any risk from it?

A. In the first place, they would have to block up the door, certainly.

Q. Would they have to? Would not this be sufficient, merely to keep the shavings away from the door?

A. They have the door open.

Q. They load shavings there, but if they kept the shavings swept up?

A. The door is open all the time while they are loading the shavings.

Q. There are men right there all the time while they are loading?

A. The mere fact of men being there does not obviate the hazard.

Q. How much of this one per cent. is on account of the grade?

A. I cannot say that I picked it out in that way.

Q. How much is on account of the location of the shaving-room?

A. Considerable.

Q. Seventy-five per cent.?

A. If they had an absolutely fireproof shaving-room of course the hazard would not be so great.

Q. You are fixing it upon the property as it is now situated without any changes, and you fix it at one per cent. How much of it is because the shaving-room exists as it does and will be close to the railroad?

A. Of course there is quite a little difference.

Q. Half of the increase would be due to that?

719 A. Yes, sir.

Q. How much of the increase is due to the fact that the dust-arrester is situated there as it is?

A. I say the dust-arrester and the shavings both, taking them together.

Q. You make that one-half of one per cent.?

A. Yes, sir.

Q. Where do you get the other half per cent.?

A. For the grade.

Q. One-half is because of the location of the shavings-room and

the dust-arrester, and the other half is for the grade of 52 feet to the mile?

A. Yes, sir; saying they can get a fireproof shavings-room.

Q. I am taking it as it is. I suppose there is such a thing as a fireproof shavings-room?

A. I have never seen one.

Q. You are talking about it; I am not saying anything about it. Is there such a thing?

A. There might be one from the outside exposure. There could not be from an inside fire. You might make a fireproof shaving-room.

Q. You can make a building that, as far as the building is concerned, the ingress into the shaving-room is concerned, is fireproof, can't you?

A. I suppose you can.

Q. Of course if you set fire to shavings they will burn?

A. Yes, sir.

Redirect by Mr. CHIPMAN:

Q. This list of fires caused by locomotives, which you gave us, you got from a gentleman connected with the company for whom you used to work?

720 A. Yes, sir, and he is now assistant manager of our company.

Q. I understood you to say these were all that he had time to look up?

A. Yes, sir.

Q. In regard to fire, would not that elevated structure have a tendency to prevent engines—fire apparatus—to work at a disadvantage in extinguishing the fire there, being so near and close up to the building in front; the track on one side and this structure on the front, would it not operate somewhat as telegraph wires?

A. Of course it would interfere to some extent; there is no question about that.

Q. How could they get a ladder apparatus there under that elevated way; how could they operate a hook-and-ladder apparatus under there; how could they bring one of those big ladders which they elevate under that structure?

A. I don't know whether they could do it or not.

Q. Don't you know they could not do it?

A. I don't believe they could.

Q. Would you not take that somewhat into consideration in a town where there was a fire department, in regard to a loss, the extent of a loss, the possibility of saving part of a property?

A. Of course, that is taken into consideration to some extent.

Q. Suppose this grade is 52 feet just about up to the place where the track strikes in front of this property, the locomotive goes upon a level and all the rest of the train, however long it is, is on the grade, would not the objection you make on account of the grade continue to exist until all the cars were pulled up to the top?

721 A. Yes, sir.

Q. In regard to the case put to you by my brother Baker, of there being men around the shaving-room when the door was open on the ground floor, if a spark of fire got in there, what would become of the men?

A. It would be so much the worse for their being there, and it would not help the property any.

Q. They would probably be killed?

A. They probably would unless they were pretty fast runners.

Q. Don't you know that it is necessary at the top of this dust-room to have openings to prevent the roof from being lifted off by the immense draught they have?

A. Yes, sir.

Q. Do you know of any dust-room being conducted without these openings from the external air, allowing it to come in?

A. No, sir.

Q. It cannot be done, can it?

A. No, sir.

Q. Where the dust-room is so high up, and the openings in the roof are so high, would there not be more danger from an elevated road than from a road on the ground?

A. Yes, sir.

Q. The gentleman has asked you if Mr. Backus could not by proper protection, or by changes, obviate the danger from this structure. You know the situation of that company in regard to the Central road, the dust-room as it is now is put clear on the other side. The dust-room has to be near the boiler and the fire, and that is on the other side away from the Central railroad, so that the dust-room is carried at present as far from the railroad as

722 they can get it upon the property. After you looked that property over, can you tell any other place where they can put that dust-room?

A. As I told Mr. Baker, I do not see how they could change it.

Q. If they pulled the whole mill to pieces and shoved everything around, where could they put it, to be free from the Central road and this road too?

A. I don't see how they can do it.

Q. You don't know that the locomotive never comes on that side track from the Michigan Central; it does what they have to do by what they call kicking the cars off. You don't know anything about that, do you?

A. No, sir.

Q. But you do know that the dust-room, as now constructed, is on the opposite side of the lot from the present railroad?

A. Yes, sir.

Q. And you do know that this structure will bring the dust-room right opposite to it—this new structure?

A. Yes, sir.

A JUROR (Mr. Wallich): I would like to know if the rates of insurance will be reduced if you cover the openings on the dust-room with wire netting?

A. No, sir.

Mr. CHIPMAN: Do you know anything about that?

A. It would depend something on the kind of netting that was put in there, of course. You could not stop up the holes.

Q. Do you know the practicability of doing that?

A. No, sir, I never saw it.

723 Q. Do you know whether a netting fine enough to obstruct any sparks that would get into the opening on the top of the dust-room—do you know whether any netting that would arrest the sparks would be open enough to give a proper draught?

A. I am afraid it would not.

Q. They have to have a free draught?

A. Yes, sir.

Q. It would have to be a pretty fine netting?

A. Yes, sir.

Q. Did the railroad company settle with the insurance companies for the fires that you have stated?

A. I cannot really tell you whether they did or not. Of course the insurance companies, as a general thing, whether a railroad or an incendiary sets fire, they generally pay.

Q. The railroad companies must have settled with the insurance companies?

A. The origin of a fire is the hardest thing to prove in the world. It is almost an impossibility to catch an incendiary, even if you see him going into the building with a match in his hand.

Q. About how much of the property is insured; about how much of the risk does the company take, and how much do they leave on Mr. Backus?

A. I should say they left on Mr. Backus somewhere in the neighborhood of $60,000.

Q. Sixty thousand dollars he would get no insurance for if the building burned down?

A. No, sir.

Q. Would he get $68,000 if the insurance company should fail?

A. These companies carry an insurance policy, they reinsure in another company.

724 Q. If the insurance companies became insolvent, he could not get anything?

A. No, sir.

Q. Suppose the insurance companies should differ as to the cause of the fire, and have a long litigation, then where would he be?

A. He would be out of course the interest on his money.

Q. His property is not insured, in your judgment, to within $65,000 of its full value; he must take the risk of the solvency of the company, and he must take the risk of the willingness of the company to pay promply and at once?

A. Yes, sir.

A JUROR: Suppose the mill should be totally destroyed by fire, how much of the insurance would you pay on the loss?

A. We would pay $68,000.

Q. How would you estimate that loss?
A. We would estimate the loss at the value of the property.
Q. What value the property had?
A. Yes, sir.
Q. How much do you value the property at?
A. I never have taken any inventory of it.
Q. How can you tell how much to pay?
A. It would be estimated then dollar for dollar.
Q. You say you would pay $68,000?
A. Yes, our policies provide for a loss of $68,000.
Q. They must prove their claim that they have lost that much?
A. Yes, sir.
Q. You stated they would pay that amount?
A. Provided they lost that.

725 Mr. CHIPMAN: Did you ever know of any insurance company recoving a loss from a railroad company for the property set on fire by a locomotive?
A. I have known of suits.
Q. Did you ever know of a railroad company to be beaten in a suit of that kind?
A. I never did.
Q. Did you ever hear of one?
A. No, sir.

Mr. WALLICH: I believe I understand the shavings-room as well as anybody except Mr. Backus, the inventor. There is no wind necessary from the outside. The pressure is from the inside. The fan creates enough pressure with the dust and shavings from the inside and that surplus of wind has got to pass through the burlap, that is what that burlap is for, to let out the air, and if the outside of that building were covered with a wire mesh, fine musquito bars, it might be ever so fine, it would let out a hundred times more air than the burlap, and I want to know if a building were covered that way, if it would not reduce the insurance on it?
Mr. CHIPMAN: Would not the effect of the wire netting be to arrest the dust there?
Mr. WALLICH: There is no dust there.
Mr. CHIPMAN: There would be so much obstruction.
Mr. WALLICH: The burlap catches all the dust.

Mr. CHIPMAN: Would not the wire netting — an obstruction?
A. It seems to me it would. It certainly would in addition to the burlap.

Recross-examination by Mr. BAKER:

Q. Have you had any occasion to examine dust-rooms as they are constructed?

726 A. Somewhat.
Q. Would you undertake to express any opinion as to how this dust-room could be arranged so as to avoid any danger to a railroad?

A. The only way that I could see was the way I talked to Mr. Backus about, and he says that he has tried it and it cannot be done.

Q. What is that?

A. With the Allington & Curtis dust-collector.

Q. What is that?

A. A metal arrester.

Q. All there is to this dust-arrester is a room in which the shavings and dust are blown by a blower, and the top of it, where the burlap is, is a small place for the surplus air to escape.

A. To collect the dust.

Q. You collect the dust on the inside, and the air comes through the burlap, and you keep the dust on the inside. There is very little if any dust that goes through the burlap. The burlap is there to stop the dust?

A. Yes, sir.

Q. There is open lattice-work so that the pressure upon that dust-room from this blower is constantly forcing the air through the burlap?

A. Yes, sir.

Q. So that as far as the dust-room itself is concerned, it would be an impossibility for the fire to get into the dust-room; the pressure is the other way all the time, is it not, blowing it away?

A. Yes, sir.

Q. Blowing it out, you say it is impossible for a spark to get in?

727 A. Yes, sir. Do I understand you that it would be impossible for a spark to get in?

Q. Yes.

A. No, no, sir.

Q. How would it do it?

A. If it got in there through those blinds, it would soon get in there.

Q. With the air being forced out it would be difficult to get it in except with a pile-driver?

A. The air won't blow out before it will get into the dust-collector, before it would get between the blinds.

Q. You think the spark might lodge on the burlap?

A. Yes, sir.

Q. Is there not air coming through the burlap?

A. That won't help matters.

Q. That would keep the spark from lighting on the burlap?

A. I think not.

Q. Why not?

A. Because it would not.

Q. And the burlap is up and down, is it; it is not horizontal?

A. No, sir.

Q. And there is an open space that a man can walk through in which the air is coming through the burlap and going out through the lattice-work?

A. I would not want to try to put any sparks on the burlap.

Q. You could not put one there if you wanted to?
A. Yes, I think I could.
Q. Suppose it got through the blinds, it would go right through on the other side, wouldn't it?
728 A. It might.
Q. You could not get it to stop on the burlap with the ai going through the burlap and swelling it out; how would you sto a spark on that burlap, take and pin it on?
A. I probably would not try to.
Q. Do you mean to say you do not think it practicable to put wire netting, put it a foot or two from the lattice-work, so that yo could have plenty of air in there, in fact there is a surplus of air al the time, you have to have a place for it to escape, and if you hav it covered with the netting to set it on fire from sparks; is not tha true?
A. I would not say it would be impossible.
Q. With your spark-arrester, or with the lattice-work situate there as it is, with the end of the building towards the railroad there would be no direct current right from the smokestack int that lattice-work anyhow, would there; it would have to be a lat eral connection in some way?
A. It would depend a good deal on the way the wind blew.
Q. If it blew diagonally across there in any way, the full force o the wind would not go into that lattice-work?
A. If the wind blew directly across the lattice-work; the win might blow diagonally.
Q. If it blew directly against the end, there would not be an danger, and if it blew diagonally towards it, it would not be lik blowing straight on and into it?
A. Pretty nearly the same; I cannot see the difference.
Q. There would be some difference though, would there not; d you think that is just as dangerous as it is situated there now as i would be if it stood longitudinally with the track; suppos
729 you turned the arrester right around, would it not be a grea deal more dangerous position than now?
A. *If* course; if it were directly sidewise, it might be a littl worse.
Q. It would be a great deal worse, would it not?
A. Not very much.
Q. You take it diagonally it is a broad surface to catch?
A. Yes, sir.
Q. It would be the same breadth if it was longitudinal, and i would be more direct?
A. Yes, sir.
Q. Have you had any experience on elevated roads anyway i insurance?
A. Not in insurance.
Q. Were you ever in Newburgh, New York?
A. I have been through there.
Q. On the West Shore road?
A. Yes, sir.

Q. Don't you know that railroad was built right through the city of Newburgh upon an elevated structure?

A. Yes, sir.

Q. Don't you know, as an insurance man, that not a single rate was increased in that city on account of it?

A. I never wrote any buildings in Newburgh, and therefore I can't tell.

Q. Don't you know, as an insurance man, that they built that railroad right through the city on an elevated structure, and not a single insurance rate in the entire city was increased on account of it?

A. I don't know that.

Q. You are a pretty well-informed insurance man?

730 A. Yes, sir, but I have never written insurance in Newburgh.

Q. You know that Mr. Beveridge formerly lived in Newburgh and did business there?

A. I don't remember; I may have known it.

Q. You recognize him as a good insurance man, don't you, a competent man?

A. As a statistician, yes, sir.

Q. What do you mean by that?

A. I mean that he is more statistical than he is practical.

Q. That is, he keeps the records well?

A. I mean what I say. I cannot describe it in any other way.

Q. You know, do you not, that he has been an insurance inspector in this city for three or four years past?

A. Yes, sir.

Q. You know what his position has been?

A. Yes, sir.

Q. He has done business for a large number of companies?

A. Yes, sir.

Q. Were your companies ever in the board of underwriters here?

A. No, sir.

Q. Were your companies members of the insurance bureau that is organized here after an act of the legislature had been passed a few years ago?

A. No, sir.

Q. You have your appraisers outside?

A. Yes, sir.

Q. Doing an itinerant sort of business through the country; you never went into the other companies?

731 A. No, sir.

Q. Don't you know that Mr. Beveridge is practically the rate-fixer for the insurance companies in this city?

A. Yes, sir.

Q. I suppose the insurance business here would compare favorably with the business in Ionia?

A. It might.

Mr. DICKINSON: Do you know that Beveridge fixed any rates for anything but his own company?

A. I don't know anything about what companies he fixed rates for.

JOHN B. ELDERT, sworn for respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?
A. Eighty-four Perry street.
Q. What is your age?
A. Forty-four.
Q. What is your business?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer?
A. About 12 years.
Q. What roads have you been on?
A. The Michigan Central, Detroit, Bay City & Alpena, Toledo, Cincinnati & St. Louis, and Houston & Texas Central.
Q. What business were you engaged in before you were a locomotive engineer?
A. Fireman.
Q. How long have you been in the railroad business upon an engine?
732 A. Sixteen or 17 years.
Q. Where were you last engaged in the business?
A. On the Texas Central.
Q. What is your business now?
A. I am not doing anything at present.
Q. Where were you last in business here?
A. I was in a store here last time.
Q. Were you ever on the Michigan Central?
A. Yes, sir.
Q. When?
A. From 1876 to 1882.
Q. Have you been about yards at all since you have been here this time?
A. Yes, sir.
Q. Familiar with the boys?
A. A great many of them.
Q. Know the running of the business?
A. Yes, sir.
Q. Go upon locomotives frequently?
A. Yes, sir.
Q. Do you know whether the Michigan Central provides any method on the locomotives for the arrest of sparks and cinders?
A. In some kinds of engines they do.
Q. Give us the nature of that device.
A. They have an extension front end, and netting that goes across that way, and another netting that goes up and down. The cinders first strike the draft section, and then go down and up through the netting until they go out. When they get full they go out.

Q. State to the jury whether it is substantially like this (showing witness the cut of the engine of the F. & P. M.)?

733 A. Many of them have an arch in; some of them have not.

Q. Have the engines got this arch in?

A. Some of them.

Q. This device is for the reception of sparks and cinders?

A. Yes, sir.

Q. What is this mesh, what you call a netting?

A. Some is coarse and some finer than others. A man can hardly tell the kind they use.

Q. Can you give an idea of the spaces in the smallest and in the largest?

A. No, sometimes even they take out fine netting and put in coarser for the engines to steam.

Q. Can you tell us whether or not the locomotives, in going on the roads, do adopt some method of arresting sparks?

A. On a great many of the engines, and I know the improved engines do.

JUROR: Try to.

A. Try to get the best device they can.

Q. As a practical engineer, have they succeeded in any device which is successful and perfect in arresting sparks?

A. Nothing perfect that I am aware of.

Q. Did you ever see engine 35 of the Wabash down in the yard?

A. Yes, sir.

Q. When did you see that?

A. I have seen her several times.

Q. When did you last see her?

A. Last Saturday night.

Q. After dark?

A. Yes, sir.

734 Q. What was number 35 doing?

A. Switching.

Q. Dragging loads and making up trains?

A. Unloading the boat, I beli-ve, and switching around.

Q. When you saw engine 35 down there Saturday night how near were you to her?

A. I was within ten or fifteen feet, part of the time, and part of the time thirty or forty rods.

Q. How long were you there observing her?

A. About two hours, perhaps a little more.

Q. Observed her work?

A. Yes, sir.

Q. You saw, did you not, that she was so fitted that she did not throw sparks?

A. I know that she was fitted for that, as I understood, but she threw sparks just the same.

Q. Give the jury some idea of the extent.

A. She did not throw sparks quite as bad as some of the other engines did that were working around there, coming in and going

out. I think if they had put her down in the corner and opened her up a little bit she would have thrown sparks more.

Q. Give the jury an idea of how she did throw sparks.

A. I don't know that I can give an idea. She threw sparks enough to set fire, if it happened to strike anything inflammable.

Q. How far from the top of the smokestack did the sparks proceed?

A. From 30 to 50 feet, as near as I could judge by the eye.

Q. Did they go up and off?

735 A. They would go up and sail off. They were not running fast enough to go back very far.

Q. Do you think she threw sparks enough to light?

A. I think she would set fire if she had been working very hard if there was anything inflammable around there.

Q. Did she throw sparks half as bad, or quarter as bad as the other engines?

A. No, I don't think she threw them quite half as bad, but she threw more than a quarter probably.

Q. Did they work her hard at the time?

A. No, they were not working her hard.

Q. Did you notice whether she had on at the time the steam jet to pour upon the sparks?

A. You could hear it perhaps twenty cars off.

Q. She had every apparatus working, including the steam jet?

A. I presume they did.

Q. You could hear it roar?

A. Yes, sir.

Q. In drawing a loaded train in the practical business of engineering, going up a grade, say 25 feet to the mile, do you think they can run that grade and drag a load with the dampers closed?

A. No, sir, I don't think they can; if the grade is very far, I don't think they would try to do it. I know I should not.

Q. The engineers would not think of it?

A. No, sir.

Q. What do you say as to whether it could be done with a load?

A. It might be done, but they would not have much steam, or dampers either.

736 Q. Suppose it was 52½ feet to the mile?

A. They would want more dampers than they had in the ash-pan.

Q. Do you think they could drag a train up a grade 52½ feet to the mile without opening the dampers?

A. No, sir.

Q. Suppose the grade is 52½ feet to the mile up to this place and the locomotive runs on a less grade, would the same rule apply as to keeping the dampers open if the train were being dragged up that 52½-feet grade, even if the locomotive had passed it?

A. They would keep one damper open anyhow.

Q. A train of say five or ten passenger cars?

A. It would be according to the size of the engine. If they had a very heavy engine, five or six cars would not be much of a train,

but I think they would keep the dampers up. I do not think a practical engineer would drop his dampers, because the exhaust would bend the dampers so that he could not close them when he wanted to.

Q. In your experience in railroading, have you known of any device in carrying on the business, have you ever seen a locomotive drawing a load or working in a yard that did not throw sparks sufficient to set fire?

A. I have not.

Q. In all your experience?

A. In all my experience.

Q. About how high would sparks go from an engine upon a running train generally?

A. According to how fast they are running and how hard they are working, taking everything into consideration.

Q. Running about ten miles an hour?

737 A. If they have got a heavy train behind them they would throw considerable cinders, but with a light train they will not throw so much. In the working of the engine, and on a grade it is quite different than if they are on a level. On a level they do not have to work it so hard, and it will not throw so many cinders. On a grade where they put an engine down, it will throw a good many cinders.

Q. As to the practical use of this netting that is used as a spark-arrester, does it burn out occasionally?

A. Yes, sir.

Q. Gets out of repair?

A. Yes, sir.

Q. Is there any examination made as to that?

A. There is a man who is supposed to examine it every time the engine goes in, once a week.

Q. Is that done practically in railroading, or is it changed when there is a hole in it?

A. Not always.

Q. I suppose the heat is pretty strong on this netting?

A. Nearly as hot as it is in the fire-box.

Q. And it destroys the wire very soon?

A. Yes, sometimes it does and sometimes it lasts quite a long while.

Q. Do you know the F. & P. M. locomotives?

A. I have seen them.

Q. Do you know of this device upon them?

A. I have been aboard them, and I have seen quite a few of the front ends. I was up to Saginaw a year ago this August coming, and I saw several of the front ends then.

Q. Who was with you at the time you witnessed number 35 at work?

738 A. Mr. Backus.

Q. Last Saturday night?

A. Last Saturday night.

Q. Do you find in the practical use of the spark-arresters that the finer mesh has any effect upon the making of steam?

A. The finer the mesh the less steam, the less draft.

Q. I don't suppose that any notice was given at the time you saw this Saturday night; there was no notice of its being on exhibition?

A. Not that I know of.

Q. You merely found out number 35 and noticed it working?

A. That and other engines.

Q. You were there to see its ordinary working in ordinary business?

A. Yes, sir.

Q. And it was working at ordinary yard business?

A. Yes, sir.

Cross-examination by Mr. BAKER:

Q. How long since you were an engineer?

A. Last January.

Q. What road were you working on?

A. Houston & Texas Central.

Q. When did you move up here?

A. I have always lived here.

Q. Did you live here when you were running a railroad in Texas?

A. Yes, sir.

Q. Your home was here?

A. Yes, sir.

739 Q. Did you ever work on the Michigan Central?

A. Yes, sir.

Q. How long ago?

A. In 1882.

Q. You have been working down in Texas since 1882?

A. No, sir.

Q. What are you doing now?

A. I am not doing anything.

Q. Where did you get acquainted with Backus?

A. I got acquainted with him down in his office, I think.

Q. When?

A. I don't know—a few days ago.

Q. How did you come to be there?

A. I went there on business.

Q. With whom?

A. Alone.

Q. Who called you there?

A. A friend of mine told me about a situation, and I went to see Mr. Backus about it.

Q. What did he tell you?

A. He told me he knew of a situation for me, and that Mr. Backus could tell me about it.

Q. As an engineer?

A. Stationary engineer.
Q. Did you hire out to him as a stationary engineer?
A. No, sir; he told me he did not know that I could get it at all.
Q. He hired you to go and watch this engine?
A. No, he did not.
Q. How did you come to go?
A. I went of my own free will and accord.
Q. Did he ask you to go?
740 A. No, I don't know that he did.
Q. Without his asking you to go and without expecting any pay, you went down and watched that engine for two hours?
A. Yes, sir.
Q. Where did you stand?
A. In the freight-house part of the time, and above the freight-house.
Q. Backus was with you all the time?
A. Yes, sir.
Q. What time did you comm :e?
A. About 8 o'clock.
Q. What time did you quit?
A. About 10.
Q. You staid right down there with Backus during all that time?
A. Yes, sir.
Q. You mean the old gentleman?
A. Yes, sir.
Q. Did you go in the depot?
A. No.
Q. Did you have any refreshments during those two hours?
A. No, sir.
Q. You were intently watching the engine for two hours with Mr. Backus?
A. Yes, sir.
Q. He didn't ask you to go?
A. No, I didn't ask him to go.
Q. You just went. How did you know there was going to be an engine down there at all?
A. I know there are engines there always.
741 Q. You went down there so see one because one had always been there?
A. I went down to see one because I had heard of this wonderful spark-arrester on number 35.
Q. Who told you about it?
A. Mr. Backus.
Q. He did not ask you to go down and look at it?
A. No, sir.
Q. Has he hired you as stationary engineer?
A. No.
Q. You expect him to shortly?
A. No, sir; not from what he told me Saturday.
Q. You are still an applicant for the place?

A. No, sir; I don't know as I am. I expect to be employed in another place altogether.

Q. Whereabouts?

A. Out at the Detroit electrical works.

Q. Stationary engine?

A. Yes, sir.

Q. Were you discharged from this Texas road?

A. No, sir.

Q. Resigned?

A. Yes, sir.

Q. You are hunting for a job?

A. Yes, sir.

Q. You watched that engine do her ordinary work for two hours?

A. Yes, sir.

Q. You were not dicharged from the Michigan Central?

A. No, sir.

Q. You resigned there?

A. Yes, sir.

742 Q. And went down to Texas?

A. Not right away.

Q. You say you looked at that engine and saw her operate for two hours last Saturday night?

A. Yes, sir.

Q. She was doing her ordinary yard-work?

A. I presume so.

Q. You know what yard-work is?

A. I don't know that she was doing her ordinary work. She was working back and forth there.

Q. Constantly for that two hours?

A. Not all the time?

Q. Most of the time?

A. Most of the time.

Q. There were other engines working right alongside or in the same yard?

A. In the same yard; yes, sir.

Q. And it is your judgment as an engineer that the amount of sparks that she emitted had been reduced three-fourths?

A. Yes, sir; about that, I should judge.

Q. Had been reduced at least three-fourths?

A. Yes, sir. She was working about the same as the other engines were.

Q. By sparks you mean something that comes out of the engine that you can see in the night?

A. Yes, sir.

Q. The sparks that came out of her were very small, were they not?

A. I didn't see any of them to pick up. They looked about as large as any of the rest of them.

Q. That is, you could see them in the air there?

743 A. Yes, sir.

Q. There was about one-quarter as many as out of the other engines.

A. Yes, sir.

Q. Most of those sparks would go out a very short distance from the engine?

A. No, sir, not a very short distance. Some of them went as far as fifty feet, I should judge. Sometimes they would go out, and sometimes they would strike the ground before they would go out.

Q. Did you see any of them strike a freight car?

A. They were not near a freight car.

Q. Did you see any of them strike a building or anything of that kind?

A. No, sir, they all struck the ground.

Q. Were they not handling freight cars about there?

A. From the freight-house to the boat; there was quite a space between the two tracks.

Q. Were there not any freight cars there?

A. Not that side.

Q. But right back of the engine, right in the draught of the engine?

A. The freight cars were all ahead of the engine.

Q. But the wind——

A. It was so that it took them off quartering the other way.

Q. Did that engine set fire to anything that night; to a car, or anything?

A. No, sir.

Q. Do you believe that that engine would have set afire to a building or anything that night that would have been right alongside?

744 A. That is impossible for me to answer.

Q. You have operated a locomotive a good many years?

A. Yes, sir, quite a number.

Q. Have they any new appliances down in Texas?

A. Yes, sir.

Q. Have they this extension front?

A. Yes, sir.

Q. The extension front that you know of has a spark-arrester that comes just below the nozzle, just below the exhaust?

A. It has a netting there.

Q. A spark-arrester, is it not?

A. Yes, sir, I suppose you would call it that.

Q. Have they a baffling plate that runs in front of the flues?

A. Yes, sir. That is made of iron.

Q. So that the cinders strike against that when they first come out of the flues?

A. Yes, sir.

Q. And then they go through this netting?

A. Yes, sir.

Q. They go through that by the exhaust?

A. Yes, sir.

Q. Do the engines you have operated have a brick arch on them?

A. Some of them have, and some have not. Sometimes they have to run them awhile with the arch burnt out before you can get a new one put in.

Q. But it is usual, if they are kept in the right way, to have a brick arch, substantially as that represented there (diagram).

A. Yes, sir, except when they are worn out.

745 Q. It helps to reduce the sparks and smoke?

A. I don't know that it does; I never saw it so.

Q. What do they have them for?

A. Making steam.

Q. What makes the steam?

A. Fire.

Q. Does it consume more of the coal and smoke, in making that fire?

A. Yes, sir.

Q. That must reduce the smoke?

A. Yes, sir.

Q. It does reduce the smoke?

A. Yes, sir.

Q. You have no doubt about that?

A. No, sir, not a bit.

Q. Have you ever had an engine that had this steam attachment on it that goes into the smokestack, and also a discharge in the fire-box?

A. No, sir; I have seen them, but never run one of them.

Q. You take an engine that has an extension front, with a netting or spark-arrester in it in good condition, a brick arch in it in good condition, and everything in good order, it produces very great reduction in the amount of smoke and cinders, does it not, compared with the old-fashioned?

A. Yes, sir, compared with the old-fashioned, providing the front of the engine is not stopped up. In running 30 or 40 miles your front end gets stopped up.

Q. You have places along the road where you let them out?

A. Sometimes you do and sometimes you don't. There are some places you cannot let them out.

746 Q. You would not do it in a dangerous place, of course. You let them out of a trap at the bottom of the front?

A. Yes, sir.

Q. You exercise all the care you can in letting them out, I suppose?

A. Yes, sir.

Q. So as to avoid danger as much as possible?

A. Yes, sir.

Q. Down in that Texas country, did you run in a saw-mill country?

A. No, sir.

Q. Did you run out on the prairie?

A. Yes, sir, rolling prairie.

Q. You didn't run into any lumber country?

A. No, sir.

Q. So that you have no doubt an extension front and a brick-arch engine is a very great improvement over the old-fashioned one?

A. My engine that I run in Texas used to run with as many cinders.

Q. It was not very much of an engine, was it?

A. Yes, sir, I thought it was a very good engine.

Q. But as far as arresting sparks was concerned?

A. It was about as good-built an engine as this one.

Q. Did it have a spark-arrester on it?

A. Yes, sir.

Q. And a brick arch?

A. Yes, sir.

Q. I suppose you could run that engine so that it could throw sparks like the old Harry?

A. Yes, sir.

Q. And you frequently did do it?

747 A. No, sir, not any more than I had to.

Q. If you have a good supply of steam on, you can run quite a little ways without opening the dampers?

A. No, sir, I would not run as far as from here to that door with my dampers shut.

Q. That is, you could not run an engine from here to that door with the dampers shut?

A. You can run an engine just as far as you have a mind to with your dampers shut, if you want to; but you don't want to.

Q. Suppose you wanted to, how far could you run it with the dampers closed?

A. I don't know; I would not want to run it very far.

Q. But suppose a case where you wanted to; suppose you were to take an engine with directions to see how far you could run it with the dampers shut, how far do think you could run?

A. I could not tell; I never tried it.

Q. So that you don't know what can be done in that respect?

A. I know after you run it a very little ways you would not have any dampers on your pan.

Q. But you have never tried it to see how far you could run?

A. Yes, sir, I have with one damper closed.

Q. But not with both closed?

A. No, sir.

Q. You let her slide with the dampers right open?

A. Not that exactly.

Q. But you never made a test on any road you have ever run on, to see how far you could run with the dampers closed?

748 A. I don't see how any practical engineer would do that.

Q. Suppose you were just going into the round-house at the end of your journey, how far do you think you could go, say how far out could you go without opening the dampers at all; could you run 20 rods?

A. Yes, sir; I guess so, because you would not have to use much steam, that is, with a light engine.

Q. Pulling an ordinary passenger train, say five or six or eight coaches, how far could you go?

A. Not very far.

Q. Could you go 30 rods?

A. No, sir; I would not want to go that far.

Q. But could you?

A. I could not tell.

Q. You cannot tell because you have never tried—because you don't know anything about it.

A. No, sir.

Q. You never had directions to run half a mile or so?

A. No, sir; nor one foot with both dampers closed.

Q. So you never did it?

A. No, sir.

Q. Can you get any draft with the door of the fire-box open?

A. Very little.

Q. You can get a little?

A. Yes, sir, a little cold air in the flues.

Q. Down there in Texas, I suppose when you are out on the prairie you just pull the dampers open and draw a train just as fast as you can?

A. Well, yes.

Q. Do you have depots down there?

A. Yes, sir.

749 Q. How many did you ever set afire with your engine?

A. I don't know as I ever set any afire. I set a water tank on fire at one time.

A JUROR: Did you ever set the prairie on fire?

A. Yes, sir; frequently we set the prairie on fire, almost every trip, but they plowed it so as to keep it from spreading.

Mr. BAKER: That is out in the country where you are running at full tilt?

A. Yes, sir.

Q. With the dampers wide open and the engine working to its fullest capacity?

A. No, sir.

Q. Nearly to its fullest capacity?

A. No, sir; not nearly.

Q. How many miles an hour?

A. Eighteen to twenty.

Q. How many lumber yards did you ever set fire to down there?

A. Never ran past any lumber yards.

Q. The only building you ever set afire was a water tank?

A. That I know of; yes, sir.

Q. But you occasionally set the grass afire in the dry time?

A. Almost every trip.

Q. But that would be in the time of drought, when the grass would be dry?

A. Yes, sir; the grass would be dry, or it would not burn.

JUROR: Did you ever go aboard the engine you saw down there?

A. I never was on her.

750 Q. Have you ever seen it used on other railroads?

A. No, sir.

Q. Do you know with the new appliances they have got no dampers—that it must be air-tight?

A. No, sir; I never examined the engine at all.

Mr. BAKER: You didn't go on this engine?

A. No, sir.

Q. Don't you think, as an engineer, that a device that will reduce the amount of sparks three-quarters is a pretty good device?

A. Yes, sir; I do.

Q. It beats everything you ever saw, does it not?

A. I don't know. If they put a train to her I could tell better; I could test her better.

Q. I suppose you think you could overload her and manage it so that you could throw sparks?

A. I think I could throw sparks out of it.

Q. There is no engine in the world but you could throw sparks out of if you tried to?

A. I don't doubt it at all.

Q. On your engines you test to see how many sparks you can throw?

A. No, sir.

Q. You overload an engine occasionally?

A. I don't do it. The superintendent does that.

Q. But in firing, your fireman overloads her?

A. No, sir; I don't allow that.

Q. So that you don't have any difficulty from that?

A. No, sir.

Q. So that, as far as your judgment goes, that is the best spark-arrester and smoke-consumer you ever saw?

A. I have not seen it in practical use.

751 Q. You saw it there operating when the engine came, frequently taking out something?

A. They didn't give it a fair test.

Q. You went there with Backus?

A. They didn't give it a fair test.

Q. It was doing its ordinary work in the yard?

A. I didn't see them with a long train on.

Q. Did you go and ask them to give it a harder test?

A. No, sir.

Q. You just saw them doing work in the yard?

A. That is all.

Q. And although you went there with Backus, and you come here as a witness in his behalf, you are compelled to tell this jury that it reduces the sparks three-quarters?

A. I am compelled to tell the truth so far as I know.

Q. And the truth compels you to tell that?

A. Yes, sir.

Redirect examination by Mr. DICKINSON:

Q. You say it is not a fair test. I suppose what you would consider a fair test would be for the use of such a locomotive, would be a locomotive dragging a train, a load?

A. Yes, sir.

Q. You didn't see, in this observation of yours of engine No. 35—you didn't see it drawing a load, or pushing a load, but only a car?

A. They had four or five cars, the most they handled, and some of the cars were loaded and some not.

Q. For a short distance?

A. Yes, sir; going very slow.

Q. What would you consider a fair test?

A. If they had twenty or thirty cars behind, in going up that grade, that would be a pretty fair test.

752 Q. Going up a grade, you have been asked about opening dampers; you have been asked if opening the door of the fire-box does not give you a draft. I suppose the draft, whether it comes from the open dampers or the fire-box, is what enlivens the fire and what makes sparks, is it not?

A. No, sir; the opening of the dampers gives a draft.

Q. A direct draft?

A. A direct draft. If you open the doors it deadens your fire, it cools your engine off.

Q. Opening the door gives you no draft?

A. Only cold air on your flues.

Q. What is the purpose of opening the door?

A. To cool the engine off.

Q. It is not to give a draft?

A. No, sir; you take a draft, and it goes right over the top of your fire.

Q. In going up a grade, will opening your door, instead of opening your dampers, help you up the grade?

A. No, sir; it is worse, your steam goes back on you.

Q. The very object of opening the door is to stop the life of your engine?

A. Yes, sir.

Q. In going up a grade with a heavy load, opening the door would make it still worse?

A. Yes, sir.

Q. Do you think that a load of five or six or eight cars, as given you by Mr. Baker as his test, could go up a grade of 52 feet to the mile—could a locomotive drag a train up such a grade or go across a level dragging a train up that distance, with both dampers closed?

A. No, sir, I don't think it could be done; I don't think that anybody would undertake to try it.

753 Recross-examination by Mr. BAKER:

Q. You never tried to do any such thing, did you?

A. Not with a train behind me.

Q. So that you don't really know whether it can be done?

A. I say I don't think it could be done.

Q. You never tried to do anything of that kind?

A. I think a man would get jacked up, as we call it, if he tried it; it would break up things.

Q. Is it not true that you can, by opening the door to the fire-box slightly, half an inch, or an inch, increase to a slight extent the combustion?

A. No, sir.

Q. You cannot get any assistance from it at all?

A. No, sir, the steam will go right back.

Q. You are quite sure that if you open the door to the fire-box a trifle, it had a bad effect instead of a good effect?

A. It has a bad effect; yes, sir.

JUROR: When the flues get choked up by soot, what effect has that upon the cinders; where do the cinders go then; you have got to clean the flues?

A. They clean the flues for you in the shops.

Q. But you start from a point to your destination without cleaning your flues, sometimes?

A. Oh, yes.

Q. Don't you find the engine will get choked up?

A. Yes, sir.

Q. What effect will that have on the cinders; they have got to go through the smokestack?

A. That leaves you one less flue to get a draft through; that is all.

754 Q. So that you have to turn out more draft, get more steam and more power?

A. Your engine would not steam so good with less flues as with all of them.

ANOTHER JUROR: If you are a stationary engineer, as well as a locomotive engineer, you must have noticed that all stationary boilers and furnaces have air-holes above the fire, and they are very useful and very necessary to open them, sometimes.

A. Yes, sir.

Q. Does not the opening of the fire-box door answer the same purpose as on a common furnace?

A. No, sir.

Q. That does not give the oxygen right into the smoke, into the air, and consume it?

A. Yes, sir; but you understand that the exhaust in a locomotive comes through your fire.

Q. When you have your fire-box open?

A. Yes, sir, it does all the time; if you have your door open, that pulls cold air through there and cold air through here (diagram), and this cold air strikes the flues without striking the fire, and cools your engine off.

Q. When the fire-box is cold below, you have no fresh air admitted to the fire, you open the door a little, and it lets in a little air?

A. There is space enough here to get your air through, when you

have your dampers closed, and you open your engine up, and the dampers go like that (clapping his hands) with every exhaust the engine makes, so that there is more or less air comes through the dampers anyhow, if your door is shut; if your door is open that cuts the draft off.

755 Q. You cannot get the same effect on a locomotive as you can on a stationary or furnace?

A. No, sir.

Q. With the air above the fire?

A. No, sir.

Mr. BAKER: Why?

A. Because the draft in a stationary is in a large chimney.

Q. Here you produce a draft with the exhaust?

A. Yes, sir.

Q. But it is a draft just the same?

A. Yes, sir.

Q. Now, if you close a fire-box on an engine, the dampers and the door are closed, so that it is all tight there, how are you going to get oxygen with which to carry on combustion; I am talking about the old combination; where are you going to get your oxygen that you keep your exhaust working here with?

A. With your dampers closed; that is what I have been trying to tell you.

Q. The juryman asked you if you could not get a little oxygen if you slightly opened the door here, so that you could consume part of the smoke under such circumstances?

A. It deadens your fire right away.

Q. But could you not get a little oxygen so that you would increase the fire actually?

A. No, sir.

Q. Which would produce the greater heat, to have it all tight there, with no draft at all, or a slight draft to aid in the combustion?

A. I don't know.

756 Q. But if you had it closed up tight, if you had your dampers closed and the fire-box closed, so that the whole thing was tight, the fire would smoke, would it not?

A. I couldn't tell you anything about it; I never saw an engine built that way.

Q. You have seen them built with dampers?

A. Yes, sir.

Q. You have seen them built with doors?

A. Yes, sir.

Q. And you have seen them closed?

A. Yes, sir; closed when they stand still, of course.

Q. Suppose you had a good fire in there and closed them all up, standing still, how long could you stay that way?

A. It would not be perfectly tight then with the dampers closed.

Q. If you had the dampers closed, and everything was practically tight, as tight as any ordinary construction would make it, don't you know that you could increase the combustion, the consumption

of smoke in that engine, by having the door to the fire-box slightly opened, or having the dampers so that you could let in a little air?

A. You could with the engine standing still not exhausting.

Q. But suppose she was exhausting so as to make a vacuum there, that would increase the draft, would it not?

A. That would draw your draft right through the flues.

Q. But if that oxygen you let in there aided in the consumption of the smoke, it would make heat?

A. No, sir.

Q. Burning smoke makes heat, does it not?

A. It does not burn the smoke.

Q. There is such a thing as burning smoke?

757 A. I have heard them say so.

Q. Have you seen it?

A. No, sir.

Q. You have seen an ordinary kerosene lamp work?

A. Yes, sir.

Q. That burns smoke when it is first lighted?

A. I could not say that it burns smoke.

Q. Don't you know that an ordinary kerosene lamp, when it is turned up to a proper height and the lamp is in good order, consumes smoke?

A. I don't know that it does.

Q. And don't you know that it does it, because there are holes through the bottom of the chimney, by which air comes in above and at the side of the flame?

A. Yes, sir, but I didn't know that it burned the smoke.

Q. There is not any smoke when the lamp is properly adjusted?

A. No, sir.

Q. Don't you know that if you closed up those little openings at the base that let in the air, the fire would smother?

A. Yes, sir.

Q. Don't you suppose it would operate just the same in a locomotive?

A. No, sir, I don't.

Q. Don't you know if you closed the dampers and the doors, and had it all tight there, sooner or later your fire would go out?

A. No, sir, I don't know as it would; when the coal is all burned up it would.

Q. Don't you know that they put this brick arch in there so as to bring the flame back and keep it in the fire-box as long as

758 they can, for the purpose of consuming as much as possible of it?

A. Yes, sir.

Q. And it operates, to some extent—not entirely, but to some extent—just as a lamp chimney does?

A. I don't know that it does.

Redirect examination by Mr. DICKINSON:

Q. Here is the principle of the kerosene lamp: It is the chimney principle, not particularly because it is kerosene, but because it is

the chimney principle, that is all there is of it, not because it is a kerosene lamp; now, I don't suppose you are learned in all the laws of oxygen and hydrogen, but don't you know that the oxygen—you know what oxygen is?

A. Yes, sir.

Q. And you know it is lighter and rises?

A. Yes, sir.

Q. It is the lightest of gas?

A. Yes, sir.

Q. Now, in this lamp, the oxygen enters through this draft from the bottom, does it not?

A. Yes, sir.

Q. Now, suppose, instead of that this should be closed below here, all closed up, so that no air or oxygen could get up, and you should put the opening in there, do you think the lamp would smoke?

A. Yes, sir.

Q. If you put your oxygen in above, it would smoke?

A. Yes, sir.

Q. And the object of this chimney, the principle of the chimney is, that it makes a draft to draw the oxygen into the flame, is not that it?

759 A. Yes, sir.

Q. Did you ever know of any oxygen—no one but Brother Baker did—that would fall, expecially when there is an exhaust pumping through your fire, to not only add to the volubility of your oxygen, but an actual pump to pump it out?

A. No, sir.

Q. Take a base-burning stove; you let in the air to your base-burning stove through the bottom, under the fire?

A. Yes, sir.

Q. If you close your dampers on your base-burning stove and open the door, what becomes of your fire?

A. It cools off.

Q. But in a locomotive there is a constant exhaust as you run?

A. Yes, sir.

Q. Pumping it out?

A. Pumping it out all the time.

Mr. BAKER: Do you think this chimney of the lamp would work if you closed up the holes underneath there?

A. No, sir.

Q. There is no doubt about it?

A. I don't think so.

Q. So that the air that comes in alongside of the blaze there does increase the combustion?

A. Yes, sir.

Q. So that if you took the chimney off, so there was no draft, you would have a smoking light?

A. Yes, sir.

Q. And it would smoke all the time that it burned, but by putting the chimney on, the principle of the lamp is that after it becomes heated it creates a draft through there?

760 A. Yes, sir.

Q. And by drawing the air through, going there with the flame, it enables the smoke to be consumed?

A. Yes, sir, it all comes in here (pointing to the lamp).

Q. Certainly, but it goes up there through the side of the flame?

No answer.

Mr. DICKINSON: Is it true that the fireman as soon as he builds his fire and puts in his coal is in a hurry to get his doors closed?

A. Yes, sir, he always swings his doors; when he has a heavy train, he puts in a shovelful and swings the door; they don't wait until they go back for another shovelful.

Q. If you open the doors and you are running, have you ever observed how much the steam will come down per second?

A. I never took any note of that.

Mr. BAKER: Do you adhere to your testimony that when the dampers to an engine are closed so that the draft through the coal is shut off, you cannot increase the combustion of the smoke, the burning of the smoke, by having a slight opening through the door either by having a small damper or leaving it slightly open?

A. I said you might increase the combustion of the smoke, but not of the steam.

Q. So that you don't agree with our men, that you could increase the combustion of the smoke?

A. It is steam we are after.

Q. But you could increase the combustion of the smoke?

A. Yes, sir, but it is the steam we are after.

Mr. BAKER: I would like to ask whether the jury intend to
761 go to see the engine tonight. It was understood last week — were to go down to look at the engine tonight. I would like to know what time you desire to be there.

Mr. LESHER: I could not possibly go tonight. I could go tomorrow night.

Mr. BAKER: Can the rest of the jurymen go tomorrow night?

Several jurors answer that they can.

A JUROR: I guess that is all satisfactory, tomorrow night.

Judge CHIPMAN: I wish to say to this jury that any test of that engine to be fair, should be one that the parties do not know you are making; you should go down there without any preparation or any knowledge by the parties, just catch it on the wing, so to speak.

Mr. BAKER: We have had the testimony of one witness who has seen it operate in its ordinary manner, but it is perfectly practical for the jury to go down there, and they can tell the engineer what they want to have done.

Judge CHIPMAN: My proposition is this: I do not want them to fix that engine up for the occasion.

Mr. BAKER: It will not be fixed up for the occasion. There is no way of fixing it up.

Judge CHIPMAN: I don't know whether they will or won't.

Mr. BAKER: You seem to be afraid of it.

Judge CHIPMAN: I am afraid. I think it is the duty of this jury to protect our rights to that extent. They say this engine is in use every night and day. Now, the jury should go there some night and look at it to satisfy themselves.

A JUROR: I want the engine to run further than in the yard; that is no test.

762 Mr. BAKER: We want you to test it in every way.

Judge CHIPMAN: You can test it just as well when they don't know the time you are coming as when they do.

Mr. BAKER: We are willing to have it run forty or fifty miles, and any engineer on this jury can direct how it shall be run.

Judge CHIPMAN: The fair way to do is to take that engine and say, Here, we want to look at it, without giving notice of the time. If you give a notice of 24 or 48 hours ahead, that would not be fair.

Mr. BAKER: All we want notice for is to keep our men there. You can take another engineer and do all you have a mind to with it, all night long, and the idea that it can be fixed is perfectly absurd. They are switching with it, but you can have it run out with a train of cars. There was a witness here this afternoon who complained that a fair test was not applied, and we want you to apply every test you may see fit to put to it.

Judge CHIPMAN: I don't want them to put in a brand-new netting.

A JUROR: The only way is to go a long distance enough so that netting will get dirty, and so that we can make a good test.

Judge CHIPMAN: There are a great many ways in which this engine can be prepared for this test, and you cannot be detected.

Mr. BAKER: It cannot be prepared, and it won't be prepared.

A JUROR: It has been suggested by a juryman that if the same engine would go around Saginaw and around those lumber piles and yards there, it would be a good thing.

Mr. BAKER: Certainly, we will take you up there. We
763 cannot do that tomorrow night, but some time during the week we will go up there and be very glad to do it.

GEORGE L. D. SUTHERLAND, sworn in behalf of respondents.

Examined by Mr. DICKINSON:

Q. What is your business?

A. I have charge of the cleaning and repairing in the car department.

Q. You are foreman of the car department of the Michigan Central?

A. Yes, sir.

Q. How long have you been foreman of the car department of the Michigan Central?

A. About thirty years.

Q. As foreman, or superintendent, of that department, what is your business at the depot, what are your duties?

A. To see that the trucks and cars are kept in good condition and cleaned.

Q. Does this include the passenger cars?

A. Yes, sir.

Q. Does that duty cover the Flint & Pere Marquette cars that come in there?

A. Yes, sir.

Q. Now, we will take the passenger cars of the Flint & Pere Marquette that come into that station, the Michigan Central station, in your department, and come under your observation. Will you please tell the jury about these passenger cars of the Flint & Pere Marquette, what the condition is of those cars as to cinders when they come in?

A. They have a considerable amount of cinders, but not so much, ordinarily, as the other trains.

764 Q. About what amount of cinders per car will come off the Flint & Pere Marquette cars?

A. There would be in the neighborhood of a pint or a pint and *and* a half.

Q. A pint in a car?

A. Yes, sir.

Q. What does that come off of?

A. Off the floor and off the seats and the ventilators.

Q. But in the neighborhood of a pint each comes off the Flint & Pere Marquette cars that come in on the Michigan Central road?

A. Yes, sir.

Q. Do you observe the cinders upon the Detroit, Lansing & Northern cars—I think they do not come within your jurisdiction, but have you observed them?

A. I have seen them there, but I don't clean or examine those trains?

Q. But from what you have seen of them, have you seen how they compare in the matter of dirt and cinders with the other cars?

A. I don't think they are quite so bad.

Q. Are they as bad as the Flint & Pere Marquette?

A. About the same.

Q. The Flint & Pere Marquette and the Detroit, Lansing & Northern are not so bad as the other cars?

A. No, sir.

Q. What is the average of cinders taken off the other cars that come into the Michigan Central?

A. We would run about a pint and a half straight on the other cars.

Q. And you get about a pint off the Flint & Pere Marquette?

765 A. Yes, sir; a pint to a pint and a half.

Q. How far do the Michigan Central cars that you refer to as getting a pint and a half straight come?

A. They come through from Chicago.

Q. Do you know anything about their having similar devices for burning smoke and cinders on the Grand River Valley division of

your road as upon the Detroit, Lansing & Northern, and the Flint & Pere Marquette?

A. They have a few engines there.

Q. They are fitted with the same devices as the Detroit, Lansing & Northern and the Flint & Pere Marquette?

A. About the same, I don't know exactly.

Q. You are not an expert in mechanics?

A. No, sir.

Q. How do you find the cinders on the cars of the Grand River Valley?

A. The Grand Rapids express brings in about the same amount as they do on the main line.

Q. How far do the Flint & Pere Marquette cars come?

A. They come through from Bay City and Saginaw.

Q. From the interior of the State?

A. Yes, sir.

Q. Not from Chicago; they have no through line outside of the State?

A. No, sir.

Q. Give us some idea of the kind of cinders and the size of them, the average cinder that comes off?

A. They are about three times the size of the head of a pin.

Q. That is the general run of them?

A. Yes, sir.

Q. Will you state whether that is the average size of
766 them; do some of them run larger and some smaller, some even like dust?

A. Yes, sir.

Foreman LESHER: Are there a great many cinders that blow off, that do not catch at all?

A. Yes, sir, there must be, with the motion they will blow off; we only get what is brought in the cars.

Q. And about as many blow off as catch on?

A. I should judge so.

Q. Would there be more than that?

A. Probably there would be.

Mr. DICKINSON: These cars on which you find the cinders on the Central road, do you find them in the Pullman cars, in the parlor cars?

A. All the Pullman cars we have on the Central road merely run between here and Cincinnati. We have no Pullman cars that run between here and Chicago.

Q. You have the Wagner?

A. Yes, sir.

Q. Do you find cinders on the Wagner cars?

A. Yes, sir.

Q. About the same as in the other passenger cars?

A. Yes, sir.

Q. And those are especially constructed to keep out cinders, double windows, etc.?

A. Yes, sir.

Q. Do you find these cinders in the winter as well as in the summer?

A. Yes, sir.

Counsel shows witness a box of cinders.

Q. Will you look at that and see if it is a fair average sample of the kind of stuff that comes off?

767 A. Yes, sir, I should say that was a fair sample.

Mr. DICKINSON: Gentlemen of the jury, this came, as we shall show, from No. 42 passenger car of the Detroit, Lansing & Northern railroad, due here on 11.15 a. m. train, taken off on June 19, 1891; it all came from one car. We shall prove that afterwards.

JUROR: Have you any idea what coal that came from?

A. Soft coal.

Mr. DICKINSON: How about the cinders on the platforms of the cars; do you include those in your statement of a pint to a pint and a half?

A. Yes, sir.

Q. The same general kind of cinders?

A. Yes, sir.

Q. I suppose the other cinders come in through the ventilators?

A. Yes, sir, the fine ones.

Q. And through the doors, and so on?

A. Yes, sir; we have a double screen, and they even work through that.

Q. You have been engaged in this business, I think, for upwards of forty years, in the car business?

A. Yes, sir.

Q. Cars coming in and going out, and locomotives and all that?

A. Yes, sir.

Q. Now, from your observation, where do these cinders come from?

A. From the smokestack of the engine.

Q. And fall upon the cars?

A. Yes, sir.

768 Q. I suppose you know something of devices being put upon trains or engines to stop cinders?

A. Yes, sir.

Q. Do you ever go upon the engine and ride about?

A. In the yard I do sometimes; not a great deal.

Q. All of your own engines have spark-arresters and things of that sort?

A. Not all of them; quite a few have them.

Q. Do you know anything about the general belief as to the spark-arresters arresting the drafts, among the engineers?

A. I have never paid much attention to it. It is out of my line.

Q. Have you observed in the running of trains whether or not, as the locomotive may or may not be heavily loaded, it pours out more or less cinders?

A. The heavier the load the more cinders it will throw.

Q. Suppose the train, in your experience of railroading, is ascending a grade, what is the effect upon its flow of cinders from the locomotive?

A. If she is working harder of course she throws more cinders.

Q. She throws more cinders the harder she works?

A. Yes, sir.

Q. In your observation of the cars coming in and out there, day and night, have you observed whether the cinders thrown are alive—throw fire?

A. We generally can tell that at night better than in daytime.

Q. I say, did you ever see a locomotive that did not throw fire when she was working?

A. I never saw one.

769 Q. In your whole experience?

A. No, sir.

Q. How far do they go from the smokestack before they deaden and become dark?

A. Fifteen to 20 or 25 feet.

Q. Occasionally some go farther?

A. It is a good deal how they are at the time.

Q. Do you know about the burning the other day of the Detroit, Lansing & Northern freight shed?

A. Yes, sir.

Q. Do you know what set it?

A. I know what I think set it. That is about two months ago you have reference to?

Q. Yes.

A. We had a lot of rubbish piled at the end of the freight-house; Mr. Ryan gave notice to remove it, but it was not removed; the next day following the Detroit, Lansing & Northern engine No. 26, with one of the smoke-arresters on, stood alongside of it there, and she touched it off and burnt the end of the building.

Q. Now, the Detroit, Lansing & Northern engine, with the wonderful smoke-arrester on it, how far did that stand from the rubbish pile?

A. About twelve feet.

Q. Don't you think it possible that rubbish pile might have been set afire by the dumping of the damper below the receptacle there?

A. No, sir.

Q. It was not near enough for that?

A. No, sir.

Q. The rubbish pile was twelve feet from the track?

A. Yes, sir.

770 Q. It burnt up the building, did it?

A. We held it with what we had there until the fire department came; it burnt the end of the building.

Q. Why do you say it was engine No. 26?

A. She stood there at the time, at the time the fire broke out.

Cross-examination by Mr. BAKER:

Q. You are connected with the Michigan Central?
A. Yes, sir.
Q. How long have you been there?
A. Forty-two years.
Q. Do you have charge of the yard here?
A. Yes, sir.
Q. There was a pile of rubbish there where this fire occurred?
A. Yes, sir.
Q. How close to the track?
A. About 12 feet from the track.
Q. What did it consist of?
A. They have rubbish heaps gather up in the yard.
Q. Was that rubbish wet?
A. It had stood in storms, but it had dried up.
Q. What did it consist of?
A. Shavings and dust and papers out of the freight-house, and such things; they made that a dumping ground.
Q. It got afire about two months ago?
A. About that.
Q. All you know about the origin of the fire is that this engine was standing there?
A. It had been working right along.
Q. It had been standing there right before the fire?
A. Yes, sir.
771 Q. How long had she been standing there before the fire broke out?
A. I don't know exactly, but my office is right opposite, and I saw her all morning.
Q. Any other engine there?
A. 303 came right up there after the fire broke out.
Q. But before the fire broke out?
A. I hadn't noticed any for a couple of hours.
Q. It was right there in the Michigan Central yard?
A. Yes, sir.

Mr. DICKINSON: On the Detroit, Lansing & Northern ground.
Mr. BAKER: They have no ground.
Mr. DICKINSON: They had then, two months ago.

Mr. BAKER: Did you see the sparks go from this engine to this heap of rubbish?
A. No, sir.
Q. It is a mere inference that it started from the engine?
A. I suppose it came from there.
Q. You suppose so?
A. Yes, sir.
Q. But it was something that was very easily ignited?
A. Yes, sir.
Q. And the servants of the company were very negligent in allowing it to remain there?

A. They had been notified to remove it, but neglected to do so.
Q. In whose department was it?
A. Mr. Ryan's.
Q. How long had it been there?
A. About a couple of months.
Q. And kept accumulating, I suppose?
772 A. Yes, sir.
Q. You would not undertake to say that all of these sparks or cinders that you gather on the platform of a car were alive when they struck the car?
A. No, sir, not all of them.
Q. Most of them would go out in going the length of the first car, would they not?
A. No, sir, I have seen them pass over fourteen cars and burn at the end, still lit.
Q. But ordinarily?
A. That would be a good deal according to the weather.
Q. But even where there is some fire in them, it is very seldom that they cause any fire where they would ignite anything; you would have some rubbish or shavings, or something of that kind?
A. They burn our platforms in our depot, and they burn the platforms on the cars; that is an every-day occurrence.
Q. Burn them off?
A. Yes, sir, we have to take them down entirely sometimes.
Q. That is a common occurrence on the Michigan Central?
A. Yes, sir.
Q. Do you know anything about the construction of the engines on that road?
A. I have never paid a great deal of attention to them; it is outside of my line entirely.
Q. You don't know how they compare with other engines?
A. No, sir.
Q. Which trains have the most cinders on them, the trains that come from Chicago, or the trains that come from Saginaw and Grand Rapids?
773 A. The trains that come from Chicago.
Q. What is the reason of that?
A. It is a longer train.
Q. Don't the Flint & Pere Marquette have a train that comes from Ludington?
A. That has four cars on.
Q. You find more cinders on the very fast trains, don't you?
A. Well, no, not exactly that. Fast trains will get away from the cinders a good deal.
Q. But the engines on the fast trains make more cinders?
A. Not altogether; some of them will.
Q. There is a good deal of difference in your engines in regard to that?
A. Yes, sir.
Q. But I suppose these cinders get on when they are running through the country and the engine is running at full stroke?

A. Take a damp day, running a train of fourteen cars, they will go on the rear cars; take the Flint & Pere Marquette trains, and they go over, they go up and go over.

Q. On a long train the rear cars get the most cinders?

A. Yes, sir.

Q. You have trains that go through to Chicago very quickly, in a very short time?

A. Yes, sir.

Q. And that come from Chicago here?

A. Yes, sir.

Q. And those through trains are more heavily laden with cinders than any other trains?

A. The night express and the day express are very heavy trains. We have as fast trains as that, but not so heavy.

774 Q. And they have a good deal of cinders?

A. Yes, sir.

Q. And you sweep these cinders off the platform and out of the car?

A. Yes, sir.

Q. But there are a good many more on the platforms than there are inside?

A. That is according to whether you keep the windows open or not. If you leave the windows up, they go in.

Q. Those that go in are very fine?

A. Yes, sir.

Q. They set the car afire inside?

A. Occasionally we get a cushion afire.

Q. How often does that occur?

A. Pretty often.

Q. It sets fire to a car while between here and Chicago?

A. Yes, sir.

Q. You mean the cushion?

A. Yes, sir; and it sets fire a good deal to the saloons; it gets in the corners there.

Q. What does it set fire to there?

A. In the corners.

Q. It sets fire to the windows?

A. Yes, sir.

Adjourned to Tuesday, June 30, 1891, 2 p. m.

775 JUNE 30, 1891—2 p. m.

Mr. DICKINSON: Mr. Baker admits that I hold in my hand a transcript of the reporter's minutes of my argument upon the first trial of this cause. You will remember the statement of Mr. Joy that he did not hear of any proposition to cross on the margin of the Michigan Central until this trial, and that he supposed our position was that we were to run across the Michigan Central yard, through the center of it, or somewhere else.

Mr. BAKER: I object to this as immaterial and incompetent.

Mr. DICKINSON: I desire to show you that no other position was

taken except that the margin was to be taken, where the aqueduct for teams is now to run. I read from page 519 as follows:

"If the Michigan Central is so willing and can spare a space for this viaduct, it might spare out of its large holdings in the city a space for this structure along the edge of its holdings, so as to keep the railroads together and keep the street free. Is there any other reason except that which Mr. Mulliken threw out, that it would cost too much?"

Again, at page 522:

"You need all this for your depot, Michigan Central. How many trains do you have? We have 68. How many has St. Louis? 244. How many acres in St. Louis? 10. How many has the Michigan Central? 38. What do you say, will you let us have a little margin to send the union depot road in there, and to keep this railroad business all out of the street? I tell you that the time has come when, without a word against railroad enterprise, without a word which will stay any railroad from entering, the time has
776 come when Detroit should use this immense property, now reaching 117 acres, for these railroad purposes, and pay taxes like individuals, and take no more streets, and take no more of our water front. Why should you not say to the union depot company, Go and take that margin along the edge of the Michigan Central depot grounds which the Michigan Central has given you for a viaduct, and put your union depot road there. Try that and see if you can call a halt on this continued accumulation of untaxed railroad property within the city limits."

Again, at page 523:

"But my friend says there is some charter right which will interfere with us taking this margin of the Michigan Central property under the statute. There is no franchise that the legislature or the courts of the United States can grant to a corporation that cannot be taxed for the public use. That is all it is, and if the legislature pass an act conferring the right on a railroad company, in the way of land or anything else, and expressly provides that the State or the public shall never hereafter interfere with that right, or take it away, the act of the legislature protecting that from the right to take it for the public use is absolutely void."

Again, at page 526:

"Now gentlemen, this is the first suit in regard to the route which is proposed for the street and the property owners. True, they had a suit with the Michigan Central Railroad Company, who did not desire their own property should be taken, and who were willing to shut up the entire street, as far as they were concerned, as a railroad company, but the question of the route, as it affects the interests of the city, above the railroad, and the interests of the
777 property-owners, the question of the route is for the first time before you, a jury appointed by the constitution in the case at bar."

Again at page 544.

"Now, who is to pass upon the question of whether it is in actual use? You know pretty well that this strip of land along the Mich-

igan Central is not in actual use, because you have been down to see it, and they are going to give it to a viaduct. Here it is provided in the statute, as suggested by the supreme court of Massachusetts, the question of actual use and of necessity for a new taking, for the possession of said railroad company, and for the said railroad company owning and not using said land 'shall be determined in addition to other questions, as provided by law in cases of condemnation of lands for the purpose aforesaid, and the same proceedings, in all respects, as near as may be, shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals.'"

Page 545:

"Do you think that 12 men are going to rob the union depot company on a condemnation proceeding for the benefit of the Michigan Central? Are they going to say to these people, Gentlemen, do not play hog here, give this margin, leave our street, leave the public its street."

Page 548:

"We have reached the first tribunal that can pass upon the question of whether there is any need to take a highway of the city and occupy it, when the Michigan Central has property there that it is willing and has given up without compensation so far, for teams, along the margin of this road. Now that has nothing to do with
the railroad crossing. A railroad crossing cannot be made
778 by a railroad company except by an adjustment of the rail-
road company. That is a feature between the two railroads. If they had taken the causeway that now passes over the Michigan Central, and the railroad commission can order them to take this causeway, in taking the Michigan Central railroad property for railroad purposes, to pass over the property, it can take the property for a union depot."

Page 550:

"You will see that Mr. Backus' position is, if all they say is true, that this is a great thing for Backus, this structure along there is a great thing for Backus; if all they say is true there is going to be no damage. Then don't pay us any damage, but cross the street and leave us free. Says Mr. Backus, I differ from you, I think this is going to ruin my business. You bring here a witness from New York to contradict it. You have not shown by the opinion of any expert, or the opinion of any one in the business, that this won't do what Backus says it will—ruin his business. Mr. Backus says, Go over there, go over onto this railroad property and don't give me a cent; we don't want your money at all; go over this route which the law permits you to take. Leave me with the work of my life here, if I am mistaken in my belief that this is going to ruin me; it is going to destroy the work of my life and of my boys whom I have reared to this work; going to destroy the inheritance that I have built up for them; what is your objection to going across the street and not paying us a dollar; we do not want your money, we would rather have all our business than all the damages the jury

could give us; go across the street, where the law says you can go, and where the great railroad expert says it is the best route."

779 Page 562:

"But how much more does it damage the manufacturer than it does a railroad company, or a person carrying on the same kind of business. If you pass the question that these people must use the Michigan Central margin for this route, and come to the question of Backus again, we must discuss it fully, though I do not believe after the labored exposition of the matter, if you understand it, or your duty, that you will permit this road to occupy this street when it has this other route."

Without troubling you further, let me state that there was not a suggestion in the argument that they desired to go through the Michigan Central property, but whether we might have the margin.

FERDINAND AMOS, sworn for respondents.

Examined by Mr. DICKINSON:

Q. How long have you lived in the city?
A. 40 years.
Q. What is your business?
A. I keep a hotel at West Detroit.
Q. What is the name of the hotel?
A. It is called the Amos house.
Q. How long have you been there in business?
A. 16 years next December.
Q. How near do trains pass to your house and the main part of your building?
A. Within six or seven feet of my building.
Q. On the front?
A. Yes, sir.
Q. Do they pass on more than one side of you?

780 A. Yes, sir.

Q. How near to you do they pass on the other side?
A. About the same distance.
Q. You have been there during the past 16 years a good deal of your time?
A. Yes, sir.
Q. You are there daily?
A. Yes, sir.
Q. And nightly?
A. Yes, sir.
Q. You say trains of all kinds pass, the Detroit, Lansing & Northern, the F. & P. M., the Grand Trunk, and so on?
A. Yes, sir.
Q. Will you please state what, from your observation to date, as to the locomotives upon those trains, pulling those trains, throwing smoke and cinders?
A. I know they throw a great many cinders which make it necessary to sweep off the platform around my house, that is the plat-

form that used to be there, made it necessary to sweep off the platform three or four times a day or oftener, which makes it necessary to keep the windows closed, or they would throw their sparks on that part of the house where the trains pass now. The tracks are much closer now than they have been. They put in another track nearer to the house.

Q. What road runs over that?

A. The Michigan Central freight trains.

Q. How near do they come to the brick wall of your building?

A. That is the one that comes within 6 or 7 feet.

Q. How far were the other tracks before this was put in?

A. Within about 14 feet of the building.

781 Q. What is the nature of these cinders that fly out from the locomotives; are they alive?

A. They are at times alive. They have been showered onto my platform so hot that it was necessary to jump up out of your chair and run into the house. On one occasion the sparks got into my coat pocket, and I usually carry my handkerchief in my coat pocket, and they set the handkerchief on fire in my coat pocket. I have known people to put up their collars to save their necks from being burned.

Q. You keep a hotel there, necessarily arranged, as far as possible, to be a wayside road hotel?

A. Yes, sir.

Q. Have you observed that the quantity of cinders has become smaller from any of the trains that pass of the D., L. & N. and the F. & P. M.?

A. Within the last few years?

Q. Yes, up to now.

A. Within the last few years they have put on what they call a spark-arrester on the front end of the locomotives, and it has reduced the quantity of cinders.

Q. That has been called to your attention?

A. Of course, I was glad to see anything that came in that line to reduce the quantity.

Q. Does it stop the flow of cinders and fire?

A. No, I don't think there are as many cinders as there used to be.

Q. You still see cinders from every locomotive?

A. Yes, sir; it depends on the condition of the fire and the amount of steam used. If they pass the front of my house using steam very hard, pulling on a heavy train, of course the quantity of cinders is increased.

782 Q. Do they throw more or less cinders and smoke whenever they pass?

A. There are times when they go by when cinders are not noticed.

Q. Name those times?

A. That depends on the amount of steam being used and on the condition of the fire.

Q. Do you find any cessation in the volume of steam that is thrown out from the locomotives?

A. No, there appears to be as much steam as there ever was.

Q. The steam does flow out in vast volumes sometimes?

A. Yes, sir.

Q. Does that come into your house?

A. That depends on the direction of the wind.

Q. Suppose the wind is in your favor?

A. If the windows are not closed, the steam and smoke come in.

Q. To what extent?

A. To that extent that if a man were at all troubled with asthma he would choke for some time afterward.

Q. It comes in so as to be perceptibly seen in the house?

A. Yes, sir; blackens the paper and walls and carpets and bedding.

Q. Have you noticed that the cinders as they come out of the smokestack on fire, about how far they can be trusted to fly?

A. Before this additional track was put in there, as I said before, the nearest track to my house was about 14 feet from the front wall, and the sparks would fly over up against the building.

783 Q. Alive?

A. Alive, and on the platform, so that they would burn your neck if you did not look out.

Q. Would it char the platform and make little black spots?

A. Yes, sir, and burn the paint off the platform.

Q. How about any burning in the house itself during that time?

A. My house has never caught on fire yet.

Q. I mean from the cinders, and perceptible burning from the cinders?

A. No, sir; I have been fortunate that way.

Q. On this device which you have spoken of, do you think that the flow of cinders has been stopped, so that the cinders will not fly 14 feet?

A. That I could not say. I do not think that the volume of cinders is so much now with this spark-arrester as it used to be.

Q. There are still cinders of the same general character?

A. Yes, sir.

Q. And keep alive as they used to?

A. There are still cinders scattered about up against the windows of my house and on the sidewalk, so that we sweep the sidewalk oftener than we would if it were not for these cinders.

Q. How do you keep the windows on the side that the trains run?

A. Since this new track has been put in, I do not use the rooms on the front part of my house any more than I can possibly help, and my help have got instructions to keep the windows closed as much as possible, and the only rooms that are occupied on

784 the front part of my house, that is steady, I have had wire screens made covering the entire window from top to bottom, so that it does not interfere.

Q. Why did you put those in?

A. I put those in to keep the house from catching fire and to keep out the live cinders.

Q. From your observation with the cinders flying, do you find that they fly from the smokestack alive?

A. Yes, sir.

Q. And they float back and down, do they not?

A. That depends on how the wind blows.

Q. Take it on a quiet day?

A. Take it on a quiet day, the motion of the train going, if it is going at any great speed, they float backward and spread out.

Q. And down to the ground?

A. Yes, sir.

Q. What would you say, from your observation of cinders and of fire from the locomotives that pass your place there, as to whether it would be more dangerous and more uncomfortable, from the smoke, steam and cinders, if the trains passed at the same distance from your house, but 26 feet in the air, raised right up 26 feet, so that they would pass 26 feet above the present grade?

A. In that case, of course the cinders would spread on the roof; they would escape the windows, the front part of the building, and it would lessen the danger to my building very much.

Q. Because the top of the smokestack would be over your building?

A. Yes, sir.

Q. If it was lowered so that it would reach the second-story window of your house, what then—if the elevation was so
785 that the smokestack would come along the second-story window?

A. In that case, in my judgment, it would be only a question of a short time, unless the windows were kept closed, that my house would be on fire.

Q. You think if the train was elevated so that the cinders would have further to fall, from an elevation, that it would be more dangerous?

A. If the windows were open, the cinders would enter my room.

Q. As it is, they do not fly up to your upper windows?

A. Yes, sir, they do. As the train goes by the cinders catch the second story.

Q. Have you a third story?

A. Yes, sir; they do not fly into the third story. As it is there now, the cinders catch the second story of the house more than they do any other story. I know that to be a fact, because I sleep in the second story of the house, and it has been necessary to put new screens there where we never used screens before.

Cross-examination by Mr. BAKER:

Q. You rent this hotel, don't you?

A. Yes, sir.

Q. And you first rented it sixteen years ago?

A. Yes, sir.

Q. At that time how near did the railroad run to you?
A. I think the nearest track was 24 feet from my house.
Q. One of the main tracks?
A. Yes, sir.
Q. How many main tracks has the Michigan Central there?
786 A. It has four main tracks and an additional track.
Q. Is that a side track?
A. No, it accommodates the Lansing, and some switching. There are four main tracks there.
Q. And the tracks go east and west?
A. Yes, sir, passenger and freight.
Q. And those tracks you think are about 24 feet?
A. No, one of them is within six feet of my house.
Q. I mean the four main tracks.
A. The nearest one to my house is one of the main tracks.
Q. I thought they had four main tracks in there, and now have put in another?
A. Yes, and that is one of the four main tracks.
Q. That makes five?
A. No, sir. You asked me how many main tracks, and I said four. One of those tracks nearest my house is one of the four main tracks.
Q. Then they have abandoned one of the old main tracks?
A. No, sir.
Q. How many were there before they put that in?
A. There were four tracks there before; there is another within the last six months, so far as the tracks are concerned.
Q. There were four before?
A. I don't know whether they called them main tracks at that time or not. Now under the new arrangement they have an east and west track for freight, and they have an east and west track for passenger, and then they have an additional track that accommodates the Lansing as it swings around to the north.
787 Q. So that they have five now?
A. Yes, sir.
Q. Before there were four?
A. I think there were five before, but one of those five was a sort of a switch track. They used to do switching in front of my house, making up trains.
Q. How close did that track come to you?
A. Which one?
Q. The old one.
A. What old one?
Q. You tell us, I can't understand you at all.
A. I say they have put in a track that comes within six or seven feet.
Q. They took out the platform?
A. Yes, sir.
Q. So that the track itself is within six or seven feet?
A. Yes, sir.
Q. The rail?

A. Yes, sir.
Q. So that the cars are over the rail about two feet?
A. Yes, sir.
Q. So that they come within three or four feet of your building?
A. Yes, sir.
Q. There is a track there like that?
A. Yes, sir.
Q. How long has that been there?
A. About six months.
Q. And that you say is one of the main tracks for the accommodation of the Lansing?
A. Yes, that is what is called their east-bound track for
788 freight.
Q. Before that, how near did one of those tracks come to you?
A. I should think about 14 or 15 feet.
Q. How many years did it operate there in front of you?
A. It operated at that distance about 10 years.
Q. And before that how far was it from you?
A. Previous to that time, the track was still further.
Q. How far?
A. It was four or five feet further. In rearranging their tracks, they moved them.
Q. For four or five years before that, they came within 20 feet of you?
A. I should think about 24 or 25 feet.
Q. You have been there all those years?
A. Yes, sir.
Q. And you have operated a hotel there?
A. Yes, sir.
Q. You have maintained the hotel there because the railroad was in front of it?
A. Because there was business there for a hotel.
Q. And there has been business?
A. Yes, sir.
Q. You have done a successful business?
A. What do you mean by a successful business?
Q. You have made a living, you are still at the old stand?
A. I am still there, still hanging on.
Q. And can pay your rent?
A. Do you want me to give it away?
Q. No.
A. I am somewhat behind on my rent, and I have hardly seen the time when I was not.
Q. But you are still there in business?
89 A. Yes, sir, my landlord has confidence.
Q. During these ten years that the track ran within 14 feet of you, you did not have to put screens in your windows, did you?
A. We did; we put screens in the windows to keep out flies.
Q. I mean to keep out the cinders?
A. No, sir.

Q. It is only since the cars came within four or five feet of you that you have put screens on the entire front?

A. It is only since the new track was put in that we have put in screens of that kind.

Q. Now the railroad there runs on the same level as the building, or substantially, your building is probably 18 inches or two feet above the sidewalk?

A. Yes, sir.

Q. And the height of the smokestack comes right along to your second story?

A. Yes, sir.

Q. During the ten years that it was operated in that position, was your house set on fire at any time by the engine?

A. No, sir.

Q. During the four or five years before that, when they were 20 or 24 feet away, was your house set on fire by the engines?

A. No, sir.

Q. During the five or six months that the trains have been operated within six or seven feet of your premises, with the screens that you have put upon your windows, has your house been set on fire?

A. No, sir.

Q. Do you keep the building insured?

790 A. No, sir, I do not keep my furniture insured.

Q. Why?

A. Because the insurance is so high.

Q. You are not insured at all?

A. No, sir.

Q. Did you ever get a rate?

A. I have had several insurance men speak to me about it, but when they came and looked the ground over, they would not even give me a rate.

Q. You are right in the midst of a big railroad property?

A. Yes, sir.

Q. Railroads on all sides of you?

A. On both sides of me. I guess you can safely say on three sides.

Q. You are right at the junction?

A. Yes, sir.

Q. How long have they had these extension-front spark-arresters on these engines?

A. I cannot say exactly when they commenced. I think I have seen the first on the Grand Trunk six or eight years ago.

Q. There is no doubt but what that appliance has reduced the amount of smoke and cinders largely?

A. There is no doubt about it in my mind.

Q. It is nowhere such a nuisance as it used to be?

A. Not as bad as it used to be.

Q. I suppose some trains run right by you without stopping?

A. Yes, sir.

Q. Freight trains and passenger trains?

A. Yes, sir.

Q. Do not stop there at all?

791 A. No, sir.

Q. So that they go by with the engine working at full stroke?

A. I think 30 miles an hour, regardless of life or property.

Q. When they go by, running full tilt like that, there are a great deal more cinders than when they slow up?

A. They throw cinders when they give the locomotive steam, that is when it flies out in a perfect cloud of red cinders.

Q. As I understood in your direct examination, when they go by running at full stroke, there are a good many more than at any other time?

A. Yes, sir.

Mr. CHAREST: You have been there for 16 years?

A. Yes, sir.

Q. Do you know of any fire that has occurred by the sparks coming out of the smokestack within that time?

A. Yes, sir.

Q. How many?

A. I know my wood shed caught fire in the night-time.

Q. Are you positive it was from the engine?

A. No, I don't know what else set it on fire; I don't know of anything else.

Mr. DICKINSON: Before this new track was laid, was the time when you had the platform?

A. They tore the platform away so as to make room for the track.

Q. Before this platform was torn away to make way for this near track, was the time when, sitting on the platform, you got sparks in your pocket?

A. Yes, sir.

792 Q. And you got charred holes in the platform?

A. Yes, sir.

Q. The passenger trains pulling along there stop near your platform?

A. Yes, sir.

Q. All passenger trains stop at the junction?

A. They used to stop, but they do not all stop now. They have what they call the interlocking switch, and they go right through.

Q. When the track was 24 feet away, every train stopped?

A. Yes, sir.

Q. That was within how many feet of your place?

A. Twenty-five feet.

Q. And they were either just coming to a stop or were just starting out?

A. Yes, sir.

Mr. LESHER: I would like to know whether your house is a brick house?

A. Yes, sir.

Q. Have you any idea how many trains pass a day?

A. No, I have no idea.
Mr. BAKER: Over a hundred, are there not?
A. More than that, over 200.
Q. What is your wood shed made of?
A. Boards, unpainted.
Q. Where was it?
A. West of my hotel, from the hotel going west.
Q. So that the railroad runs right alongside of it?
A. Yes, sir.
Q. It was made of wood?
A. Yes, sir; dry, flat roof.

Q. Where did it get on fire?
793 A. At the west end of the wood shed.
Q. What was there there?
A. Shavings, and split wood and kindling.
Q. It caught in there?
A. Yes, sir.
Q. You took it away?
A. We got water on it and put it out.
Q. Did you move your wood shed?
A. No; it is there yet, taking the chances.
Q. Did you take the shavings away?
A. Yes, sir.
Q. You have been there ever since without it catching fire?
A. It has not caught fire since then.
Mr. DICKINSON: Where is that wood shed, with reference to the hotel?
A. Right on the line of the Michigan Central, going west.
Q. The Michigan Central trains always stop there, don't they?
A. Not now; they used to stop in front of my house. If you are speaking of the nearest track to my house, that is the track for eastbound freight. They do not stop there.
Mr. RIVARD: Was the fire inside of the shed, or did it start on the outside?
A. That end of the shed was on fire, roof and all, by the time we got out to it. Whether it started from the rubbish inside that end of the shed, or whether the roof caught, I don't know.
Q. Could a spark get inside?
A. It is a cheap thing.

Mr. BAKER: Did you ever get that wood shed insured?
794 A. No, sir.
Mr. DICKINSON: You simply did not insure because you could not get any insurance?
A. Never got any rate.
Q. Are you familiar with the fire statistics?
A. I got the report of the fire commission.
Q. Do you know how many fires were set by sparks from locomotives in the last year?

Mr. BAKER: I object to his stating what the report shows.

Q. Do you know how many fires were set by locomotives in this city?

A. I don't know of my own knowledge; I know from the reports of the fire department—64.

Mr. BAKER: Where did you get that?

A. In the report of the fire commissioners.

Q. What does that include?

A. That includes the bridges.

Q. Have you got that report with you?

A. No.

Q. Who showed it to you last?

A. When this bridge question came up, the attention of the common council was called to it.

Q. How many of those were bridges?

A. I won't undertake to say that.

Q. Most of them?

A. To the best of my recollection, nearly all of them.

Q. That was when they had wooden bridges just above the smokestack?

A. The same as they are now.

Q. They have put in an iron bridge on Fort street?

A. The covering is wood.

Mr. DICKINSON: Do you do any washing at the hotel?

795 A. Yes, sir.

Q. Where do you hang your clothes?

A. West of my hotel, in the yard.

Q. Where is west of your hotel?

A. On Junction avenue, the hotel fronts, and it is on the south line of the Michigan Central roadway, so that we are as near to it as we can get. We border on the right of way of the Michigan Central railroad.

Q. West of the real part of the house?

A. Yes, sir.

Q. The main track, on which we come in on the Michigan Central, comes in front of the hotel?

A. All the Michigan Central tracks pass in front of the hotel.

Q. The Michigan Central tracks go west of your front, as I understand it?

A. The house was built to front on the railroad.

Q. Trains come from the west, and they come in front of your hotel; where is the yard that you speak of?

A. The hotel was built so as to front on the railroad. Now changes have been made, so that the hotel front is cut off, and you have to call the street the front of the hotel now.

Q. It is facing this way?

A. Yes, sir.

Q. With reference to the front, that was the place where you hang clothes, behind the hotel?

A. It might be called behind the hotel. There is nothing to protect the clothing from the sparks or the smoke of the locomotive.

Q. Does it appear on the clothing?

A. Yes, sir, especially on a damp day, if the wind happen to blow that way.

796 Q. It blackens it?

A. It compels the help to rinse it over again.

Q. And if the wind is the other way, and blows away from the yard, the clothing is protected?

A. Yes, sir.

Mr. BAKER: Suppose these are the five main tracks of the Michigan Central, your house is situated with reference to that, like that?

A. Yes, sir. This is Junction avenue, and that is the west; that is the yard of the hotel; here is where we hang our clothing.

Q. Where is the wood shed?

A. The wood shed joins the hotel here, and comes here.

Q. How big is it?

A. I should think it is about 30 feet long.

Q. How big is your building?

A. About 70 feet long.

Q. How big is it that way?

A. About 36 feet wide.

Q. There is a street here?

A. This is Junction avenue.

Q. Where does the road cross?

A. The Wabash crosses right at this corner, in that shape.

Q. How many tracks in there?

A. One track.

Q. No more?

A. That is all there is, and then there is the Lake Shore along there.

Q. How many tracks?

A. Two tracks.

Q. Where are there any more tracks?

A. South of that, if you want to go far enough south.

797 Q. Where is the depot, right over here?

A. Over here—the Grand Trunk depot.

Q. And there is a set of tracks running in there?

A. Yes, sir.

Q. Have you any other buildings?

A. A barn.

Q. Have you any street on the south side?

A. Yes, sir, a forty-foot street.

Mr. CHAREST: Did you ever get any damages for running so close to you?

A. No, sir.

Mr. BAKER: You went there because the railroads were there, did you not?

A. I went there because I thought there was hotel business there.

JAMES A. JONES, sworn for respondents.

Examined by Mr. DICKINSON:

Q. How long have you lived in Detroit?
A. Since 1864.
Q. What is your age?
A. 46 years.
Q. What business have you been engaged in?
A. Insurance and real estate.
Q. During the whole time?
A. No; since 1869.
Q. What kind of insurance, life or fire?
A. Fire insurance.
Q. You are somewhat familiar with real-estate values also in the city?
A. Yes, sir.
798 Q. What class have you known in real estate?
A. All classes; buying and selling for myself and selling for others.
Q. Business property and residence property?
A. Yes, sir.
Q. Do you know the Backus property?
A. Yes, sir.
Q. Do you know the planing mill?
A. Yes, sir.
Q. Have you been inside of it?
A. Yes, sir.
Q. Have you inspected with reference to insuring it also?
A. Yes, sir.
Q. For the purpose of getting at its value to some extent?
A. Yes, sir.
Q. You know something of the values of real estate?
A. Yes, sir.
Q. What, in your judgment, is the value of that property as it stands, real estate and all?
A. About $200,000.
Q. You know its situation as it stands?
A. Yes, sir.
Q. Suppose there should be added to the conditions an elevated structure on River street, standing about 14 feet in the clear above the road, or more, spanning the entire roadway from curb to curb, upon which should be placed three tracks, over which should run the trains of four railroads—the Canadian Pacific, doing business in Detroit, the F. & P. M., the D., L. & N., and the Wabash—with all the business that they do in passenger business in Detroit, and with such freight business as the D., L. & N. and the F. &
799 P. M. have with Detroit, except lumber and coal, what is called the package business, so that the top of the tracks will extend about 26 feet above the railroad, and these trains were to be hauled by the locomotives of the several roads, what, in your opinion, would be the effect of such a structure upon the Backus property?

Add to that, that in approaching the Backus property the trains must go up a grade of 52½ feet to the mile, what would be the effect, in your opinion, of the value of the Backus property?

A. For his purpose, I think it would destroy it almost entirely.

Q. Speaking as an insurance man, would the fire rate be increased?

A. Decidedly.

Q. In your judgment, how would the fire risk be increased?

A. With that frame dust-arrester it would make the dust and shavings building almost uninsurable; the others it would increase from 25 to 50 per cent.

Q. The dust and the shavings building is the structure with the frame ventilator on top?

A. Yes, sir.

Q. And upon the other building you think the increase would be from 25 to 50 per cent.

A. Yes, sir.

Q. In the insurance business, in the ordinary run of insurance business, do you insure the full value?

A. We like to get from 80 to 85 per cent.

Q. Is it usual for the owners of a building and a business to take part of the risk themselves?

A. Yes, sir.

Q. If this risk would be increased, Backus being insured
800 to the extent of $88,000, do you think that the running of this elevated road would make it necessary for them to take other insurance and more insurance?

A. They certainly would have to take a good deal more.

Q. What have you to say as to the need of their increasing their insurance?

A. If I owned the property I should try to get all the insurance I could.

Q. Have you any doubt about it increasing the fire risk?

A. Not the least.

Q. Have you any doubt about its being destructive of his chances for insuring to a greater amount?

A. I think the chances of getting insurance at all, in good companies, would be very great.

Q. In your business, what are your relations to your companies?

A. I am local agent in the city, and general agent in the State.

Q. For what companies?

A. The Western of Toronto, the United States of New York, and Granite State of New Hampshire; and in my local agency, the Western, the United States and the Granite State and the Kings county.

Q. How much insurance do your companies have in the State?

A. They take between $80,000 and $90,000 every year in premiums.

Q. Can you give us the grand total of the risks?

A. I could not tell that.

Q. In taking insurance, do you, after inspecting an application

for insurance, pass upon it finally, or does it have to go to your board?

801 A. I pass upon everything in the city in my agency; I do not belong to the board.

Q. Do you have to send it to your companies?

A. No, sir; I use my own judgment.

Q. You can actually issue the policies?

A. Yes, sir; and if they are not satisfied, they cancel it.

Q. Do you remember when the transit road, or the connection with the union depot, ran through the Backus lumber yard?

A. Yes, sir.

Q. It now runs through there, crossing the lumber yards?

A. Yes, sir.

Q. How wide is the roadway through there?

A. I could hardly tell; I should think about 40 or 50 feet.

Q. Have they kept that lumber yard insured, do you know?

A. Yes, sir.

Q. Before this road passed through?

A. Yes, sir.

Q. And after it passed through?

A. Yes, sir.

Q. How were the rates?

A. The rates were increased, I think, nearly one per cent., and it was divided up into sections; they had to take so much insurance on each section.

Q. How much was the rate increased in the section nearest the track?

A. It was increased all over equally; because the sections would burn if the section nearest the track would.

Q. You averaged it by increasing it all over the entire yard?

A. Yes, sir.

802 Q. Was there any increase in the general average; were they required to carry more?

A. They had to carry more, because there was insurance put on specifically in different sections; before, if they had $50,000, they could apply that anywheres, now they have so much on each section.

Q. How much did they increase that?

A. Nearly double that amount.

Q. In other words, by increasing the general average you would increase the amount of the risk and the insurance on the lumber yard, because he had to put double what was on before?

A. Yes, sir.

Q. Was it double or more than double?

A. About double; I don't recollect exactly.

Q. What percentage of insurance did it cost them before?

A. I think they were paying 1½, and I think afterward it was 2½ per cent. on the lumber yard.

Q. And the requirement to carry more insurance made the insurance double?

A. They were obliged to.

Q. This is the railroad that comes into the union depot yard and is the track for the union depot, now used by the Wabash?
A. Yes, sir.
Q. And only by the Wabash?
A. Yes, sir.
Q. After the union depot is established there will be four roads running through there?
A. I understand that is the way.

803 Cross-examination by Mr. BAKER:

Q. Were you in the insurance business in 1881 and 1882?
A. Yes, sir; I have been in it since 1869?
Q. There was a board of underwriters here then?
A. Yes, sir.
Q. And Mr. Rothermal was the rate-fixer?
A. Yes, sir.
Q. You were on the jury in the Backus case when the right of way was condemned through the Backus property, were you not?
A. Yes, sir.
Q. And you heard Mr. Rothermal's testimony, that the rate would be increased?
A. I heard his testimony; I don't recollect what it was now.
Q. You heard him testify in the case?
A. Yes, sir.
Q. He was called as a witness for Mr. Backus?
A. I don't recollect that.
Q. But you were on the jury and heard his testimony?
A. Yes, sir.
Q. And you were a member of the same board?
A. Yes, sir; at that time.
Q. And he fixed your rates, did he not?
A. At that time.
Q. So that after the case was decided, you took some insurance on this property?
A. I had insurance on the property. I have had insurance for Mr. Backus for 12 or 13 years.
Q. You had insurance on the property at that time?
A. Yes, sir.
Q. At 1½ per cent.?
804 A. I think it was 1½.
Q. How many years had you done business with Mr. Backus?
A. It must have been 12 years.
Q. Before that?
A. Yes, sir.
Q. You have been doing business with Backus 12 or 14 years?
A. Yes, sir.
Q. And had insured this lumber yard?
A. Yes, sir.
Q. About how much insurance did you have on it?

A. In the neighborhood of $250,000.
Q. And he paid you 1½ per cent.?
A. I think that was it.
Q. When you insured it after the railroad went through, who fixed the rate?
A. I think Mr. Rothermal fixed the rate.
Q. Mr. Rothermal fixed the rate in accordance with his testimony, he raised it one per cent.
A. He fixed the sections; it was specific.
Q. He fixed the rate at an increase of one per cent.?
A. He fixed the rate at so much on the sections or so much on the yard, and they took their choice. They would be obliged to carry half as much insurance again by taking specific insurance, and they had their choice.
Q. Which did they take?
A. They took the specific and then they took the broad.
Q. How much was the rate increased?
A. On sections, it was increased one-half per cent., and one per cent. broad.
Q. You would only increase it one-half of one per cent.?
805 A. Which was equal to one per cent. broad.
Q. You gave him the right to a blanket policy on the whole yard, with one per cent. increase?
A. Yes, sir.
Q. And that was what Rothermal had previously testified to, and what he did when he came to fix the rate?
A. I don't recollect what he did testify to.
Q. You remember he was called as a witness?
A. Yes, sir.
Q. And that he testified in the case?
A. I believe he did.
Q. Did you ever insure the Backus lumber mill?
A. Yes, sir.
Q. When?
A. I insured the old mill and paid for it, and I insured the present mill.
Q. When did you insure the old mill?
A. We had the old mill insured when it was burned up.
Q. How many years ago?
A. I insured the lumber and mill for the last 12 or 13 years.
Q. Before they burned?
A. Three or four years before it burned.
Q. How much did you pay on it when it burned?
A. Somewhere about $50,000.
Q. Was that all the insurance on it?
A. I think I had it all, but I am not positive.
Q. I suppose they made proofs of loss?
A. Yes, sir.
Q. What set it on fire?
A. It was unknown. I don't think they knew what it was.
806 Q. Did the Michigan Central set it on fire?

A. I think not.
Q. It was some internal fire?
A. I think it was spontaneous combustion, rags in the engine-room were the cause of it.
Q. What did you insure the old mill for?
A. 5.75, I think.
Q. What do you insure the new mill for?
A. 5.25 and 4.50.
Q. Have you any insurance on it now?
A. Yes, sir.
Q. How much?
A. $20,000.
Q. Do you know this insurance of Mr. Wardle?
A. I do not. I know there is additional insurance.
Q. You don't know what rate they charge for it?
A. No, sir.
Q. What is your rate?
A. 5.25 on the mill and 4.50 on the boiler-house.
Q. You separate them?
A. Yes, sir.
Q. How much on the shavings-room and the boiler-room?
A. I forget the proportion.
Q. On the main building, how much do you get?
A. 5.25 on the main building and 4.50 on the boiler-room.
Q. The main building is more dangerous than the boiler-room and the dust-arrester?
A. Yes, sir.
Q. Does that include the stock?
A. The same rate on the stock.
Q. How much on the main building?
807 A. My policies cover $125, each one, on the boiler and engine room, and the rest is on the mill.
Q. You put 5.25 on the main building and 4.50 on the boiler and engine room, and 4.50 on the dust-room and the shavings-room?
A. Yes, sir; I don't think there is any insurance on the dust-arrester.
Q. You think that the presence of this elevated road in River street, with the building left just as it is, would increase the rate from 25 to 50 per cent.?
A. Yes, sir, at least.
Q. That is, where it is 5.25, it would increase it 2.518 per cent.?
A. If we would insure it at all.
Q. What do you base that on?
A. The liability of the sparks blowing into the dust-room.
Q. In that connection, will you tell us how much of this rate, 5.25, is charged because the Michigan Central goes alongside of the property?
A. I don't think there is over 50 cents, probably, or 75 cents. I don't think the Michigan Central is a very great hazard to this mill, because it is down low.

Q. You think the Michigan Central running alongside is not much of a hazard?

A. No.

Q. You don't charge anything for that?

A. I should charge something, because there is a shed.

Q. You think it is about one-half of one per cent.?

A. From a quarter to one-half of one per cent.

Q. But a railroad on the other side you would charge 2.518 for?

808 A. The dust-arrester is away from the Michigan Central.

Q. I suppose you are familiar with dust-arresters and shavings-rooms?

A. I know something about them.

Q. Do you think it would be impracticable to protect this building?

A. I think it is impractical to protect them open.

Q. This shavings-room is solid next to the street, all except the door and the bottom of the wall?

A. The sides are not, and the opening in the shavings vault is not.

Q. Is not the end that abuts on the street solid, with the exception of a door below?

A. Yes, sir.

Q. That is a brick wall, is it not?

A. Yes, sir.

Q. It has a gravel roof?

A. Yes, sir.

Q. And it is a brick wall on the inside, is it not?

A. Yes, sir.

Q. There is a small window in it?

A. Two or three windows in there, I think.

Q. A solid brick wall on the west?

A. Yes, sir.

Q. So that there is an opening on the side, and a little beyond the window there is a door?

A. That goes into the engine-room.

Q. Do you think it would be impractical to so conduct that shavings-room as to do away with all increased risk?

A. I don't think it is possible.

Q. What is the reason?

A. From the elevated road, the sparks flying in.

809 Q. I am talking about the shavings-room.

A. The sparks flying into the shavings-room.

Q. They simply load shavings into that door, back a wagon in there and load shavings?

A. The shavings come down through a spout.

Q. There is a door by which they load shavings into the wagon?

A. Yes, sir.

Q. Do you think it would be impractical to put a sheet-iron covering over that door so as to protect them?

A. If it was to be kept closed, it might be protected, but it has to be open.

Q. Could they not put a sheet-iron roof over that door so as to protect it, and then could they not keep the shavings clean around the door, and would there be any risk?

A. It is pretty hard to tell where a spark is going.

Q. If you had the roof running out to the elevated road, there would not be much danger from it, an iron roof?

A. They might get in under the roof.

Q. There would not be much hurt?

A. There would be so much that we would not care to assume the risk.

Q. Let us go back to the dust-arrester; that is a solid inclosure, all except the top, this lattice-work?

A. Yes, sir.

Q. Do you think it would be impractical to protect that?

A. And keep it open?

Q. Could they not put wire screens on each side of that?

A. That would not keep the sparks out entirely.

Q. You think it would burn up in a day or two if the road was in operation?

A. I think it would be liable to the first day.

810 Q. Don't you exaggerate this insurance matter?

A. Not a bit.

Q. You think the agent here who testified that the increase would only be one per cent., is entirely off his base?

A. I do.

Q. Did you ever testify for Mr. Backus before?

A. Yes, sir.

Q. In any of those old cases?

A. In this same case.

Q. That is the only time?

A. Yes, sir.

Q. But you have done business with him a great many years, and were on the jury before?

A. Yes, sir.

Q. And you were in favor of high damages for him?

A. In favor of justice.

Q. You were the highest man on the jury, were you not?

A. No, I think not.

Q. Do you testify that you were not the highest man?

A. I did my duty on the jury.

By Mr. DICKINSON:

Q. Who was the attorney for Backus in that case?

A. Fred. A. Baker.

Q. I was not in the case, was I?

A. No, sir, or they would have probably got more.

WM. P. TRIPP, sworn for respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?

A. In this city.

811 Q. How long have you lived in Detroit?

A. About 14 or 15 years.

Q. What is your business?

A. Lumber inspector.

Q. Whereabouts are you now engaged in the lumber-inspection business?

A. With A. Backus, Jr., & Sons.

Q. What is your position there?

A. Foreman in the yard.

Q. And inspector?

A. Yes, sir.

Q. What was your business before you went to work for A. Backus & Sons?

A. I have been in the same business.

Q. For whom?

A. For the Michigan Central railroad for 12 years.

Q. For any one else?

A. Yes, sir, with the Parsons Lumber Company.

Q. You have been engaged in the inspection of lumber during your whole life?

A. Yes, sir, since I have been a boy.

Q. About 30 years?

A. Yes, sir.

Q. In the matter of lumber coming into the Michigan Central yard, or going into the city of Detroit, will you please tell the jury what is first done with a car-load of lumber that goes over the F. & P. M. and the D., L. & N. on its arrival, for delivery?

A. The first thing is to get the stakes out of the car.

Q. What next?

A. To get a good broom and put that into active service; get on top of the car and take the cinders off the car.

812 Q. The first business is to sweep the cinders off the lumber after the stakes are out?

A. Yes, sir.

Q. To what extent do the cinders accumulate on this lumber that comes over the F. & P. M. from the interior of Michigan?

A. It makes a great deal of difference where the car has been located in the train. You find a car of lumber that was next to the engine and the accumulation of cinders is greater than if it is in the rear end of the train.

Q. How far back do the cinders extend?

A. Usually from eight to ten cars, in fact from ten to twelve cars.

Q. What is the length of a lumber car?

A. 33 to 34 or 36 feet.

Q. How far back will you find the cinders?

A. Usually five or six cars we find them to a large extent; the lumber is well covered.

Q. What do you call a large extent?

A. Where we can get a peck or a half bushel on the top of the car.

Q. Have you recently seen a lumber car come in on the F. & P. M. in your yard?

A. Yes, sir; we received one last night, which was being unloaded when I left the yard this noon.

Q. Who took off the cinders?

A. I swept the top of the car myself before starting this morning.

Q. Where did this car come from?

A. From Saginaw.

Q. Was ticketed down into your yard?

A. Yes, sir.

813 Q. Came by what road?

A. By the F. & P. M. and the Wabash.

Q. Did you take any of the cinders off that car?

A. Yes, sir.

Q. What did you do with the cinders?

A. Those that I kept are here in this box.

Q. Were there more cinders on that car of lumber than are in this box?

A. Yes, sir.

Q. How much more?

A. Fully as many more.

Q. You took all these off of one car-load of lumber on the F. & P. M. car?

A. Just what I got handy.

Q. You took off as many more?

A. The car was not unloaded when I left.

Mr. CHAREST: I suppose this lumber that comes in—in inspecting the lumber, do you find any fire specks or places on the boards where it had been burned?

A. We find that more in the yard near the tracks where the lumber is piled up.

Mr. DICKINSON: I suppose this lumber that comes here is not put in the dryer?

A. No, sir.

Q. It usually comes from the mill, damp?

A. Yes, sir.

Q. Do you know how long it took this car to come down here?

A. We have the shipping bill. The car came into our yard last night.

Q. This is the regular form of the ticket?

A. Yes, sir; it reads as follows: "Car number 1726, via

814 Romulus, care Wabash road, Backus, Jr., & Sons, shipped by Strong & Sweet, June 26, 1891."

Q. You have taken the cinders off of that; did you select that car specially, or is that an average amount as you get it?

A. That car has much less than a great many.
Q. Have you taken any records of any other F. & P. M. cars?
A. Yes, sir; last winter we had a great many more.
Q. You were called upon to take the record of those at that time?
A. Yes, sir.
Q. How does this average up with the regular F. & P. M. from Saginaw, the amount you found on this lumber?
A. You find a great many that have more on.
Q. How as to others having less?
A. There are not many that have less.
Q. Do you see cars coming in over the D., L. & N.?
A. Yes, sir.
Q. How do they compare, as far as cinders are concerned, with the cars that you have sampled?
A. Not much difference, that I can see.
Q. What effect have the cinders upon the machinery? Do you know anything about its effect, if the work of cleaning is not well done before it goes into the mill?
A. I notice it is damaging to the planer knives and the machinery.
Q. All the fine machinery in the mill?
A. Yes, sir.
Q. Is it possible to get all this grit off?
A. No, sir, even though we sweep it we cannot get it all off.
815 Q. In your business, you have been engaged in and about the yard there, where Backus receives his lumber from the river, have you not?
A. Yes, sir.
Q. You know the cars of the Wabash, there?
A. Yes, sir.
Q. Your lumber yard is down here at Eighteenth street, is it not?
A. Yes, sir.
Q. And the Wabash crosses the yard?
A. Yes, sir.
Q. That is the union depot track, is it not?
A. Yes, sir.
Q. What road now uses it?
A. At present the Wabash and the Canadian Pacific, only.
Q. How wide is the right of way?
A. I don't remember now.
Q. About 60 feet, is it now?
A. Yes, sir.
Q. How many main tracks through there?
A. One main track and two side tracks.
Q. One main track, over which the trains of the Wabash and Canadian Pacific now run?
A. Yes, sir.
Q. Have you observed the effect upon the piles of lumber of the Wabash locomotives?
A. Yes, sir.

Q. What do you find the effect upon the lumber piles?
A. Where live cinders, as they are known by railroad men, fall upon the lumber, they burn holes in the dry lumber.
816 Q. What kind of lumber do you pile nearest the track?
A. They aim now to pile common lumber down there.
Q. How far is it from the main track to the piles of lumber?
A. About 30 feet from the main track, I should think.
Q. Upon those lumber piles along the main track, you find there is an accumulation of cinders since the Wabash went through there?
A. Yes, sir.
Q. To what extent?
A. Quite a large extent, where they are piled there any length of time; in a few months they accumulate.
Q. Is it to such an extent that it is required?
A. Yes, sir.
Q. What is the nature of those accumulations as compared with this?
A. It is something finer than that.
Q. Does it discolor the lumber?
A. Yes, sir.
Q. How far from the track have you found burned spots in the lumber?
A. One pile I noticed nearly 60 feet.
Q. What do you find upon this pile?
A. What we call the covering boards, are burned in a good many places, some places near together.
Q. You have covering boards over the piles?
A. Yes, sir, we have to keep them covered up, especially along the track.
Q. To what extent are there burned or charred places in the lumber near the track?
A. Some.
Q. Give us an idea, if you can, of the quantity of cinders
817 you find upon the piles, 30 feet from the track, we will say, as near the track as you find it, cinders upon the lumber?
A. I swept one board last winter and I found about a pint of these fine cinders.
Q. How near the track was that?
A. I think that was a pile between 50 and 60 feet.
Q. Is that an old pile?
A. Yes, sir.
Q. Had been there some years?
A. Yes, sir, had been there some time.
Q. About how long had that been there?
A. I can't tell; it was there when I came there last August.
Q. Do you find on the other piles of lumber near the track, since you came there, any accumulation of cinders and this burned appearance?
A. Yes, sir.
Q. You find it to be the general rule that the tops of the cover-

ing boards are charred at a greater or less distance from the track, and cinders upon the piles?

A. Yes, sir.

Q. You have no other road running near you except this Wabash single track?

A. That is all.

Q. How far from the dock front does this run?

A. Several hundred feet.

Q. I suppose you have seen cars running in and out during your whole life in the railroad business, in the lumber yards and in the course of your business?

A. Yes, sir.

818 Q. Did you ever see one, up to this date, that did not throw sparks and cinders?

A. No, I never saw anything of that kind.

Q. In running nights there, do you see any locomotive that does not throw cinders and fire out of its smokestack?

A. No, sir.

Q. Have you ever seen one do its work that did not throw as it is running?

A. No, sir.

Q. To what extent are you troubled in that work in the yard with smoke and steam?

A. We are troubled very much with the dense smoke that comes out of the smokestack.

Q. Is that a matter of daily occurrence, or only occasional?

A. It is continual.

Q. To what extent does the smoke flow upon you in that lumber yard?

A. So much so that it discolors the lumber in a very short time after it has been piled in the yard.

Q. Give us some idea of the volume of smoke?

A. It comes in such dense quantities at times that we are unable to see anything a few feet away. We had a case of that kind last week. Sometimes where we are inspecting lumber off a car we have to stop our work while the train is passing by.

Q. How about steam, is that a matter of common occurrence?

A. That with the smoke.

Q. Does it come out in large quantities?

A. Yes, sir.

Q. You have your office somewhere near there?

819 A. Yes, sir.

Q. You have an office quite near the track?

A. Yes, sir.

Q. What effect do these trains have, passing on the single track, in the matter of noise?

A. So much so that we cannot use our telephone when the train is going by, at least I cannot hear very well.

Q. Did you inspect locomotive No. 35 on the Wabash; did you look at and see it work?

A. I see it every day.

Q. Has your attention been recently called to the claim that she has a perfect smoke-consumer and spark-arrester?

A. I heard that was the fact.

Q. Have you observed that particular engine since?

A. I was more particular when I heard that was the fact.

Q. How often have you seen that engine running about?

A. I have seen it on an average eight or ten times a day.

Q. Do you see it in the night?

A. Several times.

Q. Have you observed how beautifully clean she is and how she does not throw any smoke or cinders?

A. I have not observed that.

Q. Do you say she does throw cinders?

A. Yes, sir.

Q. And smoke?

A. The same as the rest of them, I think; it seems to be the same color.

Q. At night do you see the sparks go out of her smokestack?

A. Yes, sir.

Q. How high will they float. I suppose the wind has something to do with that?

820 A. Yes, sir, and the speed they run. I could not say as to that, but I have seen them go out of the smokestack quite frequently, and that is all owing to how hard they are working the engine. If they are working the engine hard and have a heavy road, a good long train, there are more sparks of course.

Q. What do you call a heavy load, as you have seen No. 35 working?

A. I never saw her with over 12 or 13 cars, which would be a light load for an engine nowadays.

Q. She still throws sparks?

A. Yes, sir.

Q. Have you seen her running with any number of cars that she did not throw sparks in the evening?

A. I saw her a little while the other evening light; there were no sparks, but when they reversed the engine to go back, it threw sparks.

Cross-examination by Mr. BAKER:

Q. How long have you worked for Backus?

A. Since last August.

Q. Where did you work before that?

A. For the Parsons Lumber Company.

Q. Whereabouts?

A. In the city.

Q. How long did you work for them?

A. About two years.

Q. Before that where did you work?

A. For the Michigan Central.

Q. Whereabouts?

A. In Detroit.

Q. In a lumber yard?

821 A. In a lumber yard most of the time, part of the time on the road.

Q. What were you doing for the railroad?

A. Handling their lumber, buying and inspecting.

Q. Lumber they used in their railroad business?

A. Yes, sir.

Q. How long did you work for the Michigan Central?

A. Twelve years.

Q. You gathered this off the F. & P. M. lumber car?

A. Yes, sir.

Q. The second thing you have to do when a car comes into the yard is to get the cinders off?

A. Yes, sir.

Q. And you do that?

A. Yes, sir.

Q. You don't have to get a fire-engine and put out a fire the first thing?

A. No, sir.

Q. You have been in that lumber yard down there since last August?

A. Yes, sir.

Q. How many times has the lumber in that yard burned up since then?

A. I have never seen any burn up.

Q. The lumber is piled right alongside of the track?

A. About 30 feet.

Q. There is a 60-foot right of way with the main track in the middle and two side tracks on each side?

A. Yes, sir.

Q. And Mr. Backus piles the lumber right up to his line. How does he pile it, with the ends towards the track, or the side of the piles?

822 A. The ends towards the alleys.

Q. The alleys run across the track, do they not?

A. Yes, sir.

Q. So that there are openings as you pile the lumber; what do you call those?

A. Courses.

Q. So that every board is the thickness of a board apart?

A. Yes, sir.

Q. Those boards go longitudinally along the side of the track, so that there are spaces an inch wide right through the piles?

A. Yes, sir.

Q. That is the way they pile it?

A. Have to do it.

Q. Could not pile it the other way?

A. Not very well.

Q. Why?

A. Because our alleys run the other way.

Q. Why could you not run the alleys the other way?
A. How could you get out of the yard?
Q. You have a street that runs through it, haven't you?
A. Yes, sir.
Q. Could you not put the alleys the other way?
A. No, not to make straight work with it; it would make an extra turn.
Q. Is there any fence or building put up to protect the lumber from the cinders or smoke?
A. No, sir.
Q. It is all open?
A. Yes, sir.
Q. And the lumber is piled upon the ground on the same grade substantially as the railroad runs?
823 A. Yes, sir.
Q. About how high are those piles?
A. They vary from eight and ten feet to fifteen feet.
Q. Some as high as 20 feet?
A. Possibly some of them 20 feet.
Q. How many million feet of lumber are there down there now?
A. Perhaps three millions; I don't know just how much; hardly that now.
Q. How many is the highest number of feet that you have known in the yard?
A. Since I have been there perhaps over 4,000,000 at one time.
Q. Did you ever see that yard when there was 20,000,000 feet of lumber on it?
A. I don't know that I ever did. I presume there has been though; they could put that much there.
Q. You say this car came down from Saginaw the other night?
A. Yes, sir.
Q. How did it get into Backus' yard?
A. By the Wabash.
Q. It came from the junction to Romulus and then came in on the Wabash?
A. Yes, sir.
Q. How often do you get a car that way?
A. Sometimes we get 3 or 4 at a time, and sometimes we don't get any, and sometimes we have 8 or 9 in a day.
Q. You get a constant supply of lumber in that way?
A. Certain lumber comes in that way.
Q. What kind of lumber?
A. Usually coarse lumber that comes that way.
824 Q. Why don't you bring it around by water?
A. Good lumber usually comes by water.
Q. Why don't you bring this by water?
A. This is special lots.
Q. How many million feet have you brought down since you have been there in this way?
A. It would take some time to say that.
Q. Give us an estimate?

A. I presume we have on an average during the winter 3 or 4 cars a day that come that way.

Q. About how many feet to a car?

A. They average about 15,000 to a car.

Q. And in the winter time it will average 3 or 4 cars a day?

A. This last winter.

Q. About how many million feet do you use up there a day?

A. We don't use a great many million a day, but 50 or 60 or 90 thousand a day; very often 90,000 a day.

Q. Is most of that received by rail?

A. No, sir.

Q. What proportion of it is received by rail?

A. In the winter of course it is all received by rail.

Q. But in the summer time, what proportion is received by rail?

A. Only odd lots in the summer time.

Q. Odd lots of 3 or 4 cars a day?

A. Not that many on an average.

Q. How much on an average; a car a day?

A. Well, probably.

Q. How much do you get on the Detroit, Lansing & Northern?

825 A. We have not had any lately.

Q. You do get some occasionally?

A. Yes, sir, on all the roads.

Q. How does that get to you?

A. It has to come around by Romulus.

Q. But does it not sometimes come into the Michigan Central yards and get to you in that way?

A. Yes, we had some come that way last fall.

Q. But if it does not come into the Michigan Central yard, and come down in that way, it comes around by Romulus in some way?

A. Just according to the way it is billed.

Q. It comes on the Detroit, Lansing & Northern, and then down to Romulus on the Flint & Pere Marquette, and then in on the Wabash?

A. Yes, sir.

Q. About how many cars a day do you get from that source in the winter?

A. We have not had a great deal since I have been there.

Q. About how many thousand feet since you have been there?

A. I could not tell; I never thought about it in that way.

Q. Did it average a car a day?

A. No, sir.

Q. A car a week?

A. Hardly that, I think.

Q. A car in two weeks?

A. I could not say.

Q. A car in three weeks?

A. I would not attempt to say.

Q. Do you get any hardwood lumber there?

A. Yes, sir.

826 Q. Where does that come from?
A. From all over the State.
Q. Does any come on the Wabash?
A. Yes, sir.
Q. A good deal comes on the Wabash?
A. Yes, sir.
Q. What is it, principally?
A. Oak and ash and basswood and maple.
Q. And walnut?
A. And all kinds of hardwood.
Q. About how many thousand feet do you get in there a day of hardwood on the average?
A. It would be hard to estimate. We sometimes have quite a number of cars come in, and then again we do not have any for some time.
Q. Do you get any hardwood by the river?
A. Yes, sir.
Q. Where does that come from?
A. Various points up the shore.
Q. What is that, principally?
A. Basswood, maple, some oak—principally maple.
Q. Do you ship any lumber out of that yard by rail?
A. No, sir; not now.
Q. Do you ever?
A. Most of our lumber has to go to the mill to be dressed, and then, in that case, it is shipped right from the mill.
Q. Have you shipped any lumber out of that yard in the rough, before it was dressed, since you have been there by rail?
A. Yes, sir, a few cars.
Q. How many cars?
827 A. Oh, half a dozen, I presume.
Q. Where did they go?
A. East and south.
Q. What roads did they go on?
A. The Grand Trunk and the Wabash, I presume; I didn't keep much track of it.
Q. Did you ever ship any on the Canadian Pacific?
A. No, sir.
Q. You shipped some on the Wabash?
A. Yes, sir.
Q. You say that in this yard some of these cinders will char or slightly burn the wood?
A. Yes, sir.
Q. Where they light on a lumber pile?
A. Yes, sir.
Q. Does it accumulate more on the top of the piles or through the piles?
A. Those charred spots show on the top of the piles.
Q. And the piles are just about the same height as the smokestack, are they not?
A. They are higher than the smokestack.

Q. A little bit higher?
A. Yes, sir.
Q. So that the charred parts are on top there?
A. Yes, sir.
Q. Is the lumber charred through the piles where it goes through these crevices?
A. No, sir; it is fine cinders that goes through the piles.
Q. On these piles of lumber that come in on the cars, they usually have cross-bars, against which the cinders lodge, and there is where you get most of the cinders, is it not?
828 A. No, sir; you get more on the ends.
Q. That is on the ends of the lumber?
A. Yes, sir.
Q. That is, it is not piled up very even, and where the ends stick out unevenly is where the cinders gather?
A. Most of them, and they naturally blow off the top and work down through on the ends of the lumber.
Q. And the farther the train has come, the more the cinders accumulate, I suppose; it depends a little on which way the wind blows and the condition of the weather?
A. And how near they are to the engine.
Q. The closer to the engine, the more cinders.
A. Yes, sir.
Q. Mr. Backus makes a considerable use of the railroad facilities he has there in this yard?
A. Not a great deal.
Q. About how many million feet in a year does he handle in this way?
A. I could not tell without consulting the books.
Q. Well he handles three or four million?
A. It does not all of it come by rail.
Q. He consumes 60,000 a day on an average, year in and year out?
A. Yes, sir.
Q. Does a quarter of his lumber come by rail?
A. No, sir.
Q. Does one-eighth of it?
A. I could not say.
Q. In your judgment, how much of his lumber? You have been there since last August and were there one winter.
A. I have not been there through one season yet.
829 Q. But it is very close to the 1st of August. In your judgment, for the time you have been there, what proportion of his lumber comes there by rail?
A. A very small proportion of it.
Q. What proportion?
A. I would not attempt to say without consulting the books.
Q. You have no judgment about it?
A. I have not had experience enough there in that regard.
Q. Did you hear his testimony in the old condemnation case, that he had all the railroad facilities he wanted?

A. I was not there at all; I don't know anything about it.

Q. You were not a witness in those cases?

A. No, sir.

Q. You didn't hear him testify or say on any occasion that he didn't want any railroad facilities down there?

A. No, sir.

Q. Do you know how much the lumber is damaged in its market value by being piled next to the railroad?

A. Yes, sir, I know it is damaged quite extensively; quite a great deal.

Q. How much a thousand?

A. There are cases where it is depreciated, I was going to say one grade or more, in that class of lumber there, that is, $6; there is six and seven dollars between the different grades, and we have to sell it for one grade less.

Q. You pile the poorest lumber next to the railroad, don't you; what does that cost on an average?

A. From eight to ten or twelve dollars for our coarse lumber.

830 Q. How long does it stay there usually?

A. That near the railroad does not usually stay there a great while.

Q. I suppose the longer it stays the more it is damaged?

A. Yes, sir.

Q. How long does it stay on an average?

A. Three or four months; and in some cases, perhaps, six months; there is one pile there, I guess, that has been there six months.

Q. Suppose a pile has been there about six months, how much would it be depreciated in value per thousand?

A. I don't know just the condition of that pile.

Q. Say it is worth $10 a thousand when it is piled there, how much would it be worth at the end of six months?

A. It is damaged more or less, and they run it through the machinery——

Q. But you are an expert in this business, and I want to know how much less it is worth. Is it worth 50 per cent. less; would it reduce it to $5 per thousand?

A. No, sir; not as much as that.

Q. Would it reduce it 50 cents a thousand?

A. I would not attempt to say as to that point.

Q. You would not undertake to fix the depreciation in dollars and cents?

A. No, sir.

Q. Is there any depreciation at all?

A. Certainly.

Q. There is some depreciation?

A. Yes, sir, I have said that.

A JUROR: How can you estimate when you don't know what the depreciation is?

A. I could give my judgment.

831 Q. What is your judgment of the depreciation on that?

A. In a case of that kind, it is probably 75 cents to a dollar a thousand.

Q. In six months?

A. Yes, sir.

Q. How much would it be in a year if it remained there?

A. It would be more, of course.

Q. How much would it be in two years; the lumber would be actually worthless in two years, probably?

A. O, no, sir; I have stated in one case that came under my observation, where it has depreciated one grade. Of course that was good lumber, and it depreciated one grade, which is about 6 to 7 dollars, there being that difference between each grade, and then it didn't sell as readily as it would if it had not been piled there—if it had been away from the railroad.

Redirect by Judge CHIPMAN:

Q. The reason that you cannot answer, as to the exact difference, is that the lumber is sent to the mill and handled there?

A. Most of our lumber goes to the mill and is dressed there.

Q. And there the difference, in grade and all that, is settled by them at the mill?

A. Yes, sir; you can judge of lumber a great deal better after it is dressed.

Q. And they determine that, and you don't actually determine what deterioration there is in that lumber, but it is determined at the mill?

A. Yes, sir.

Q. And the parties at the mill can tell better than you?

832 A. Yes, sir, after it has been dressed.

Q. What engines bring in the Detroit, Lansing & Northern lumber to your yard?

A. The Wabash engines.

Q. On the Michigan Central?

A. No, sir.

Q. Mr. Baker asked you if Mr. Backus does not make use of the railroad there in his business. You said yes. Don't you understand that he pays the railroad for everything that he gets from them?

A. Certainly.

Q. It is not a favor at all, it is business?

A. Yes, sir.

Recross by Mr. BAKER:

Q. You have been in the lumber business, or connected with it, for a great many years?

A. Yes, sir.

Q. Is it practicable to run a lumber yard successfully, as the business is conducted at the present time, without railroad connections?

A. It is all owing to the situation.
Q. Do you know of a successful yard anywhere that has not a railroad connection?
A. Oh, yes.
Q. Where?
A. In our northern country.
Q. Up where they manufacture lumber?
A. Yes, sir.
Q. But I mean in a country where they sell it?
A. It is very handy to have them.
833 Q. And is it customary to pile lumber right up close to the railroad?
A. Why, yes.

Recross by Judge CHIPMAN:

Q. And is it customary to find these burnt places?
A. No, sir; not usual.
Q. Did you hear my question?
A. I say not usual.
Q. You don't often find burnt places in lumber?
A. No, sir.
Q. And yet you say that you frequently find it down there?
A. Yes, sir.

Adjourned to Wednesday, July 1, 2 p. m.

JULY 1, 1891—2 p. m.

Mr. DICKINSON: By reason of the absence of Mr. Peter Henkel across the sea, we read his testimony in the Backus case, and also his testimony as to the condition of the elevated road in the Kidder case. I read from the Backus case, commencing at page 356.

PETER HENKEL, sworn in behalf of the respondents, testified as follows:

Examined by Mr. DICKINSON:

Q. How long have you lived in the city of Detroit?
A. About 47 years.
Q. Been an active business man here ever since you came here?
834 A. Yes, sir.
Q. Seen the growth of the city for 47 years?
A. Yes, sir.
Q. Have you known Mr. Backus?
A. Yes, sir.
Q. I think you are a large owner of real estate in this city?
A. Yes, sir.
Q. You are familiar somewhat with the manufacturing interests of Detroit?
A. Yes, sir.

Q. You have seen their growth here?

A. Yes, sir.

Q. Do you know Mr. Backus' property?

A. Yes, sir.

Q. Have you seen the proposed superstructure of the union depot entrance into the city along River street?

A. No, sir; I have not seen it.

Q. The railroad will enter about Twelfth street, and will enter by a viaduct along Twelfth street, which is set upon piers or posts, with a stone foundation—foundation below the surface, and will go up to the front of the Backus property, all in front of the Backus property, steadily rising until it reaches the railroad crossing of the Michigan Central, where it rises to 18 feet in the clear above the tracks; but in front of the Backus property, and the entire front of the Backus property, it has three tracks and covers the roadway, that is, the piers upon which it stands are on the curb-line. The structure covers the entire roadway, with the exception of the sidewalks, which there is some dispute about. The sidewalk spaces are from 4½ to 6 feet wide. There are three tracks and switches
835 in front of the Backus property, and it comes as to the Backus property, about in proportion as you see by this structure there, this model. The structure coming from Twelfth street here, runs up by the Backus property, and the tracks are upon the Backus front in the street, as you see the tracks here on this model. On the Michigan Central side, on the south side of the street and immediately adjoining the railroad structure, there is a viaduct for teams, made without this railing. I don't know that the railing is solid, but at all events, there is a viaduct for teams that runs by the side of it, along by the Backus property, 24 feet wide; it is 14 feet in the clear.

A. How high from the ground?

Q. It is 14 feet in the clear to the bottom of the girders, leaving just 14 feet in the clear. The structure will stand so that the top rail will be even with the floor of the Backus third story, and, of course, the cars upon the structure in passing to and from will add to that height, and possibly will come above the third story. Now, this railroad will run to the union depot, which is to be opened to all the railroads that desire to come there. There is in the union depot already provided above there, over which the trains must pass to reach it, a freight warehouse for the Flint & Pere Marquette and the Detroit, Lansing & Northern, and any other roads that desire to use it, as it is a freight and passenger depot, and for the passenger depot it professedly is to accommodate all the roads that desire to come there and pass over this track. This will be the only approach. Now, you, knowing the Backus property as you do, you know the business of a planing mill and the work they do there?

A. Yes, sir.

836 Q. What, in your judgment, would be the injury to the Backus property, 238 feet front, with the Michigan Central railroad running by the rear of it, or the northwest rear of it, with

13 or 14 tracks, and having its egress for business, now upon River street, upon Woodbridge street?

Mr. BAKER: I object to that question, on the ground that the model submitted is not correct, and the statement of facts is not justified by anything that has appeared in the case, and I take an exception.

Mr. DICKINSON: And the points I have called your attention to in the model are those to which you will confine your attention to, and they are substantially as I have stated.

A. I would call it confiscation of a big part of the Backus property.

Q. Suppose you owned the Backus property, with the mill upon it just as it is, what would you take to let the railroad run by there in this shape, occupying River street as it is proposed with this structure?

Mr. BAKER: I object to that question on the ground that it is not a competent question what he would take.

Mr. DICKINSON: That is true; it is not competent to say what he would take; but what would be the injury to the property, in your opinion, Mr. Henkel?

Mr. BAKER: The same objection to that question as I made to the other one.

A. It is hard to value a man's property; it may be worth double the amount to Mr. Backus' business or to Mr. Backus himself than what it would if you were to put it on the market.

Q. You can give it in proportion, without naming dollars and cents?

837 A. I would say more than half of it; the property would be destroyed for his purpose.

Q. Outside of manufacturing business immediately connected with railroading, like railroad shops and that sort of thing, do you think that any manufacturing business would want to occupy a place so situated?

A. Not very well; no, sir.

Q. Would it be salable, in your opinion, for manufacturing purposes outside of railroad business or business connected with railroads?

A. I think it would not.

Cross-examination by Mr. BAKER:

Q. Did you ever have any experience in running a planing mill and box factory?

A. No, sir; I was never in the business.

Q. Have you ever been in the Backus mill?

A. Yes, sir.

Q. Been through it?

A. Many a time.

Q. Do you live in that vicinity?

A. Yes, sir.

Q. How do you understand that this elevated road is to be constructed?

A. I understand that it covers nearly all the roadway, as Mr. Dickinson stated.

Q. How does it cover it?

A. The width of it nearly covers all the road, as Mr. Dickinson stated.

Q. What does it cover it with?

A. With the railway.

Q. How will that be constructed?

838 A. I have no doubt but what there will be a good many supports under it, and a railway with many ties will certainly darken the roadway and darken everything that is near it in the vicinity.

Q. You have been under the elevated roads in New York?

A. Yes, sir, many times. I call that a confiscation of all the property where it runs along in New York city; it is nothing else but a confiscation of all the property that runs there.

Mr. DICKINSON: You have got to the point that the New York court of appeals got to finally.

Mr. BAKER: In your opinion, the Sixth Avenue elevated road confiscated the property on each side?

A. Yes, sir, it is nothing else than a confiscation of that property.

Q. It was not of any use to the property-owners after the road was built?

A. I would not say that it was not of any use at all.

Q. Don't you know that it increases the value of the property on Sixth avenue in New York?

A. I would like to know where property has not increased in New York city? Just tell me one spot; even at the slaughter-houses it has increased.

Q. You testify that that was a confiscation of the property—do you mean by that that it destroyed the property for practical purposes?

A. Yes, sir, in my opinion it is so; it is a confiscation of that property.

Q. Suppose as a matter of fact it increased the value and increased the rental value of the property, then it would not be a confiscation, would it?

839 A. I would still call it a confiscation, yes, sir, right there; if I had property there I would call it a confiscation of my property.

Q. Although it increased your rental and increased the value of the property, you would call it a confiscation?

A. I would call it a confiscation still; even a telegraph post is a confiscation of the property where the telegraph post, even a lantern post, that is not used——

Mr. DICKINSON: The Supreme Court of the United States agrees with you on the telegraph post.

A. It is just as much a confiscation as the railway.

Mr. DICKINSON: To that extent.

Mr. BAKER: Do you know how large these posts are?

A. They have got to be large enough to support the railway and the traffic on it; they may be a foot in diameter; I never built a railway, I don't know about that.

Q. But you are giving testimony here as an expert as to the amount of damage this will do. Did you ever own a piece of property alongside of an elevated road?

A. No, sir.

Q. Did you ever have control of a piece of property alongside of an elevated road?

A. No, sir.

Q. You have had no experience in the practical, actual physical effects of an elevated road on the adjoining property?

A. Except what I have seen.

Q. What have you seen in New York?

A. What I have seen in London and New York, both places.

Q. So that is all you know about it?

A. That is all I know about it; and besides what people have told me that owned the property along the road.

840 Q. You know that teams can come right under these elevated roads?

A. In New York city, yes, sir.

Q. You know that that is the way this is to be constructed?

A. Well, it shows here (model) that the teams have to climb up here on this bridge, in front of Backus' property, the teams have to climb up.

Q. Do you know where they are going to climb up, on which side it is?

A. Yes, sir.

Q. Whereabouts?

A. The Michigan Central side.

Q. Partly on the Michigan Central property, is it not, and out of the street?

A. Probably it might be.

Q. Don't you know that the River Street roadway is going to be left entirely open just as it is now?

A. I don't understand it so, because the railway is going to cover it.

Q. But it will be 14 feet in the clear?

A. Probably that might be the case; I have no doubt of it.

Q. And you think that would damage the property one-half of its value?

A. Yes, sir.

Q. In your opinion?

A. Yes, sir; that is, if I owned it I would consider it depreciated one-half of its value.

Q. You are a little prejudiced against elevated roads, aren't you; you don't like them very well?

A. No more than against any other private property.

Q. Do you carry on any manufacturing business?

841 A. Yes, sir, we have a flouring mill here.

Q. And you have a pork-packing institution?

A. Yes, sir.

Q. Do you own property in New York or Philadelphia, or any place where they have an elevated road?

A. No, sir.

Q. And you have been a neighbor and acquaintance of Mr. Backus a long time, I suppose—a friend of his?

A. No more than to you.

Q. But it is as much as that; are you as much a friend to Mr. Backus as you are to me?

A. I presume I am.

Mr. DICKINSON: The other case, so far as it pertains to this record, I will read from Mr. Backus' cross-examination of the testimony of PETER HENKEL, page 439 of the Kidder case, which is as follows:

Mr. BAKER: You are quite antagonistic to the railroads, are you not; that is, you do not like a railroad company very well?

A. Mr. Baker, as a business man I think you ought to think better of me than that.

Q. I just ask you that.

A. I wish I could run railroads into every line of the compass in this city here; I would not care if it was a hundred of them; I would rather see it; the more the better, and it — just what we want, more railways. I am sorry that I have been subpœnaed in these cases, but I had to come; if I did not come somebody would be after me, and as long as I am here I am bound to tell the truth as much as I know it.

Q. There is no doubt about that, and no doubt but what you try to do it.

842 A. No matter whom it hurts or whom it hits.

Q. But when you express an opinion, you would not do that with the same degree of confidence that you would of fact that you know more about?

A. This young man (pointing), I saw him the first time in my life this morning; never knew him; if he hadn't introduced himself to me I would not know anything about him.

Mr. DICKINSON: You never met him until after you were subpœnaed, did you?

A. I never met him until this morning that I know of.

Q. A subpœna was served on you first before you met him?

A. Yes, sir.

Mr. BAKER: Take this state of facts: Suppose there are a large number of mills throughout the United States that are right alongside of railroads and railroad tracks, and successfully operated. If that was so, if you operated a mill in that way and found the railroads did not interfere with it seriously at all, you would not express the opinion that you have here, would you?

A. In my opinion, I think that it is a failure every time when they build mills too close to railroads.

Q. You think it is a failure?

A. Yes, sir; a failure every time, and not only do I think so, but often I spoke to millers, and they told me the same thing.

Q. What miller ever told you that?

A. Well, as long as I am in the business, I have been talking to so many millers that I could hardly tell you.

Q. Who have you talked with that had a mill alongside a railroad?

843 A. I have not got my book-keeping in my head.

Q. If you don't recollect, say so. I simply ask you what miller you have talked with?

A. I think there are several millers near Ann Arbor who spoke to me in that shape.

Q. Give me their names?

A. I could not give you their names.

Q. Do you know the Perrien mills in this city?

A. Yes, sir.

Q. Or the Sowden; is that alongside of the railroad? There is one mill on Gratiot avenue alongside of the Milwaukee crossing; who owned it?

A. I think they used to make flour called the Mayflower.

Q. Who owned the mill?

A. I forget his name.

A JURYMAN: Sowden?

A. Yes, Sowden; I met him every day, but I am getting too old to keep all those names in my head.

Q. How close do the railroads run to the mills in Ann Arbor?

A. I don't know; I haven't seen them.

Q. You have not been in Ann Arbor recently?

A. Not for ten years.

Q. You have seen the elevated roads in New York, have you not?

A. Yes, sir.

Q. You think that when an elevated road is built along the street there, it confiscates the property?

A. Yes, sir.

Q. And you think that when a railroad is built in front of property, in front of the Union mills, it confiscates the property?

844 A. Yes, sir. The last time you asked me about the Sixth avenue—of course on Sixth avenue it has not the effect it has on Greenwich street, in New York. Just look at Greenwich street in New York and there you see the effect, where business men have to have artificial light all day, from morning till night, and then they cannot do any business.

Q. How wide is Greenwich street?

A. Greenwich street is about the size of this street here, maybe 40 or 50 feet wide.

Q. Do you mean to say that they do not do any business on Greenwich street?

A. They do business, certainly, but how do they do it? I have

spoken to lots of men who were sickly all the time, and had to go away somewhere to be cured up again.

Q. That is because they were obstructed in light?

A. Of course, on Sixth avenue it is wider and it has a different effect there than on Greenwich street. Every merchant and property-owner on Greenwich street says it is nothing but confiscation of property.

Q. How long is it since you were there on Greenwich street?

A. Last fall.

Q. You get your ideas, I suppose, entirely from Greenwich street; that is what makes you think it is confiscation?

A. Yes, sir; even go on Pearl street, it is the same way.

Q. That is based principally upon the effect upon the light, is it not?

A. Not only that.

Q. What else do you refer to besides its being dark there so they have to burn gas?

A. Certainly it covers up their light; yes, sir.

845 Q. That is all there is to it?

A. No, sir.

Q. What else is there to it?

A. It is the effect of the noise. It makes people almost crazy, they tell me, in their heads, the constant effect of the rolling backward and forward.

Q. Who told you that there?

A. Several business men there.

Q. Did they act crazy when you saw them?

A. They say it brings the effect of it.

Q. How many men did you see there who were crazy through it?

A. I have not seen any, but they told me so. I have not seen any who were crazy.

Q. Suppose you were a younger man and you were starting out to build a flouring mill, or to equip one, would you not go and locate right alongside of a railroad, so that you could have side tracks?

A. I would, but at a bigger distance than this is from it.

Q But you would get near a railroad, would you not?

A. I would get as close to railroad facilities as possible, that is, without getting their smoke and soot and so on.

Q. But would it not be a good plan to locate a flouring mill right in the forks of a railroad, right in the junction, right between two railroads?

A. If you had room enough to be away from catching the smoke and cinders and so on.

Q. In your opinion, would it prevent you from locating a mill because a railroad ran right alongside of you?

A. Well, if it would run as close as this here, it would.

Q. Suppose it ran as close as 30 feet?

846 A. I never would locate it there, not so close as that; there is a great risk of fire there also.

Q. And you testify that on your knowledge of the business?

A. Yes, sir.
Q. As an experienced millman?
A. I am not an expert in the milling business.
Q. I suppose you know all about the business; are you not a practical miller?
A. No, sir.

Mr. BAKER: I propose to read a part of the cross-examination.

Q. You never owned a mill that was adjacent to a railroad?
A. No, sir.
Q. The nearest you ever came to anything of the kind is the steamboats on the river?
A. Yes, sir.
Q. You don't have any side track at your mill?
A. No, sir.
Q. How far is the Milwaukee yard from your mill?
A. Where the locomotives stop, that must be nearly 1,000 feet.
Q. Are there any large manufacturing institutions in the vicinity of your mill?
A. Yes, sir.
Q. And a good many smokestacks around there?
A. Yes, sir; but they are high enough to reach above.
Q. But there is a good deal of cinders, in any of the lower portions of the city here, cinders and smoke that are in the air, is there not?
A. From those factories, the chimneys are generally high enough.
847 Q. I know, but it falls down and blows around just the same?
A. Oh, yes, we have got to be careful somewhat.
Q. When the wind is right, you close the windows?
A. Well, we cannot close them all; we have to close them on that side where they come sometimes.
Q. That is when it blows from one side, you can leave the other side open I suppose?
A. Yes, sir.
Q. And you get along the best way you can?
A. Yes, sir.
Q. But it is a great deal of annoyance?
A. Yes, sir.
Q. But you never have concluded to abandon the mill business there yet?
A. No, sir.
Q. You are staying there?
A. Not on that account.
Q. You are doing a successful business in the Commercial mills?
A. I think if those chimneys were as low as the locomotives will run here, it would be different.
Q. Are you doing a successful business where you are?
A. So far; yes, sir.
Q. Can you manufacture flour of the first quality?

A. Yes, sir.
Q. And do do it?
A. Yes, sir.
Q. For how many years have you done it?
A. For a great many years; something like 12 years or more.

848 Q. This is a mere opinion on your part, is it not; the milling business could not be carried on successfully; you would not be sure that was the exact truth in regard to it, would you; it is merely your judgment?

A. I am very sure of one thing, if a track like this (pointing to the model), with locomotives passing every few minutes, running as low as that, close to our mill, we would have to give up the business; that I am positive of, because the smoke would go right into the windows.

Q. Suppose the windows are kept closed?

A. Well, if the windows are kept closed, you cannot do that always, you have to have fresh, good air in the mill.

Q. But suppose all the windows right adjacent to the street, there where the purifiers were, were kept closed?

A. But in a case of this kind, the smoke would blow all around the mill, where the track and locomotive is so low; but if you had high chimneys, it would be different; the smoke would blow off.

Again I read from page 450:

Q. You have testified in almost every case that the old depot company have ever had, have you not; in all those cases down there, in 1882, you testified, didn't you, in the old condemnation cases?

A. Only in two that I know of.
Q. What two are they?
A. That of Bigley and Parker, I believe.
Q. And Backus?

A. No, sir; in Parker's, I was on the jury; what was the other pork-packer?

Q. Belknap.

A. Belknap & Drake, I think in that case, and in Bigley's case.

849 Q. You testified in five cases, and were on the jury in one?

A. I testified only in two cases.

Q. Didn't you testify in the Backus case?
A. I could not remember.
Q. There was not any case of Belknap & Drake, was there?

A. I could not say, it is impossible for me to remember everything; it may be in the Backus case, instead of Belknap & Drake's; I am not positive.

E. L. THOMPSON, sworn for respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?
A. In Detroit.
Q. How long have — lived here?

A. Nine years.
Q. Where did you come from here?
A. From Lapeer, Michigan.
Q. How long have you lived in the State?
A. Twenty-five years.
Q. What is your business?
A. Lumber.
Q. In what branch of the lumber business are you engaged?
A. I have prosecuted it in all its branches, from the forest to the finished article.
Q. What part of the business are you engaged in in this city?
A. In the distribution and dressing and manufacturing of lumber in various forms.
850 Q. Have you a planing mill?
A. Yes, sir.
Q. Where is it situated?
A. On the River Rouge.
Q. You are engaged also in the sawing business somewhere else?
A. Yes, sir.
Q. Whereabouts is your planing mill on the Rouge?
A. Immediately west of the village of Delray on the north branch of the Rouge.
Q. What sort of business do you do in that planing mill; what do you make?
A. Almost all commodities, fine lumber, sash and doors and boxes and dressed lumber of all kinds.
Q. How far is it from a railroad?
A. It is on a spur of the Canada Southern division of the Michigan Central?
Q. You have a track in there?
A. Yes, sir.
Q. How far from the main line?
A. Perhaps a third of a mile.
Q. You mean by a spur you have a side track in there for freight to serve you?
A. Yes, sir.
Q. I suppose on the spur they do not trundle through as they do on trunk lines, with engines and locomotives?
A. They switch past us to the paper mills, the Sulphite Fibre Company and to the Seaton Manufacturing Company?
Q. Do you know Mr. Backus' mill?
A. Yes, sir.
Q. Do you know its situation?
851 A. In a general way. I am not familiar with it as to details.
Q. You have been inside of it, have you not?
A. Yes, sir.
Q. What do you say as to its character as a planing mill?
A. I should think it is quite well constructed and a substantial establishment.
Q. A very large capacity?

A. I should think so.
Q. Does some other work besides yours, in hardwood?
A. I am not familiar with that; I have understood they do.
Q. Do you know its situation relative to the Michigan Central side track?
A. I have seen them in passing there, and also from being in the yard.
Q. Do you know its relative situation as to River street?
A. In a general way.
Q. You know its situation in the rear?
A. Yes, sir.
Q. What have you to say as to the need of light in a planing mill?
A. It is very essential.
Q. Why?
A. I do not know that I could enlarge on that, only in a general way. It facilitates the prosecution of the work.
Q. You have to have light?
A. Yes, sir.
Q. In doing fine work in a planing mill, how about the need of having a clean mill and clean raw material?
A. It is essential.
Q. Is the machinery fine, edges fine?
852 A. The edges should be to do good work.
Q. Does grit affect it?
A. Yes, sir.
Q. Cinders and that sort of thing?
A. When it comes in contact with the knives.
Q. I suppose there is pretty large competition in the planing-mill business.
A. I think so.
Q. I suppose that in the course of the manufacture of this fine work, if it becomes discolored or scratched, while it will serve its place, does it affect its salable character?
A. If it were spoiled in the dressing it would be unsalable as finished material.
Q. Would discoloration injure the salable character of it?
A. It would.
Q. Could you sell first-class material if it were made first-class material; if it were discolored or scratched or marked by soot and cinders, could you sell it as first class?
A. The discoloration would not exist after it has been passed through the machine unless it were exposed to the drippings.
Q. I mean if it is exposed in any way, and becomes discolored, would it affect its salable character?
A. It would not be roughened necessarily by the falling of the dirt upon it.
Q. But the point is this, whether it must not be clean and smooth in order to be salable as first-class material?
A. Yes, sir.

Q. If it is not, if it does not have the proper appearance, it destroys its sale, does it not, as first-class material?

A. Certainly.

853 Q. Is there a part of the system in a planing mill, to handle the business, in the making of this fine material, is it a part of the business and system to keep things clean?

A. It is very essential.

Q. That is a part of the system, is it not?

A. Yes, sir.

Q. Do you know what the character of the dust formed from a planing mill is? What is the character as to its inflammability?

A. The fine dust is explosive.

Q. Almost like powder, is it not?

A. Yes, sir.

Q. This dust, even where there is a dust-room, does it accumulate in the mill?

A. If it is allowed to it will.

Q. It floats upwards into the dust-room?

A. It is carried off by an exhaust fan.

Q. But it is in the air before it gets into your exhaust fan?

A. There is some floats back in the place, but if the machines are properly operated it is usually taken away entirely.

Q. Is it a part of the business to keep the rooms, rafters and buildings clear of this dust?

A. They should be swept down once a week.

Q. Is it permitted to carry an open light or smoke an open pipe in a planing mill?

A. It is not in ours.

Q. What do you say as to the business?

A. I would regard it as a very hazardous thing to do.

Q. Because of the particles of dust?

A. Yes, sir.

Q. And to do that in any part of the mill?

854 A. Yes, sir.

Q. In working up the finer ornamental material in a planing mill do you have it dry?

A. Yes, sir.

Q. Is it put in a dryer first?

A. Yes, sir.

Q. Then it is all carefully dried and seasoned before the fine work is put under the knives?

A. Yes, sir.

Q. It is very inflammable after drying, is it not?

A. It would burn more readily.

Q. Have you looked at this model, the relative situation of the elevated structure here on this model to the buildings, as shown, and examined it?

A. Not carefully, but generally.

Q. I will put to you this question. Knowing the situation as you do and knowing the situation in reference to the Michigan Central, it is proposed to build an elevated railroad along River street, in

front of the Backus property, the structure for it spanning the street from curb to curb and going within six or seven feet of Backus' front line, less than six feet, with the sidewalk; upon this elevated structure, it is proposed to put three tracks, on this front. The structure itself is to be 14 feet in the clear, from the present roadway up to the under side of the structure. Over this structure is to be run trains, the passenger cars and freight cars, to the union depot, which is to be on the corner of Fort and Third streets, and the union depot is to accommodate the passenger trains that are desiring to come, and for the present the passenger trains of the Canadian Pacific, the Flint & Pere Marquette, the Detroit, Lansing & Northern, and the Wabash,

855 and also to pass over these tracks are to be the freight cars which do the city business, what is called the package business, that is the freight that is brought to Detroit and the freight that is sent out from Detroit by jobbers, with the exception of the heavier freight, like lumber and coal. All this business is to be done for the Detroit, Lansing & Northern, and for the Flint & Pere Marquette, as freight, the top of the tracks is to be 25 feet from the roadway. There are two switches in front. The top of the track will be about even with the floor of Backus' third story. They are to run these trains, I will say, with the ordinary care with which engineers work who are instructed to be careful of railroad property in entering depots, are run at this distance from the building, and they approach the Backus property from the main trunk line at a grade of 52½ feet to the mile. What have you to say as to what the effect will be upon the Backus property and the planing-mill business in that situation?

A. I should regard it as decidedly an injurious effect. Do you say it is 14 feet, the under side of the structure; is the section of the truss ten feet deep?

Q. It is nine feet deep.

A. Is that solid or lattice like the model?

Q. Like the model, 14 feet in the clear in front of the Backus property substantially like the model. Then beyond that, on the south side of the street, in addition to the structure, and adjoining it, there is to be built a superstructure for trams, which of course will be a closed roadway over which teams may pass, on the other side of the street opposite the Backus property, and beyond the railroad structure, 24 feet wide?

A. That would be outside of River street entirely?

856 Q. Entirely, it would take in the sidewalk and take in a portion of the Michigan Central yard. The ends of this structure, the approach to this structure are above and below Backus' place, so that the structure is a solid roadway beyond and joining the elevated railroad structure?

A. Where it comes to a grade on River street is west of Mr. Backus' place?

Q. Far away from Backus' place. Now how would that, in your opinion, affect the business?

A. I should think that the passing and repassing of trains would

be a great annoyance, besides the dropping of grease and cinders from ash-pans and other things through the structure.

Q. You understand, do you not, that Backus' mill is to be supplied through trunk gates with the raw material for use in the mill on River street, and under this structure?

A. Yes, sir.

Q. How would it affect the light?

A. I think it would obstruct it seriously.

Q. What have you to say as to the danger from fire from this proximity to the planing mill?

A. It would increase the hazard.

Q. What have you to say as to the effect of steam?

A. It would be very objectionable if there were open windows. I don't know that it would penetrate the planing mill, being so much lower down. It would affect the upper stories of their factory.

Q. Would it affect the light?

A. It would affect the light, certainly.

Q. You want a steady light in a planing mill, not a flickering light?

A. Yes, sir.

857 Q. How about the darkening or the flickering of the light from the passing of trains?

A. It would have an injurious effect.

Q. How about the effect of cinders from a train, even if they were not on fire, getting into the mill; into the mill or onto the mill?

A. It would involve additional work as well as impair the efficiency of the machinery and the profit of the work accomplished.

Q. The dropping of the oil and grease and cinders and soot on the lumber would affect it?

A. The cinders and soot would be the principal injury.

Q. You are disinterested in this matter?

A. I hope so.

Q. From your knowledge of the planing-mill business, do you think a planing-mill man would locate in that business with that structure?

A. I should not, unless most extraordinary inducements were offered of some kinds that I do not see existing there.

Q. Do you think that planing mill would be salable to a planing-mill man in that situation?

A. I do not.

Q. Have you any doubt about it, from your knowledge of the business, with the requirements and needs?

A. I should not have for myself. I could not speak of what another might judge.

Q. Do you have to have the lumber surveyed also?

A. After planing, do you mean?

Q. Before it comes in, as to quality?

A. We usually survey it after dressing.

Q. When it goes into the cars it is necessary to have it inspected?

858 A. Yes, sir.

Mr. TRAUB: What would be the relative value of the mill; what would be your estimate of the value of the plant?

A. I could not give an intelligent opinion as to that.

Mr. DICKINSON: What do you think the *affect* would be on its salable character, and the effect on the value, whatever it is—whether it is $100,000 or $50,000?

A. In other words, how much would it depreciate?

Q. Yes; give it by percentage.

A. I should say that it would depreciate 50 per cent.

Cross-examination by Mr. BAKER:

Q. How long were you in business at Lapeer?

A. About 15 years.

Q. Did you learn the lumber business there?

A. Yes, sir.

Q. Were you born and brought up there?

A. No, I was there from my majority. I was raised in Vassar.

Q. What was your business in Lapeer?

A. Lumber.

Q. What branch of the business?

A. From the tree to the consumer.

Q. Did you have a planing mill in Lapeer?

A. At Five Lakes, north of Lapeer—a saw-mill and shingle mill.

Q. Was there a town there?

A. Simply a mill village.

Q. What did you manufacture in the planing mill there?

859 A. We manufactured flooring and siding, and finished lumber and everything up to sash and doors. We did not make those; we made mouldings and casings.

Q. Where did you sell your products?

A. From the Mississippi river to the Atlantic ocean, I should say.

Q. How did you ship it, by rail?

A. Yes, sir.

Q. No navigable stream?

A. No; an interior mill—railroad mill.

Q. Your experience was in the country where there was no navigable stream?

A. In that instance.

Q. So that the logs and lumber had to be handled, and the products, as you manufactured them, had to be shipped by rail?

A. Yes, sir.

Q. You were not in the business before the railroad was built?

A. No, we built a railroad to reach the place.

Q. Where did that railroad run from?

A. Fish Lake.

Q. Operated as a railroad?

A. Yes, sir; operated by the Michigan Central, or rather the Detroit & Bay City, at that time.

Q. I suppose you still manufacture lumber there.

A. No, sir.

Q. The logs have all been used up?
A. Ten years ago nearly.
Q. When did you come to Detroit?
A. I came to Detroit in March, 1882.
Q. Was Mr. Backus running a planing mill here then?
A. Yes, sir.
860 Q. Did you build a new planing mill, or buy an old one?
A. We built a new one when we built; but we did not build until 1884.
Q. What did you first do here?
A. I simply made this my residence, and I sold our products in Chicago; had a yard there.
Q. You continued your Lapeer business?
A. No; we continued our new business in the upper peninsula; we had a mill there.
Q. You had no business here?
A. No business here, except my residence here for two years.
Q. In 1884 you located a planing mill and built one?
A. Yes, sir.
Q. What else did you locate on the Rouge?
A. Our storage yard for receiving and piling the product of our mill.
Q. Have you a lumber yard there?
A. Yes, sir.
Q. Is it located on the navigable part of the Rouge?
A. Yes, sir.
Q. So that you can load vessels there?
A. Yes, sir.
Q. Is that the Delta Lumber Company?
A. Yes, sir.
Q. How large a yard have you?
A. About 14 acres.
Q. How many million feet of lumber have you in the yard now?
A. We have nine million in stock, and I think about a million and a half is at the Gratiot Avenue yard.
Q. How far are you from the Michigan Central line?
861 A. About a third of a mile.
Q. Who built the side track into your place?
A. The Michigan Central.
Q. At your request?
A. Yes, sir.
Q. Was it there when you located there?
A. No, sir.
Q. Have any manufacturing institutions been built up beyond you since?
A. The Sulphite Fibre Company and the Sutton Manufacturing Company, both.
Q. Did the Michigan Central extend the side track into them?
A. Yes, sir.
Q. So there are two large manufacturing institutions beyond you on that side track?

A. Not on that side track; they turn off on our premises and go to the westward.

Q. That side track goes into your yard, and they have a branch beyond going to theirs?

A. Yes, sir.

Q. How many cars do those other institutions have in a day?

A. I am not able to answer that question.

Q. A number every day?

A. Yes, sir.

Q. How many cars do you receive there daily?

A. We receive very few; we ship away; ours is nearly all brought in by vessel.

Q. What proportion of your lumber is brought by rail?

A. Two or three per cent., perhaps.

Q. How is it in the winter time?

862 A. We take in a stock in the fall to last us. We are supposed to do so at least.

Q. But do you take in some by cars?

A. Yes, sir.

Q. Where does it come from?

A. Various points in Michigan and elsewhere.

Q. Have you a place on the navigable water where you receive your lumber?

A. Yes, sir.

Q. And that is where you get your stock from?

A. Yes, sir.

Q. I suppose at the present time, the lumber that is manufactured upon navigable water is somewhat limited, is it not; you have to go back further for it than formerly?

A. Have to go further back for the logs.

Q. Is there not a large amount of lumber in this State that it is necessary to handle by rail?

A. There is less of it now than four or five years ago.

Q. There is considerable of it yet?

A. Somewhat.

Q. Is it customary to manufacture lumber in the interior and to carry it on cars to navigable water, then load it into vessels and take it to manufacturing points?

A. That is practiced, but I think there are more than three times as many logs drawn to navigable waters as manufactured lumber.

Q. Take lumber manufactured in the upper part of the lower peninsula, if it is once loaded on cars, would it be economical to take it to Chicago without loading it on vessels?

A. It would go directly to its destination if it were loaded on cars.

863 Q. Suppose that you are engaged in the lumbering business in the central part of Michigan, and you have lumber bound to Detroit, where it is going to be manufactured, in your mill or in Backus'; you would bring it down in cars, being once loaded, and not take it to Saginaw and ship it?

A. We would bring it down by cars.

Q. What proportion of your output goes away in vessels?

A. There is not really any of it, except a few scow-loads go to the Pointe or to the flats.

Q. Where do you sell your products principally?

A. From the western line of Illinois to Maine.

Q. You do not go west of Illinois?

A. We do not go west of the Mississippi river.

Q. From the Mississippi river to Maine you cover the entire country?

A. We sell in all that country; we do not cover it all.

Q. About how many million feet of lumber do you manufacture into products in your mill annually?

A. Twenty-two or twenty-three million feet.

Q. You manufacture that lumber into what sort of products?

A. I understood your question to allude to the saw-mill.

Q. No, I am talking about the planing mill.

A. Our planing mill would handle about 60 per cent. of that product. The balance would be lumber sold in the rough.

Q. About how many million feet of lumber do you take into your yard annually?

A. From 24 to 26 million.

Q. You put out how many million?

A. The same as we take in.

864 Q. You either send it out as lumber or manufacture it into a manufactured product of some kind?

A. Yes, sir.

Q. What are those products, what do they consist of?

A. We make doors, we do not make blinds—doors and sash and casings and mouldings and ceilings and flooring and finishing of all sorts, and decorative shingles, etc.

Q. Have you a large local trade in Detroit?

A. We have a fairly good local trade.

Q. Detroit could not consume a fifth part of your product?

A. Probably 20 or 25 per cent.

Q. Is a quarter of your product sold in Detroit?

A. Yes, sir.

Q. Is it used here?

A. Yes, sir.

Q. Would it be practicable to carry on your business down there, carry it on successfully without railroad facilities?

A. It would not.

Q. And you use those facilities principally in shipping your products?

A. Yes, sir.

Q. In shipping things of this kind to Maine, New York, and so on, would it be practical to load them into vessels and take the lumber part of the way and then go on by cars, would it be economical?

A. It would not be economical.

Q. You have your mill there to make finished products of some kind?

A. Yes, sir.

Q. It would not be economical to undertake to ship it by vessel, would it, unless it was bound for some lake port?

865 A. No, it would not.

Q. If it was to be used in the interior of the State of New York, you would not ship it by vessel to Buffalo and by rail to destination, would you?

A. If the lake vessel could go through the canal?

Q. I say off from the canal?

Mr. CHAREST: Can't we save time and leave the canals alone. There are a great many questions that I don't see what you are driving at.

Mr. BAKER: Perhaps some of the other jurors can. I think I will examine the witness and find out some of the facts that I want to rely upon. What I am trying to show — that it is impossible for Mr. Backus to do this business without using the railroad, and that the railroads are of more use to him than injury, and this very road would be.

Mr. CHIPMAN: Why don't you ask him if he has got all the railroad facilities he wants already; whether he would like to have more come there?

Mr. BAKER: I have established already by this witness that Mr. Backus has not got all he wants, if you will pay attention to the facts that he has testified to.

Mr. CHIPMAN: I have not heard any such testimony.

Mr. BAKER: Simply because you do not want to hear it; you do not want to understand it.

Mr. CHIPMAN: We will see when we get to the jury.

Mr. BAKER: That is just where we will see.

Q. In your yard I suppose you pile the lumber from the vessel into the yard?

A. Yes, sir.

Q. And then you use it daily by taking it to the mill?

A. As required.

Q. How do you take it to the mill?

866 A. On trucks.

Q. You have tramways?

A. No, plankways laid on the ground, and we use a two-wheel truck.

Q. Without horses?

A. With one horse.

Q. Is it a tramway?

A. It is not a tramway—an elevated passage.

Q. It is not necessarily elevated, is it?

A. With your definition, it is a tramway.

Q. What I want to get at is, do you haul it on an ordinary truck such as runs in the street?

A. No, sir.

Q. You have tramways that run on the surface of the ground?

A. Yes, sir.

Q. But they have wooden rails?

A. No, no rails on them.

Q. Describe it.

A. It is simply a plank road, and we use a two-wheel vehicle that we put about 1,200 feet of lumber on, and we have a pair of shafts to which the horse is attached. They call this the morman, and he catches onto the trucks and draws them to the mill.

Q. How many horses do you use at that work?

A. We use two horses for supplying the mill.

Q. Do two horses do the work?

A. They haul what is drawn into the mill.

Q. Most of your lumber goes into the mill?

A. 50 or 60 per cent. of it. It is a two-wheel truck, a cart with a frame on it.

Q. How deep are the wheels?

867 A. Three feet high.

Q. A broad wheel?

A. Four-inch tires.

Q. And these trucks hold about 1,200 feet?

A. Yes, sir.

Q. And you haul 50 per cent. of the lumber in your yard into the mill with those trucks with those horses?

A. Yes, sir. You understand those trucks are not unloaded. They are drawn in there and the load is left upon them until it is run through the planer. We have 150 of those trucks.

Q. How do you load the cars?

A. After the lumber is dressed it is put on these same trucks as it comes from the machine, and it is carried to the car door, wherever the car may stand along in the shed.

Q. How close do the cars stand to the mill?

A. They run through the edge of the mill.

Q. So that they are covered by the roof?

A. Yes, sir.

Q. Is that an economical way of handling the lumber and the products?

A. We regard it as so.

Q. And you do all that with two horses?

A. After the lumber leaves the planer we do not use the horse. We haul all the lumber into the mill with two horses.

Q. When you haul the trucks to the car door, you do it by hand?

A. Yes, sir; it is on a level, smooth floor.

Q. How high are the wheels?

A. The same trucks.

Q. Is 1,200 feet about the capacity of that?

868 A. No, they will carry a great deal more than that, but they are too heavy to handle.

Q. You can handle them conveniently with about 1,000 or 1,200 feet?

A. Yes, sir.

Q. You have a large engine there, I suppose, and a boiler and a dust-room?

A. We have a shavings-room.

Q. What kind of a dust-arrester have you?

A. One known as the Allington, made at Bay City or Saginaw—a centrifugal machine.

Q. How is that constructed?

A. The shavings and dust and all the air coming from the exhaust pan goes into the side. It is on a scroll, and as it is thrown around on the inside it escapes out of the top; the dust and shavings pass through the pipes into the shavings vault.

Q. Do you use a great long apparatus covered with burlap?

A. No, sir.

Q. Did you ever use any such thing?

A. No, sir.

Q. Is this dust-arrester of yours a good practical machine?

A. It does our work with entire success.

Q. How do you take the dust from the machine?

A. It is taken out near the top with a small pipe, six inches in diameter.

Q. One on each machine?

A. We take it up into conductors into a main trunk line.

Q. How do you force it through the conductors?

A. By an exhaust fan.

Q. How many conductors in the room where you work?

869 A. Our planing mill is all one room.

Q. How many stories high is your planing mill?

A. One.

Q. You have over each machine a pipe by which you can conduct the dust to this dust-arrester?

A. The dust includes the shavings, and they go into a conductor, a conveyor, that carries it to the shavings vault.

Q. Where is the dust-arrester located?

A. On top of the shavings vault.

Q. How far from this main room where you have all your machines?

A. One hundred feet, say.

Q. You carry it through a long pipe?

A. Yes, sir.

Q. What is the diameter of that pipe?

A. 26 by 30 inches square.

Q. This is a metal dust-arrester?

A. Yes, sir.

Q. How large is it in diameter?

A. Probably 16 feet across.

Q. Is that all?

A. At the largest part, and there is another part above it not so large, where the fine dust is collected.

Q. Is that round or square?

A. It is round; it is on a scroll—not a true circle, but a reducing circle.

Q. Does that distribute the shavings and the dust—what does it do to the shavings?

A. They collect the shavings in the bottom part of the device, and they pass through a pipe a foot in diameter into the shavings vault beneath, and the dust passes through the same vault, through another pipe, into the top of the dust-arrester.

870 Q. Is the dust-arrester inclosed; is it tight all the way around it?

A. Yes, sir; a large aperture at the top.

Q. Do any of the shavings go out?

A. They do if it gets stopped up.

Q. But if it works the pure air goes out?

A. Yes, sir.

Q. Any smoke or anything escape from it?

A. I think I have seen a fine dust blowing out at times.

Q. But it is almost invisible?

A. It is practically so; you have to look very close to see it.

Q. How long have you used this dust-arrester?

A. I am unable to say, probably four or five years.

Q. Who put it in for you?

A. The manufacturers.

Q. Where do they reside, the Allington machine? You never used one of these machines 40 or 50 feet long, and composed of spaces that are covered with burlap?

A. No, sir.

Q. So that you have no knowledge as to whether they are a proper dust-arrester or not?

A. I have not.

Q. Is this dust-arrester that you have in general use?

A. There are a large number in Michigan. I could not say that it is the largest.

Q. Are they in use in other places in this city?

A. I think they are.

Q. Whereabouts?

A. I think one or two of the furniture factories, and Vinton & Company have one.

Q. Down here on the Milwaukee road?

871 A. Woodbridge street.

Q. There is a planing mill right in the junction on the Michigan Central out here at their junction with the Bay City road, is there not?

A. Yes, sir.

Q. Do you know what they use?

A. No.

Q. Do you know what they use at the Peninsular car works?

A. I do not.

Q. But you do know that there are a number of these small metal dust-arresters in use in this city?

A. Yes, sir.

Q. You have used yours four years successfully?

A. Entirely so.

Q. You say you have run a planing mill at Lapeer, or at Fish Lake, and you have run one in Detroit since 1884; I want to ask

you this question, whether you think a planing mill can be successfully conducted, taking the present competition that exists in the business, the struggle which almost every kind of business has to sustain, do you think a planing-mill business can be successfully conducted where the lumber yard is half a mile or more from the mill, and the entire product, the entire lumber that is fed to that mill has to be hauled by teams?

A. It would be hardly fair to answer that question.

Q. It does not make any difference whether it is fair or not. I want to know whether you think a business, considering the present situation of the business, the location of lumber and the location of the places where the product is to be sold—I want to know whether in your judgment a planing mill can be successfully con-
872 ducted where the lumber yard is a half a mile from the mill, and every foot of lumber that is taken to that mill has to be hauled by teams?

A. It simply costs so much more to get the lumber into the mill. If it costs 50 cents to put it in from a half mile it might cost 20 cents to put it in from 50 rods, so the difference in the cost would be the difference between the longer and the shorter haul.

Q. Suppose a man could save 20 cents a thousand on every thousand feet of lumber that he manufactured, he could do a successful business, could he not?

A. If he did not lose it somewhere else.

Q. To go back to my question, do you think that you could take the Backus mill and the yard, just as it is located, and run it in competition with your mill at Delray?

A. Where would you mean to sell the product?

Q. Sell it wherever you can.

A. If we were going to ship the product by car we could do a cheaper business; but if we were going to retail the lumber it would operate on the other side.

Q. I don't suppose the city of Detroit would use one-quarter of the product of the planing mills in this city?

A. No, I don't think it would; I don't know that the wholesale trade of Detroit is as large as it was four or five years ago.

Q. Any one mill could produce all that is wanted here?

A. No.

Q. How many mills would it take?

A. I guess there are 100,000,000 feet of lumber used in Detroit, and I don't think any two planing mills could handle that amount of lumber.

Q. Rough and dressed?

873 A. Yes, sir.

Q. Then you concede, do you not, that any mill that is located here has to depend largely upon a trade outside of Detroit?

A. For 50 per cent. of their product, they would.

Q. They depend upon shipping it elsewhere?

A. Yes, sir.

Q. As far as that trade is concerned, could the Backus mill compete with your mill?

A. I should say not, everything else being equal; they have as good railroad facilities, but we have better dock facilities.

Q. They would be losing every year all the time whatever it cost to handle the lumber between those two yards, would they not?

A. Yes, sir; we have more yard adjacent to the dock; we do not have to haul back as far.

Q. You have more frontage on the river?

A. Yes, sir.

Q. You located this yard just as intelligently as possible to do a successful business?

A. I tried to.

Q. There are planing mills and box factories at Bay City?

A. Yes, sir.

Q. And at Saginaw?

A. Yes, sir.

Q. And at Chicago?

A. Undoubtedly.

Q. Have they such institutions in Toledo?

A. I think they have.

Q. And Cleveland?

A. Yes, sir.

874 Q. It is a business that prevails generally in this country, almost every town has an institution of that kind?

A. Yes, sir.

Q. So that there is a great deal of competition in the business, nobody monopolizes it?

A. No, sir.

Q. You never formed a trust to unite all these mills?

A. I have never heard of any?

A JUROR: Had not the cost of 17 acres on the Rouge something to do with your location down there?

A. It had somewhat; we wanted lots of room.

Q. If you had to buy 17 acres in the city?

A. We would not do it.

By Mr. BAKER:

Q. You have that advantage in addition then?

A. Yes, sir.

Q. Would it be advisable down there where you are, where land is cheap, to put your yard a half mile from your mill?

A. I should prefer not to do it.

Q. You compete with Mr. Backus in everything except box chutes?

A. I don't know that we compete; we are in the same line.

Q. Do you make box chutes?

A. To some extent.

Q. Do they go all over this country the same as the other products?

A. No, they mostly go to the South, towards the Ohio river.

Q. Have they institutions in Chicago that make box chutes?

A. I am not able to answer that intelligently.

875 Q. Are you able to compete with the Chicago manufacturers?

A. We have never run against them; the Bay City are the hardest people we have to meet.

Q. They are the toughest competitors you have?

A. Yes, sir.

Q. Are the planing mills in Bay City advantageously located?

A. Yes, sir.

Q. Have any of them a yard a half mile from the mill?

A. No, I guess not in that case; in one instance, Ross, Bradley & Co. haul all their lumber into their yard from the dock.

Q. It is perfectly practicable, is it not, in running a lumber yard, to take the lumber and handle it with those trucks, if your yard is properly located?

A. Yes, sir.

Q. So as not to have a large number of teams?

A. Yes, sir.

Q. And that is the economical way of doing it?

A. Yes, sir.

Q. You know Mr. Backus' yard at the foot of Eighteenth-and-a-half street?

A. I pass it frequently.

Q. It has 400 or 500 feet frontage on the river?

A. Yes, sir.

Q. And a couple of slips that run into it?

A. Yes, sir.

Q. Would there be any difficulty in using these trucks?

A. I don't think that there would.

Q. There is about seven acres in his yard, is there not?

A. I could not say.

876 Q. Something like that?

A. Probably.

Q. Mr. Dickinson put a hypothetical question to you; do you think you understand this exactly how this elevated railroad is to be built in that street?

A. I have simply seen that portion which they have erected; I drove by it yesterday.

Q. You have seen that portion that is in the yard down there?

A. Yes, sir.

Q. Do you realize that the superstructure is to leave the street entirely open, as far as teams going up there is concerned, the ingress and egress will be just the same as it is now?

A. I cannot say, but I think it will be just the same.

Q. Why?

A. Because of the columns that support it.

Q. Suppose that the columns are so placed that they do not interfere in any way, they span his gates, and the telegraph poles that are there now will come out and a smaller obstruction be put in the place, and the superstructure is higher than the timber across his gate?

A. That would reduce it.

Q. Can you tell us where there would be any obstruction to teams under such circumstances?

A. I don't think they will encounter any obstruction in the columns if they are placed as you state.

Q. In your estimate you make it on the theory that his teams would be incommoded in some way?

A. Yes, sir.

Q. You also think his light would be affected—what do you base that on?

877 A. On the height and breadth of the section of this structure.

Q. Do you know how far the superstructure will be from his building?

A. No, sir.

Q. Do you know that it will be between 30 and 40 feet?

A. If that is what the thing measures.

Q. You did not think it was as far as that?

A. I could not say as to that.

Q. Did you know that after that structure is erected, except a very short time early in the morning, it won't even throw a shadow on his premises?

Mr. DICKINSON: We object to that statement.

Q. Did you realize that, except when the sun is very low on the horizon in the morning, that that superstructure will not even throw a shadow?

A. I never gave it any consideration, never stood on the premises to look at it.

Q. You assume that his light is going to be seriously interfered with?

A. I do.

Q. If it is not to be seriously interfered with, you would change your estimate, would you not?

A. I cannot see how it is going to be otherwise.

Q. Suppose it is otherwise?

A. If it is otherwise, of course the depreciation would be less in that regard.

Q. Do you understand that this ten feet of superstructure, as Mr. Dickinson saw fit to refer to it, is to be a solid structure, the entire width of the street?

A. I asked the question, and I understood the answer to be that the lattice-work shown on that plan was the kind to be used,

878 but following that is the viaduct that has to be closed in.

Q. But the viaduct is on the other side of the street, and mostly out of the street. It was stated in the question that was put to you, that this was going to be 10 feet deep, and solid right across the street?

A. Yes, sir.

Q. That is the way you understood it?

A. Not being solid. Ties were to be laid some distance apart, so that sunlight can pass through.

Q. Do you understand that the only thing that will be built in the street will be in the first place lateral girders that run from post to post across the street, and that the bottom of those girders will be 14 feet above the street level, so that there is a girder made out of plates of iron running across the street, with nothing between the girders, and longitudinally on top of those girders will be strung longitudinal girders upon which the ties will be laid?

A. What length of span?

Q. Thirty-five feet. And the ties are to be six inches apart, and while there are to be three tracks for most of the distance, there will be a space of about four feet between the tracks, so that the daylight and sunlight can go right down through, and the sides are open, so that we simply have an elevated structure that is surrounded by light. Will you just tell this jury how you think that is going to affect the light in Backus' mill?

Mr. DICKINSON: You forgot to mention about the pans under the track.

Q. I am glad you referred to that. There are pans to be erected between these longitudinal girders. Those pans and the
879 girders will occupy between five and six feet. They are put there for the purpose of catching the drippings and the things you are so afraid of. Suppose that is there?

A. It would seem that the access to the light is limited under those conditions.

Q. Does it appear limited?

A. It does to my mind.

Q. Can you conceive that there would be a deficiency of light in a structure that is 14 feet high and is open on the sides, and has four-feet spaces, two of them through the roof?

A. Yes, sir; I can conceive of it.

Q. Suppose you took out the sides of this building and put in posts 35 feet apart; suppose you took out the sides of it there, and this side, and put in posts 35 feet apart, and left the roof just as it is, the ceiling just as it is, and you opened two strips through the roof there four feet wide, went right through to the sky; now, do you think that when people were in the room, in that situation, there would be a deficiency of light?

A. Well, is not this higher?

Q. Say it is only 14 feet high?

A. I should think there would be; the higher the structure the more freely the light would come in.

Q. But suppose the sides were taken right out and columns put in 35 feet apart, would it have a great effect in the light?

A. It would not have a great effect on the light when the cars were off it, perhaps; the cars on there would darken it very considerably; they are far from being transparent; they would effectually close it off.

Q. But they go by in a very few seconds?

880 A. Ordinarily.

Q. They are only there a moment. Now do you think, as a practical planing-mill man, that such a structure, with cars run-

ning over it, would ever interfere with a single workman in that mill?

A. I do.

Q. To what extent; what is it in the mill that he could not see, that he would have seen if the superstructure of the railroad was not there?

A. Let me illustrate: Suppose he was fixing a matcher to make flooring, he would have necessarily to have a fine adjustment; he is working at that, and a train comes along and he stops his work.

Q. How long would he stop?

A. I don't know how long the train takes to pass.

Q. How long would it take a train at ten miles an hour to go 238 feet?

A. Perhaps not over a couple of minutes.

Q. Do you think it would take that long? At that rate how long would it take to get to Chicago?

No answer.

JUROR: If you were obliged to change your location, and the Backus mill with the viaduct in front of it was to rent; two blocks away from there was a mill made the same as the Backus mill, to suit your business the same as the Backus mill, without the viaduct—which one would you rent?

A. The one you have last described, most certainly.

Q. Without the viaduct?

A. Yes, sir.

Mr. BAKER: You think that if there was a mill there that had no railroad facilities in front of it, you would prefer it to one that had?

881 A. That was not the question that the juror asked.

Q. Do you assume that no use could be made of this elevated road?

A. I do.

Q. What do you base that on?

A. Because it is on a grade so high up.

Q. What is the grade of the proposed elevated road in front of the Backus mill?

A. I am told 52 feet in a mile.

Q. You don't know what it is yourself?

A. No, sir; not of my own knowledge.

Q. Do you know of any reason why an elevated side track could not be put in in front of his property on a level so that cars could stand on it?

A. No, sir; it could certainly be done with sufficient outlay.

Q. So that a side track could be put in there. Now, do you think that the way railroads are run in this country, Mr. Backus has got all the railroad facilities he wants with the Michigan Central?

A. I should think he had.

Q. What makes you think so?

A. Because he has never failed to get his goods shipped, I understand.

Q. But they have to go out under the control of the Michigan Central to the junction at least, don't they?

A. Yes, sir.

Q. Now, sometimes it is important in your business to make a quick shipment, is it not?

A. Sometimes, yes, sir.

882 Q. And if you have direct communication with a road -hat is going right down to the point of shipment, it is an advantage, is it not?

A. It would not be if you had to elevate your goods to the top story.

Q. Suppose you didn't have to elevate them; suppose when you manufactured them you had simply to slide them down?

A. Then I would have the lower one even.

Q. Suppose your mill was so constructed that the product went out of the mill on a slide, would it make any difference; suppose you had the Backus mill there, three or four stories high; do you understand, or do you testify, as a practical millman, that it would make any difference to him, any practical difference, as to which floor he loaded his product on?

A. It would depend upon which floor he finished it on.

Q. But if he finishes it up a story, he can load it there just as well as to slide it down and load it there?

A. Yes, sir.

Q. So, can you see any physical difficulty in Mr. Backus using a side track alongside of this mill?

A. Let me explain; I do not think he planes his lumber in the upper part of the mill—his dressed lumber, boxes, etc., that is what he loads on cars.

Q. But his planing machines are on the first floor, are they not? Do you know that the first thing he does with his lumber is, he puts it right through those planing machines and then puts it through some rollers that he has there, and slides it to the top story of his mill?

A. I don't know that he does that. What does he do that for?

883 Q. He does it to put it in a place where he can manufacture it into box chutes.

A. My proposition is that he ships dressed lumber, that he does not have occasion to elevate.

Q. But his product, his principal product there is largely in box chutes, and he sends a great quantity of lumber to the roof?

Mr. DICKINSON: He does not testify to that.

Q. Now, a mill that is constructed in that way with these rollers that catch a board, and they keep on going back and forth there until they get in the top room; then he commences to work on it, and finally he makes it into box chutes, and they come down; now, do you think it would make much difference to him which story he loaded them into cars on?

A. As I said before, it would depend on where he finished them.

Q. He could finish where he saw fit, could he not?

A. I suppose he could, but it might not be equally convenient.

Q. It might not be quite so convenient; but do you think there would be any physical difficulty in adapting his mill to suit the situation?

A. I could not say as to that.

Q. Don't you know that it would be a great advantage to him to be enabled to ship directly over the Wabash road to St. Louis and to Cincinnati and to Indianapolis?

A. That would depend on whether he had orders for those places or not.

Q. Suppose he had orders?

A. It would be.

Q. It would be a great advantage, would it not?

884 A. I would say it would be an advantage.

Q. And suppose he was doing a hardwood business, would it not be an advantage to him to bring hardwood from the hardwood country of Indiana—northern Indiana?

A. It might facilitate the delivery of it.

Q. You know that his yard is located at Eighteenth-and-a-half street, with the Wabash road running through?

A. Yes, sir.

Q. And that that track down there is to be connected with the union depot to run on this elevated road, right in front of the Backus property?

A. Yes, sir.

Q. And it is practical to put in a side track there for his use, and have his lumber partly elevated, so that he would not have to slide it through those rollers quite as far. Do you know of any reason why he could not use that railroad instead of teams to haul all his lumber from his yard?

A. If they do the work for him for nothing.

Q. Suppose they would charge him less than it would cost to do it with teams?

Mr. DICKINSON: We make an objection, and will take an exception.

Q. As Mr. Dickinson objects, I will put this question to you: Don't you know that the railroads could handle his lumber from his yard to his mill if a side track were built in like that, and could do it cheaper per thousand than it is possible to do it with teams?

A. Do you include in that the loading on the cars at the initial point?

Q. Using the same force to load that he now uses, he could load onto the cars with trucks, as you load, could he not?

885 A. Yes, sir.

Q. There would be no trouble about that, and it could be hauled right up to two or three cars, and stood in front of his mill, and the lumber moved from the cars right onto his machine?

A. That could be done.

Q. Is it not your judgment, as a planing-mill man, and with

your knowledge of the business, that it could be done by the railroads cheaper than it is possible for Mr. Backus to do it with teams?

A. No, sir; because every time you handle lumber you very much increase the expense; you would be obliged to handle it on the car, and off the car again. When you put it on the truck it is not handled again until it gets to the machine.

Q. It would still be more expensive than your system?

A. Yes, sir.

Q. But would it not be less expensive than his present system?

A. I would not say as to that.

Q. But even then it would be more expensive than your system, would it not?

A. It would.

Redirect examination by Mr. DICKINSON:

Q. Do you think there is a railroad with three tracks—four railroads with three tracks—running over it, connecting with the union depot, doing the business of four great roads, that could make a deal that would be satisfactory to a business man, to haul all his freight for half a mile?

A. I should not expect them to.

Mr. BAKER: They do it every day.

886 Q. Haul all his freight from his lumber yard up to his mill, and fill that track up with the business as he wants it; do you think that would be practicable?

A. Shippers usually have a great deal of difficulty in getting cars and getting switching.

Q. And you have had some experience throughout the United States with the long and short haul?

A. Yes, sir.

Q. Do you think you could make any terms with a railroad to do all your hauling for half a mile?

A. Not if they did it with a profit.

Q. If you had a switch up from Backus' lumber yard, do you think you could always get a car in when you wanted it, and not convert your planing mill into a lumber yard, using the tracks as they do?

A. In our experience, we always have to provide a day ahead at least.

Q. As you want your lumber in a lumber yard, you know the kind you want, and you have to have a lumber yard in which to do the inspection and sorting; a lumber yard is essential?

A. Yes, sir.

Q. And that is usually done, the sorting and the inspecting and putting into piles, so that you can give an order from your mill for what you want, and it makes it necessary to have a yard for that purpose?

A. That is generally the case.

Q. And then you give an order from your mill for what you want, and then the truck goes and takes it?

A. That is the way it is usually.

Q. And then it is fed from your truck as you need it?

A. Yes, sir.

887 Q. Do you think it is practicable to get that business done by a railroad—a railroad running in an elevated situation?

A. I do not.

Q. How many of those trucks do you have at one time in the mill?

A. I would have to give a random answer to that; I could not say definitely, but it would be anywhere from 12 to 20 or 30.

Q. For use inside?

A. Yes, sir.

Q. You have been asked about the difference in the cost of having his lumber mill down on the dock and this distance from his planing mill. Do you know whether it makes any difference in the insurance rate whether your lumber yard is adjacent to your planing mill?

A. I do.

Q. Which way is the insurance?

A. It decreases it to have it removed.

Q. I do not want to inquire into your private business, but your lumber yard is quite adjacent to your mill, is it not?

A. One hundred feet away.

Q. What rates do you pay?

A. $2.75, 2¾ per cent. If we were in the city limits we would have a reduction of 25 cents.

Q. But the remoteness of the lumber yard affects the insurance rates?

A. I think $2.25 is the minimum rate, however.

Q. In regard to your railroad facilities, in practical business, you want to sell a load of lumber, you have an order for a load of dressed lumber to ship from your mill, down on the

888 Wabash or on the old Butler road anywhere, what do you do?

A. We usually order the car the first thing from the Wabash.

Q. They send it in over the Michigan Central track?

A. Yes, sir.

Q. Can you switch by the Wabash, the Flint & Pere Marquette, the Detroit, Lansing & Northern or the Canadian Pacific, or any road that runs in Michigan, over that side track?

A. Yes, sir; for competing points they absorb the switching.

Q. To non-competing points they do not. You are not obliged to pay to competing points for switching; they are always glad to get a load from you?

A. Yes, sir.

Q. On any road?

A. Yes, sir.

Q. That is the practical way the business is done?

A. Yes, sir.

Q. Will you tell me whether you have not all the railroad facilities at your mill that you want?

A. Yes, sir; we have.

Q. With one switch?

A. Yes, sir.

Q. Do you know that the law requires every road that comes here to give you connection?

A. Yes, sir.

Q. And it is your right to load a car there and have it go over any road that enters Detroit?

A. Yes, sir.

Q. Do you know Mr. Backus' railroad facilities?

889 A. He has the same as we, I understand, with the Michigan Central.

Q. Have you any reason to think that he has not all the railroad facilities he wants?

A. I think he has.

Q. Would you in his place require any more?

A. I cannot see why I should.

Q. Would you require any new switching by the Wabash road at your place?

A. I would not want it if I had to give the ground for it.

Q. It is not of sufficient importance to you to have any other switch than what you have?

A. No, sir.

Q. Now, Mr. Baker thinks that Backus is kind of running his business there in a way that is not a good way—running a lumber yard that is about half a mile away from his planing mill; he thinks he could run it better for him; he thinks he could plane a great deal more, and make more money; you know the situation of his storehouse on Fort street also?

A. Yes, sir.

Q. Do you know what it costs him for a load of lumber to get up to his planing mill, with the site he has?

A. No, sir.

Q. Per thousand feet?

A. No, sir; I could not say.

Q. Do you remember what it costs you?

A. We don't figure that way. We charge the team service in the hauling of lumber from the yard as a planing-mill expense, and that includes the dressing, and I could not divide it up.

890 Q. Would it occur to you that ten cents a thousand feet would be pretty cheap transportation?

A. I should think that was cheap.

Q. You would consider it cheap if you found that was what it was costing you at your place?

A. Yes, sir.

Q. Do you think Mr. Backus' position in having his lumber yard near the center of the city for city trade, is better than it would be down at Eighteenth-and-a-half street?

A. The difference in hauling would not be material.

Q. But do you think his proximity for orders, in having his planing mill near the center of the city, is better?

A. It would be an advantage.

Q. Do you receive your lumber by water?

A. Almost entirely.

Q. And you know that Backus does, and that he requires a water front?

A. Yes, sir.

Q. His planing mill is situated relatively about right for his business, and his whole plant, with his storehouse and his lumber yard, is it not?

A. I think it would be better with his storehouse adjoining his mill.

Q. Do you think it would be better with his lumber yard adjoining his mill?

A. With the ground costing as much as it does there, I would not say so.

Q. Would there be any more risk from fire if he put his storehouse near his mill?

A. No, sir.

Q. Does he not gain on his insurance for his storehouse by having it remote from his mill?

891 A. Yes, sir.

Q. What do you think would be the advantage of having the storehouse near his mill?

A. In the teaming and the maintenance of the additional office at his storehouse.

Q. You have what is called the Cyclone dust-arrester, dust machine, and you have on your dust machine used about 15 horse-power, have you not?

A. On the fan you mean? We do not use any power on the dust-arrester.

Q. But I mean in the exhaust.

A. The exhaust is 35 horse-power in our mill.

Q. And you find, do you not, that the dust from your dust-room comes out through those spaces to some extent; it comes upon the slats and upon the buildings outside to some extent—the fine dust?

A. It is very limited; the wind blows it away.

Q. But it does come out?

A. I presume so, but very little; although it is not visible.

Q. You don't mean to state or set up that your dust-arrester is better than the one that Backus uses?

A. No, sir.

Q. Do you know that the Backus dust-arrester, the same one, is used in a number of mills in the country?

A. I have heard so.

Q. And it is said to be the best?

A. I have not heard anything said about it, except by Mr. Backus; he said it was a good one.

Q. You have examined that model?

A. Casually.

Q. Have you ever studied the law of light as a science at all?
892 A. No, sir.
Q. Do you know from your experience that as the atmosphere is, without regard to the sun being sighted, whether it is on this side of your building or on that side, do you know that the law is as to light, that as your view of the atmosphere itself is obstructed, so is your light obstructed?
A. Yes, sir.
Q. Do you find that is true?
A. Well, yes, I should say so, generally.
Q. Now, we will say if, across here, 200 feet away, that gray-stone building there, probably 200 feet away or more, should be higher, so that it would obstruct the windows, obstruct our view of the sky, below the curtains, or obstruct our view of the sky, as we look from the window, would it affect the light in this room?
A. I would not say that it would so far away; it would affect the light in the street; we have that in the Moffat building, with the Hammond building opposite.
Q. As you look across there?

Mr. Dickinson then goes across the court-room and pulls down the curtain of the window next to the southeast corner of the room, and then asks:

Q. Can you see the building?
A. Yes, sir.
Q. Can you see the sky?
A. No, sir.
Q. Now, that is a pretty extreme test. Now, will you stand here (down out of the witness-box), irrespective of the light from that window, does the fact that your view of the sky is there obstructed, darken this room?
A. I think it does.
Q. And does it darken it more the more you retreat from the window, as you go back here?
893 A. Yes, sir.
Q. If you bring that building within 50 feet of you it darkens it more and more?
A. Yes, sir.
Q. And would any object, introduced between your vision and the sky, darken the light proportionately?
A. As that demonstrates, it would seem to do so.
Q. Now you have examined that structure here, the model, have you not?
A. Yes, sir.
Q. We have not put it in evidence, by proof, by its proper proportions with the engineer's plans. Now, with the structure as it stands, without the cars, with dust-pans under every track, solid, standing in the proportionate proximity to this building as it stands there, and the scale is 5 feet to the inch, have you any doubt that, with that structure standing there on the curb of the street, as you remember it, without regard to the distance between the Backus

property and the structure itself, but as you remember the curb of the roadway, with the structure standing there, with these dust-pans and the ties of six inches and spaces of 8 inches only, with the openings of the tracks, as shown in that model, and with the roadway beyond it, on the Michigan Central side of the street, 24 feet wide, a solid roadway, have you any doubt that it will darken the windows of that building?

A. Not any.

Q. And darken it for the work inside?

A. The lower portion of it, it would certainly do so.

Q. Now, I will ask you one more question, as a business man, and it is suggested by a question asked by one of the jurors. You
894 are anxious to go into the planing-mill business, or a man is anxious to go into the planing-mill business; we will put it as a hypothetical question to you, as an expert business man—a man is anxious to go into the business of planing mills, and he is looking about for a site—or a manufacturing business—do you think he would buy that place or that site for it, with that structure erected?

A. In the planing-mill business it would certainly be very unsuitable; it might not be for some businesses, as a chandler's.

Q. Do you think a man wanting to go into a manufacturing business would go into it with that structure there?

A. Would it not be well to qualify it by saying at a certain price?

Q. Would he buy it for a planing mill; would any man going to carry on a business unconnected with railroad business buy such a piece of property as that?

A. If he bought it at all he would do it as a bargain.

Q. A man might carry on a car-manufacturing business there?

A. Yes, sir.

Q. He would not buy it as a planing-mill business under any circumstances in your judgment?

A. No, sir, he would not.

JUROR: What effect would the cars passing back and forth by the mill have on the mill?

A. They would increase the hazard.

Recross-examination by Mr. BAKER:

Q. Would anybody buy the Backus planing mill and yard as it is now situated for the purpose of carrying on the planing-mill business, even if the elevated road was not to be built there?

895 A. I would not, but I don't know what another man might do with it.

Q. You say that Mr. Backus has got all the railroad facilities that he wants, and that you have?

A. I said that we had, and, as far as I knew, Mr. Backus has.

Q. Will you please tell us what the switching charges are from the Michigan Central road to the Wabash?

A. They are $2 where they are charged.

Q. In what cases do they charge?

A. To non-competing points.

Q. What are non-competing points?

A. Points that would not be reached at the same rate or approximately by the Michigan Central or its connections.

Q. What are the switching charges from the Michigan Central to the Grand Trunk?

A. That varies; if a car is going east-bound, it is $6, and if it is going into Michigan it is $2.

Q. If it is going into Michigan it is $2, and if you want to go over the Grand Trunk east it is $6?

A. Yes, sir.

Q. And that is just what the Michigan Central charges you to deliver it to the Grand Trunk—switching charge?

A. Yes, sir; but it is not because it is worth $6.

Q. But they charge it. Now do you undertake to say that it would not be an advantage to any one of the manufacturing institutions in this city, to be connected with two or more different railroad systems?

Mr. DICKINSON: I want to ask a question right there.

Mr. BAKER: Wait a minute. I am examining the witness now.

896 Mr. DICKINSON: I want to ask him right there if he pays that charge.

Mr. BAKER: It does not make any difference. I have asked him, and he answered that the switching charge on the Grand Trunk is $6 on east-bound business, and I followed that up by asking him whether it would be or not an advantage to a business institution in this city to have connection with the Michigan Central and also with the Grand Trunk?

A. I would not care anything about the Grand Trunk. I can reach every point on the Michigan Central that I can get over the Grand Trunk.

Q. But suppose you wanted to do business to points that were reached by the Grand Trunk that you could not reach the other way?

A. They are unknown to me.

Q. But many of them exist, do they not?

A. That may be.

Q. So that it is not true, as a general proposition, that a business institution has sufficient railroad facilities when it only connects with one?

A. I would not say yes to that question, because I don't think so, for I think the Michigan Central affords facilities that will reach every point.

Q. But when you go to certain points on the Grand Trunk they will charge you $6 for delivering the car to them?

A. If you ship it from here to the Grand Trunk, but if you ship it to Buffalo you can get it on the Grand Trunk without any charge.

Q. Because they compete there; but suppose you are going down in New England somewheres?

897 A. That is all right.

Q. Suppose you are going down into Lower Canada?

A. I don't ship there.

Q. Is it not a fact that you don't go there because of those shipping charges?

A. No, sir.

Q. Is it not a fact that you don't go there because you have not adequate facilities?

A. No, sir, I have not looked for any business there.

Q. Didn't you fail to look for any business there because of the lack of facilities?

A. I never sought for any business there, I never cared for it; I had plenty of business elsewhere.

Q. But if the charges were equal you could do business there?

A. If there is anything doing, I could.

Q. They being unequal, you could not do business there successfully?

A. I never tried.

Q. And you have not tried because of the inequality—is that not true?

A. I would not say that, because I have not given it any thought.

Q. Did you mean to testify that that building over there darkened this room and not the curtain?

A. I said that the room was darkened by the non-reflection of the light.

Q. Did you mean to testify that the building over there darkened this room and that the curtain didn't?

A. I said by the appearance it darkened it.

Q. Is it not true that this room is darkened by the curtain and is not darkened by that building a particle?

898 A. I don't think so. I judge from our experience in the Moffat building, from the Hammond building; when they put that building up we had a deficiency of light by it.

Q. Do you testify that in your judgment the Williams block or Kanter block darkened this room this afternoon?

A. It seemed to do so.

Q. After the curtain is pulled down it seemed so to you?

A. Yes, sir.

Q. You say that a railroad could not handle your business down there in your yard?

A. I don't understand the question.

Q. Didn't Mr. Dickinson ask you whether or not the railroads could handle your lumber and get it to your planing machines for you?

A. Yes, sir.

Q. You said they could not do it?

A. It could not be done advantageously.

Q. Do you mean to say that a railroad could not handle business between two points that are half a mile apart?

A. No, sir; I don't mean to say they could not, but I said it was not practicable.

Q. You say it is not practicable to have it done on your own yard, because everything is right there handy?

A. Yes, sir.

Q. You used these two trucks and do your entire business and do it cheaply?

A. Yes, sir.

Q. Suppose your lumber yard was half a mile or more up on that switch, beyond the sulphite works somewhere, at least half a mile away, do you mean to testify that the track there could not be utilized and made advantageous in handling the lumber between your yard and the mill?

899 A. If they had a good road, it could not be made available with safety, for the reason that you have to handle the lumber on the car, and then again off the car; we do not remove it from the wagon.

Q. Suppose you had tramways?

A. Then you would have to handle it from the truck to the car.

Q. And then suppose that you put it right alongside of the mill, so it could be slid right to the machine?

A. It takes a man on that car to pass that lumber off.

Q. But it takes a man to shove it, anyhow?

A. No, sir; the machine operates it on to the trucks.

Q. Now, you built a railroad up there in your country on purpose to accommodate your business?

A. Yes, sir.

Q. And you have got a side track down here, and it is certainly practicable to carry lumber in greater quantities and at less expense on a railroad than you can do it by teams, as a general proposition?

A. Yes, sir; it certainly is.

Q. You say that the ordinary switching charge here in Detroit is $2?

A. Yes, sir.

Q. And how many thousand feet is permissible for a load of lumber?

A. I have seen 20,000, I guess, on a car; that would be ten cents a thousand; but it does not pay anybody to load in that way.

Q. Well, it may not in the situation you are; I don't think it would, but the question is whether it might not pay Mr. Backus, and that will depend on how much it costs him the other way, and we will find out before we get through with it.

No answer.

900 GEORGE W. ROBINSON, sworn in behalf of respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?

A. Detroit.

Q. How long have you lived there?

A. Twenty-six years, I think.

Q. What is your business?

A. I am in the lumber business.

Q. How long have you been engaged in that business?

A. The greater part of the time I have been in Detroit.

Q. And in what branch of the business?

A. Largely in shipping, planing mill; I have been in the wholesale trade, also in the retail trade, to a more or less extent, doing a little of both.

Q. And whereabouts in Detroit?

A. Some years ago, just about where the Wabash passenger depot now stands, below Twelfth street on Woodbridge street.

Q. Do you mean the Wabash depot or the Wabash yard?

A. Depot.

Q. How much of a depot is there?

A. They call it a freight depot, perhaps, right in that neighborhood. Since that, on Fort street west, near the corner of Tenth street. Now I have a yard at Delray, just below the Exposition.

Q. Are you familiar with the Backus property?

A. Yes, sir.

Q. Do you know the mill?

A. I know the mill pretty well; I have seen it.

Q. Have you been inside of it?

901 A. I have not been inside that I remember.

Q. You know the situation upon River street?

A. Yes, sir, I know the situation well; I have passed it a great number of times.

Q. And you know its relative situation to its lumber yard and its storehouse?

A. Yes, sir.

Q. In view of the magnitude of the business, and in view of the kind of business, what have you to say as to the plant being well situated for doing business of that kind?

A. I see no reason why the business could not be handled advantageously.

Q. It is pretty successfully arranged, you think?

A. Well arranged I think under existing circumstances, that is, the expense of property in the city, and those things taken into consideration.

Q. You know the extent of business that Backus does, the amount of raw material that he must handle in connection with the capacity of his mill?

A. I never made an estimate of the amount that he might handle, but it must run up well into millions.

Q. And it is necessary for him to have a large assortment on hand?

A. Yes, sir, in order to do his business successfully.

Q. You know the general situation of the Backus property?

A. Yes, sir.

Q. Will you please state how, in your judgment, the value of the property would be affected if a structure should be built upon River street in front of the Backus property, spanning the entire curb, the posts on the edge of the structure standing just inside the

902 curb, on which should be placed ties and tracks, the struct-

ure standing in the clear over the roadway 14 feet, with the top of the tracks 25 or 26 feet above the roadway, and standing about on a level with the floor of the third story of the Backus property, and over that structure should be run all the passenger trains of the Flint & Pere Marquette, the Detroit, Lansing & Northern, the Canadian Pacific and the Wabash, coming to Detroit, and the package freight business with the city, exclusive of the heavy lumber and coal of the Detroit, Lansing & Northern and the Flint & Pere Marquette, conducting the general business of railroads in passengers and freight to that extent, those four roads, over the structure, to connect with the union depot at the corner of Third street and Fort street and below, the corner nearest the center being on the corner of Third and Fort streets; what would be the effect on the Backus property, in your opinion?

A. If I was to take the matter into consideration—for say a term of ten years, if the property was mine, I would move the machinery out and build a mill somewhe[re] else and do the best I could with the real estate. It would be [worth] less; it would be worse than useless, I believe, to undertake [to] run that for a term of ten years, rent free; that is just my opinion about it candidly.

Q. You would not start a planing mill there if it was given you rent free?

A. No, sir, I would not consider it for a minute.

Q. Have you any interest in the Backus matter at all?

A. Not a dollar; but I take the matter from the point of inconvenience, the noise that must be in the passing of trains, making it obscure—almost dark, I should say—and the matter of extra insurance, the inconvenience, taking it altogether, many other
903 things, even though I should get that property, the buildings and real estate, without a dollar of cost for a term of ten years, it would be better for me to go and buy a piece of property elsewhere.

Q. Rather than to take it without charge?

A. Yes, sir.

Q. If you were compelled to run a mill?

A. Yes, sir.

Q. You think the fire risk would be increased?

A. There is no thinking about it, as I understand it; that is a fact.

Q. And the fire insurance rates?

A. They would be increased.

Q. On what do you base your judgment in that regard?

A. There must necessarily be sparks from a locomotive, even with great care, and even with the greatest care; with a light train, on a downgrade, you would have very few sparks; but with a heavy train, and with an upgrade, there would be a great many, and there is no obstruction that I have ever seen yet that will prevent it with a heavy train; and I have watched that very carefully in the Pennsylvania depot, where they take the greatest care possible, and on the starting of their heavy trains there is invariably a puff of sparks comes out of their smokestack.

Q. And you have observed trains going up a grade?

A. That is visible to any person, going upgrade with a heavy train on, that there will be more or less fire come out, even though it may be very fine.

Q. Have you had any experience in receiving lumber?

A. Considerable.

Q. By the Flint & Pere Marquette and the Detroit, Lansing & Northern?

A. Yes, sir.

904 Q. What is the condition of lumber as received, and what is the first business in order when lumber is received over those roads?

A. Very often, when we receive it on open cars, we are very careful to get the cinders off, which will sometimes be half a ton on a car.

Q. How much?

A. Half a ton, easily enough, on a car of lumber, when it runs near the engine. I have never estimated it, but there is a very large amount of cinders on a car; so much so that when we are not very careful, with good lumber, it damages the lumber very materially; we have always had that to contend with in receiving it by open cars; in wet weather, when those are likely to get washed down into it, we are very careful to give orders to ship in box cars; there is a very large amount of cinders.

Q. In one car-load, you say there is how much?

A. I will say that, judging from the size, estimating half a ton, from the size of half a ton of coal that will be scattered over—coal screenings.

Q. You never weighed it, but it would take what would be equivalent to half a ton of coal screenings, in appearance.

A. It would take what would be equivalent of half a ton of coal screenings, in appearance; I don't know what the weight of it would be.

Q. But estimating it as you would half a ton of coal screenings?

A. Yes, sir.

Q. And have you seen on open cars any effect of the burning of these cinders on the wood?

A. As a rule, they are not burnt much.

Q. Are they covered; have they a top also?

905 A. As a rule, they have not been burnt; I have not noticed that they are burnt much, because lumber is generally damaged always on top, and it is liable to be wet as well as dirty.

Q. Are you at all acquainted with the dust that rises in a planing mill?

A. Yes, sir, I am.

Q. What familiarity have you with that?

A. I have run planing mills to quite an extent.

Q. Whereabouts?

A. Down on Franklin street, the old planing mill of D. A. Ross & Company, and of later years for myself.

Q. When did you last conduct a planing mill?

A. It is about seven years since I ran a planing mill.
Q. And where was the last one you ran?
A. At the corner of Twenty-fourth street and the Michigan Central railroad.
Q. You had the Michigan Central near you, then?
A. Yes, sir, we were right near the track. I have a yard there at the present time.
Q. But you did have a planing mill, and how near to the track?
A. It was very near the track, just room enough for my own siding.
Q. How did you arrange your business with reference to the main track?
A. I arranged that just so I could get in my siding between that and the main track; it was on an angle there, and the greater part of the mill was away a distance say of 50 feet from the main track.
Q. How large was your building?
906 A. One-story building, only for planing purposes, not for box purposes at all.
Q. Did you have a dust-room?
A. Yes, sir.
Q. Where was that situated?
A. That was situated on the east end, but on the corner furthest away from the railroad.
Q. You built your mill there; did you build it there after the Michigan Central came?
A. Yes, sir.
Q. With reference to the Michigan Central road?
A. Yes, sir.
Q. You know how the Michigan Central runs along by the Backus property there, and what facilities he has?
A. Yes, sir.
Q. As a practical business man, with a side track from the Michigan Central road, do you think that Backus has all the railroad facilities that he needs?
A. I would say so.
Q. Have you in your business a side track there now?
A. Yes, sir.
Q. From what road?
A. The Michigan Central.
Q. You have all you need?
A. Yes, sir.
Q. Would you have another side track in there if you could have it?
A. Not to give the ground for it.
Q. You would not be discommoded with it?
A. I would consider the land of greater value than any possible value that would arise from having the additional track?
907 Q. Is there any point in railroading now that the Michigan Central and its connections do not reach that the Wabash reaches?

A. I have not had any occasion to ship to any points, but there may be.

Q. You ship by the Wabash?

A. Very little.

Q. But you do ship?

A. Very little.

Q. Do you ship by the Flint & Pere Marquette?

A. In-bound freight. And I will say how as to the Wabash, that in-bound freight I ship by the Wabash.

Q. You know of no difficulty in getting in?

A. No, sir.

Q. Or using your side track?

A. No, sir.

Q. Or the Detroit, Lansing & Northern?

A. No, sir.

Q. I don't suppose you have done much shipping by the Canadian Pacific?

A. Not very much, although I have some.

Q. You don't get much in-bound lumber by the Canadian Pacific, with the tariff?

A. We get a little.

Cross-examination by Mr. BAKER:

Q. You say you have got a yard at Delray?

A. Yes, sir.

Q. Where is it located?

A. Just adjoining the Canadian Pacific.

Q. What railroad does it connect with?

A. The Michigan Central.

908 Q. How far from Thompson's—the Delta lumber planing mill?

A. I think three-quarters of a mile.

Q. On the same switch?

A. No, sir.

Q. On another switch?

A. Yes, sir.

Q. Are you on the water too?

A. Yes, sir.

Q. It connects with the Michigan Central line that runs from here to Toledo?

A. It connects with the Exposition line.

Q. Is not that a Wabash connection?

A. No, sir, it is a Michigan Central connection.

Q. Does it not go into the Wabash tracks?

A. Not that I am aware of. The Michigan Central put it in and controls it.

Q. It is down there on the flat?

A. Not on the flat.

Q. It is their line that runs to the flat, the switch runs to the flat?

A. The Michigan Central run down there. They have tracks all along running into the Exposition building.

Q. What switching charges do you pay to have a car taken from there by the Michigan Central and delivered to the Grand Trunk?

A. I don't pay anything.

Q. Do you send any?

A. Yes, sir.

Q. Whereabouts is it delivered to the Grand Trunk?

A. I suppose at West Detroit. I never questioned that point. The Grand Trunk pays all switching charges.

909 Q. The Grand Trunk pays the charges?

A. Yes, sir.

Q. And adds it to the freight I suppose?

A. No, sir, they pay the charges and it is not added to the freight. The Grand Trunk delivers cars to the Michigan Central for me without any charge to me.

Q. What companies do charge you switching rates?

A. Not any.

Q. You never had to pay anything in that way?

A. Not for a long time.

Q. What does the man pay to whom you consign?

A. I deliver all my lumber to points east.

Q. And pay the freight?

A. Yes, sir.

Q. East-bound—the New England States?

A. Largely to Pennsylvania, I could not say the New England States, but largely to Pennsylvania. I ship over the Grand Trunk largely.

Q. To what points on the Grand Trunk?

A. Everywhere, all points on the Grand Trunk that reach the destination east, on connecting lines.

Q. You do very little shipping on the Grand Trunk?

A. I do a very great deal on the Grand Trunk.

Q. To what points do you go to?

A. Not on the Grand Trunk to any point, because the Grand Trunk ceases at Buffalo; connecting lines take it, and it is their connecting lines, but in no case do I pay any switching charges over the Grand Trunk road; in case I want a Grand Trunk car delivered to any place on the Michigan Central tracks, it is delivered.

Q. What does the Grand Trunk pay the Michigan Central for it?

910 A. Six dollars.

Q. Then there is a charge?

A. But when it reaches Philadelphia the freight is no greater.

Q. When you reach competing points it is no greater?

A. No, sir.

Q. And you don't ship to any place but competing points?

A. I know of no point within the limits of the United States that the Grand Trunk reaches that cannot be reached by other roads, where we ship lumber to, as lumber dealers.

Q. Are there not many points on the Grand Trunk where you could not reach them by the Michigan Central?

A. I know of none within the limits of the United States where we ship lumber to east points.

Q. None in Maine or Vermont or any of those places?

A. I know of none that I could not reach by other lines, from the fact that the Grand Trunk and the Michigan Central will connect at the same road at Buffalo, and it is a competing point to Buffalo; and the other lines will take it from either the Grand Trunk or the Michigan Central there.

Q. Do you know that it is true that the Grand Trunk pays the Michigan Central six dollars for each car?

A. I believe it is true from this fact, that I can get a place built in my own yard without any charge, but if I wish to haul to the Grand Trunk, they tell me that they pay to the Michigan Central.

Q. How many cars did you ever see with half a ton of cinders on?

A. I don't say I have seen them with half a ton of cinders. I corrected that by saying that I thought from the pile of
911 cinders that was on that it was about as large as half a ton of coal screenings.

Q. How many cars have you seen like that?

A. A great many in my time. All cars are not in that condition. It depends whether they are near the engine or not, but I have seen a great many cars like that in my time.

Q. That would be in wet weather?

A. Wet and dry; they are more apt to be blown off in dry weather.

Q. I want to know when you saw them with half a ton on.

A. I am estimating by comparing with half a ton of coal screenings.

Q. You built a planing mill on Twenty-fourth street on the Michigan Central line?

A. Yes, sir.

Q. And you just left room enough between the buildings and the Michigan Central to put in a side track?

A. Yes, sir, I did at the corner; that is, where the store-room was, where the planing mill was; it would be 50 feet or more from the Michigan Central.

Q. How many feet was your building from the Michigan Central tracks?

A. I suppose 20 feet at the corner——

Q. And you put a side track right alongside of it there?

A. Yes, sir. The corner was about 20 feet, just room enough for two tracks, I think. Then when we got to the back end of the building, 150 feet, we were nearly a hundred feet from the Michigan Central railroad; it is on an angle there, and that is where the planing mill proper stood.

912 Q. And how far was the building where your planing machines were from this side track?

A. The nearest point would be about 50 feet.

Q. Is that mill there now?

A. No, sir; it was torn down to make room for other manufacturing institutions.

Q. How long did it stand there?

A. I think it was built in 1883, and it was taken down last year.

Q. In 1890; so it stood there seven years?

A. Yes, sir.

Q. How many times did the railroad set it afire while you were there?

A. I think not at all.

Q. How many times did you ever know of a railroad to set a planing mill afire?

A. I cannot say that I know of any, actually.

Q. Where is your present mill?

A. I have not any mill at present; I am not running a planing mill.

Q. But you say that you would not care to give the ground for another side track?

A. I would not give the ground for another side track, with the present facilities that I have.

Q. But suppose you could connect with another system of railroad and save six dollars a car, you would be very glad to have a side track, would you not?

A. Under the interstate-commerce law, I suppose all lines are aware that they are not allowed to pay six dollars a car for the sake of their business.

Q. They have no right to pay a rebate?

A. They are not paying a rebate; they are merely paying terminal charges.

913 Q. And the terminal charges are six dollars a car?

A. Yes, sir.

Q. Suppose you could save that?

A. I do save that.

Q. And if you had a switch to the Grand Trunk you could save it all the time, could you not?

A. No, sir; I could not so much as get six dollars for hauling a car; then they would be on an equal footing with the Michigan Central railroad, and would deliver the cars, instead of hauling them into the Michigan Central.

Q. Could they not, as a matter of fact, haul them for $6 less than now?

A. They would not be allowed to under the interstate-commerce law.

Q. You testify to that?

A. Unless they made it to all shippers alike, then they would have to make it to shippers on their own line as well as to shippers on the Michigan Central.

Q. Do you understand that the interstate-commerce law does away with all the shipping charges?

A. I understand that the interstate-commerce law——

Q. Just answer my question. The question is, do you under-

stand that the interstate-commerce law does away with all switching and terminal charges?

A. No, sir; I don't.

Q. You think that if you owned the Backus planing mill, and they should build an elevated road in front of it, you would tear it down and move somewheres else?

A. I certainly should look about for another, pretty quick.

Q. You would tear it down and move somewheres else, if you owned it, anyhow?

914 A. No, sir; I would not.

Q. Do you think that is a good place to have it now?

A. I have noticed the Backus family for a good many years, and I have noticed that they appear to live as comfortably as I do, by managing my business as economically as I can possibly do, and I suppose they are making money; I have never heard anything different, I know they pay their debts.

Q. Is that all you know about it?

A. I suppose they have been making some money.

Q. You think they are making money there because they wear good clothes and are living well?

A. I suppose that a concern that has been in business for a great many years must be.

Q. Do you know how much they have made out of railroads in that time?

A. I don't; nor do I know how much the railroads have cost them.

Q. Don't you know that the money that they have made out of railroads they have sunk in that mill?

A. I don't know about that.

Q. You don't know what kind of business they have carried on there?

A. I know something about their business, as much as I ought to, without being inquisitive.

Redirect examination by Mr. DICKINSON:

Q. How do you think they have acquired seven and a half acres of yard, three acres for their planing mill and a valuable storehouse on Fort street west—out of railroads or by carrying on a legitimate business?

915 A. I rather think they have acquired that out of their legitimate business, from what I supposed; I never heard anything to the contrary.

Adjourned to Thursday, July 2, 2 p. m.

THURSDAY, *July* 2, 1891—2 p. m.

W. B. KNAPP, sworn for respondents.

Examined by Mr. CHIPMAN:

Q. Where do you live?

A. Detroit.

Q. How long have you lived here?
A. 11 or 12 years.
Q. What is your business?
A. I have been in the lumber business during that time.
Q. In what particular branch of that business?
A. Almost all parts of it at different times.
Q. You have been a lumber inspector?
A. Yes, sir.
Q. And have done almost everything in the business?
A. Yes, sir.
Q. Where are you at work now?
A. I am not doing anything at present in that line.
Q. Where were you employed last?
A. I was for a little over ten years with Backus & Sons.
Q. Where?
A. Here in Detroit.
Q. What particular place?
A. I was most of the time at Eighteenth-and-a-half street, where the yard is. I had charge of that place during that time.

916 Q. Of course you know where that yard is situated?
A. I do.

Q. You know where their planing mill is?
A. I do.
Q. And you know also where their Fort Street storehouse is?
A. Yes, sir.
Q. While you were in their employ, where did your business take you the principal part of the time?
A. At the foot of Eighteenth-and-a-half street, where the yard is located.
Q. Did you there have the occasion to observe the effect upon lumber of passing trains on the Wabash through that lumber yard?
A. I did.
Q. As I understand it, the Wabash track cuts the yard in two?
A. Yes, sir.
Q. There are parts of the yard on each side of the track?
A. Yes, sir.
Q. Will you tell the jury what the effect of the passing of those trains is upon the lumber?
A. It blackens the lumber and destroys its value to a certain extent.
Q. How does it blacken it?
A. The smoke and dirt coming from the locomotives become grimed into the lumber more or less, according to its locality and distance from the track.
Q. Where does the smoke and the dust affect the lumber principally; what part of the lumber pile?
A. It is generally pretty well scattered through it.

917 Q. The boards are piled on string pieces about the width of each board, so as to allow a space for the air to work in between the boards?
A. Yes, sir.

Q. You say these cinders and discoloration work pretty much through the piles that are nearest the track?

A. Yes, sir.

Q. Did you observe any effect of fire upon any of that lumber?

A. I have.

Q. What did you notice?

A. I have noticed several times where coal has burned in slightly in the boards; those piles nearest the track; I don't know just how far off, probably 30 or 40 feet perhaps.

Q. How far back from the track did you observe the effects of the cinders and discoloration upon the lumber?

A. I don't know that I can tell how far back; as you go from the track, it discolors it less; the greater the distance the less it is discolored, either way.

Q. How far back did you go before you lost the effects of it entirely?

A. Perhaps a couple of hundred feet.

Q. About a couple hundred feet from the tracks on both sides, you think you would find more or less of the effects of the cinders and smoke and discoloration?

A. Yes, sir; it might not be quite as far, and it might be a little further.

Q. But the effect grew greater as you got nearer the track?

A. Yes, sir.

Q. Can you give the jury any idea as to the quantity of cinders which fell on and worked into these lumber piles; say at the place where there were most of them?

918 A. I don't know as there is any place where there would be the most at the same distance from the track; it would probably be about the same amount.

Q. Take those that were 40 feet from the track; those that were burned?

A. It would take but very few courses of lumber to get a quart or two of cinders off of them.

Q. What effect do the cinders and discoloration have upon the lumber?

A. It depreciates the grade.

Q. I suppose in depreciating the grade, it depreciates the price?

A. Yes, sir; that is, the valuation is made either in the grade or in the price.

Q. What did you do with this lumber after it was covered with cinders; do anything to clean it?

A. We cleaned it off the best we could.

Q. With what regularity is that done?

A. In drawing the lumber, it was customary to jar the cinders off as much as possible when taking it out of the piles, and after one or two courses had been jarred, shove it up to the edge and dump it over the side, so as not to walk on it any more than was necessary, because in handling it over it often makes it worse than it originally was.

Q. With a rough board, walking over it, it would grind the cinders in, would it not?

A. Yes, sir.

Q. The cinders are apt to get imbedded in the rough surface of the board, are they not?

A. Yes, sir; also the smoke will work into the fibres of the wood, so that it discolors it.

Q. Any sweeping done on this lumber?

919 A. Yes, sir.

Q. How often, how regularly, and why?

A. In unloading the cars it is customary to sweep the car off every course or two so as not to walk over the cinders, because if in handling the lumber the cinders jar off, if they are not swept off, they become ground in the same as in the pile.

Q. Did you get lumber from the F. & P. M.?

A. I have at different times.

Q. Did you get some from the D., L. & N.?

A. Yes, sir.

Q. Take the F. & P. M. road, what was its condition as to cinders?

A. There would be some cinders on the cars. It would not be always alike. Some cars would have more than others, perhaps.

Q. About what proportion?

A. Every car would have some.

Q. And some more than others?

A. Yes, sir.

Q. Did you ever see a car on fire down there?

A. I never saw a car of lumber on fire. I have seen a freight car on fire.

Q. On what road?

A. On the Wabash.

Q. Do you know how it caught?

A. This was a freight car standing on the side track very close to the main line, in which we were loading lumber, and directly after this train had passed I saw a little smoke from the top of the car, and I got a pail of water and put it out.

Q. That was immediately after it had passed?

920 A. Yes, sir, it got to a blaze before I got the water, perhaps as large as your hand.

Q. How near did the locomotive pass?

A. The next track; perhaps the center of one track to the center of the next.

Q. Do you know anything about this elevated track that they propose to build down there in front of Mr. Backus' mill?

A. I have seen the map of it, and I have seen that part of it that is now constructed down there, or being constructed.

Q. Do you know that the grade is 52½ feet to the mile up to just before they get to Backus' place?

A. I understand that to be the case.

Q. You know that the track there, the posts, or uprights, which hold this track, span the street from curb to curb?

A. Yes, sir, I so understand it.

Q. Did you know that immediately opposite Backus' place there is, commencing below Twelfth street, and running clear up beyond Backus' place, occupying a part of the sidewalk, the street opposite Backus, and also a portion of the Central grounds, what is called a viaduct for teams to be built there?

A. Yes, sir.

Q. Do you know that this structure is to be 14 feet in the clear in front of Backus, from the ground up; that it is to be about 25 feet in height?

A. Yes, sir.

Q. Do you know the situation of things at the Backus mills?

A. I do.

Q. Do you know where the dust-house is?

921 A. Yes, sir.

Q. Where the dry kilns are, the engine and so forth?

A. Yes, sir.

Q. And the Michigan Central spur which runs in there?

A. Yes, sir.

Q. You know the entire situation?

A. Yes, sir; I have been there a great many times.

Q. Will you tell the jury what effect in your judgment the erection of this structure there, and the use of it by a railroad will have upon the value of that property?

A. As to the value of that property, I cannot say; it will practically ruin the property for planing-mill purposes, and ruin the planing-mill business there.

Q. You think it would ruin it?

A. I do; the fire, the dirt and the smoke coming from the trains which pass on that structure, and more or less darkness will be caused by those trains and this structure in front of the property; it would, I think, practically ruin the planing-mill business there.

Q. Do you know what is done inside of the planing mill?

A. I have been through it hundreds of times.

Q. Do you know the nature of this dust which collects around a planing mill, and which they try to confine to the dust-room?

A. Yes, sir; I know just how inflammable it is, from the fact that I have tried it by taking a handful of it out of the street and stringing it along and touching a match to it.

Q. What is the result?

A. It will run just like powder.

Q. So that you have no doubt it would ruin it for planing-mill purposes?

A. No question about that in my mind.

922 Q. Increase the risk of fire?

A. Yes, sir.

A JUROR: You experimented by setting the dust on fire?

A. Yes, touching one end to see if one part would catch from the other; just a handful—string it along like a string of powder.

Q. It would ignite as fast as gunpowder?

A. Run right along like powder—yes, sir; that is this dust that

accumulates on the side of the building, inside of the dust-room and throughout the interior of the mill—anywhere where there is sawing and planing to be done.

Q. Was there any breeze while you were doing that?

A. None to speak of, else it would have blown it away before it was touched.

Q. Do you think it would blow it away or ignite whether the wind was blowing or not?

A. It is just as explosive as powder.

By Mr. CHIPMAN:

Q. Have you heard of any fires being set by locomotives within a few days?

A. Yes, sir.

Q. Where?

A. I heard of one yesterday.

Q. Where was that?

A. At the foot of Twenty-fourth street, where the Wabash crosses Twenty-fourth street.

Q. What was it?

A. Alongside of the Wabash track, just below where Morley has a lumber yard.

Q. When did that occur?

A. It must have been yesterday, or day before. I was there yesterday and saw it, and saw it again today.

923 Q. The same fire?

A. Yes, sir.

Q. Smoking there yet?

A. Yes, sir.

Q. Do you know whether that is the fire and smoke we saw alongside of the track when we went out night before last?

A. The man that was working on the dump, where they are dumping dirt, said he was within a little ways, and it started up directly after the train had passed.

Q. What other fire have you heard of?

A. I was in Saginaw a short time ago and I heard of one there.

Q. What was that?

A. That was just outside of A. W. Wright's lumber yard.

Q. What was it?

A. It was a little flame started up near the track, and they attributed that to locomotive sparks, inasmuch as there had been no fire around there and the trains were passing there every little while.

Q. What did the fire start in?

A. Sawdust on the ground.

Q. Did you see that?

A. I saw the place where it had burned.

Q. You saw the place on Twenty-fourth street too?

A. Yes; I did not see them catch fire.

Cross-examination by Mr. BAKER:

Q. You did not see this fire start in Saginaw, did you?

A. No.

Q. How far outside of the lumber yard was it?

924 A. I don't know just where the line is, perhaps 100 or 125 feet from the lumber piles.

Q. How close to the lumber piles does the railroad run?

A. In some places it is closer than others, I should say perhaps 50 feet would be as close as the main line would be to the lumber, perhaps further than that.

Q. And side tracks on that 50 feet?

A. No, the side tracks are outside of that.

Q. You don't know how this fire started, did you?

A. Only as I tell you.

Q. You don't know how the fire started down below here?

A. Only what this gentleman told me.

Q. This fire below caught in a lot of rubbish?

A. Where it is thrown in there in making a fill.

Q. It is usual to keep rubbish of that kind around a planing mill?

A. No, we calculate to keep a planing mill as clean as possible.

Q. You say that this dust which is thrown out by planing machines, when it collects together in considerable quantities, it is inflammable; it will burn, I suppose you mean?

A. Certainly.

Q. Is it usual to allow that to collect about a mill?

A. No more than is absolutely necessary.

Q. They have an apparatus there for gathering that up?

A. So far as it is possible to gather it up.

Q. They sweep down the ceilings?

A. Yes, sir.

Q. And keep the mill clean?

A. Where it is possible to keep the mill clean.

Q. You were down there in that lumber yard a great many years?

925 A. Nine or ten years.

Q. You were there when the railroad was put through?

A. Yes, sir.

Q. Did the railroad ever set fire to the lumber in the yard?

A. I don't know. We had two fires there; whether it came from the locomotive, I don't know.

Q. Where did the fire catch that you speak of?

A. Probably 150 feet from the railroad track.

Q. Didn't that fire catch from a passing steamboat?

A. I don't know; it was 200 feet, probably, from the river.

Q. You don't know which it caught from?

A. I don't know.

Q. What is your judgment about it?

A. I have no way of forming an opinion either way.

Q. Don't you know that a steamboat had just gone by when that caught?

A. I do not.
Q. Where was the other fire that you speak of?
A. Nearly in the same place, probably a week or so after; only a small fire, put out with a pail of water.
Q. A very dry time of the year?
A. Not necessarily dry, it was in the fall of the year.
Q. What did it catch on?
A. When I got there, there were half a dozen piles on flame, so I could not tell.
Q. Did it catch on the lumber or in the alley?
A. I think it caught in the lumber piles, but I am not sure of that. All I know is that the fire was there when I got there.
926 Q. Those were the only two that occurred during the entire 10 or 11 years you were there?
A. I think that is all.
Q. When you were there the main switch for the Wabash yard down there, the old union depot company yard, was located right close to the Backus property?
A. One of their switches was there.
Q. And almost the entire switching on that yard was done on the right of way that ran through this lumber yard?
A. Not entirely. There was an engine working at each end of the yard.
Q. There was an engine working there all the time?
A. A good deal of the time.
Q. When an engine was working there, doing yard-work through the lumber yard, day in and day out, the lumber was badly discolored in course of time. It would depend upon how long it was left there?
A. Yes, sir.
Q. You know that Mr. Backus recovered of the railroad some $60,000 for these injuries?
A. I do not.
Q. You were a witness in some of the cases?
A. I was a witness in one case.
Q. You know when the railroad was built there?
A. Yes, sir; I was not a witness in that case.
Q. The lumber would have to be left there a considerable length of time to be seriously injured.
A. Not a considerable length of time. In some parts of the yard it could be left there a considerable length of time and would not be seriously injured. In other parts of the yard, it would injure very quickly.
927 Q. If a pile of lumber is piled next to the track, or alongside of the tracks, and it is only left there a short time and manufactured, and a new supply put in, it would reduce the damage from the soot and cinders to a minimum, would it not?
A. It would reduce it some?
Q. Mr. Backus does not store lumber at the planing mill?
A. Yes, sir.
Q. Whereabouts?

A. In the mill.

Q. I mean outside?

A. Not in large quantities, because there is not sufficient space for it.

Q. He simply hauls his lumber up there and unloads it into the doors near the planing machines, and it goes away from there every day?

A. It is run through the planing machines and dressed and sent to the proper floor, where it is sorted and from there they take their stock daily. There is probably a half million or a million feet in there ready for these machines.

Q. Then it is on the move from the time it gets there until the time it gets out, in some shape, it is being moved up and down that mill?

A. No, it goes to the top and remains there until they have an order for that certain kind.

Q. It is in that condition. It is in the building, they do not put it on the roof?

A. No, it is in the building.

Q. And it is in process of manufacture?

A. It is waiting the process of manufacture.

Q. How much do they feed to the mill every day?

A. Perhaps an average of 50,000 or 60,000 feet.

928 Q. And about the same amount must go away in finished products?

A. Practically.

Q. You know enough about lumber to know that if you piled it up out in the country, the weather would discolor the lumber?

A. Except the roofing boards it will not discolor.

Q. It will not discolor it if it is left open, so that the air can go through?

A. If it is piled tightly in the country, it will, but if it is carefully piled in the country, away from any smoke or dirt, it will not discolor it, except the boards that are on the roof, where the sun strikes.

Q. Take it off of Woodward avenue, where they have a lumber yard, and there is not a railroad within a third of a mile of it, it will be discolored by the smoke that prevails in the city?

A. I never noticed the yard.

Q. Suppose you piled it up right here on the Campus Martius, don't you know that it will be discolored?

A. If it is subjected to smoke and dirt, it will be discolord wherever it is.

Q. There is more or less smoke and dirt in a large city, any way you can fix it.

A. There is some in different localities, more than in others.

Q. You think this planing mill will be ruined. Will you tell us what operation or what process of manufacture would be interfered with by this railroad?

A. The dirt and smoke coming from passing trains would, in summer time, when it is necessary to have the windows up, blow

all through the mill, and blacken the lumber in process of manufacture.

929 Q. What effect would that have upon the operations of the machinery?

A. It would depreciate the value of the product you are working on, whatever that might happen to be.

Q. What other effect would it have?

A. It would darken the mill.

Q. Do you see any difficulty in having screens on the windows there?

A. I don't know but you might have screens.

Q. Do you see any difficulty in having the windows on River street closed, and having open windows on the other side?

A. I do.

Q. What is the difficulty of that?

A. You could not get a circulation.

Q. You could not get a circulation on three sides?

A. Not at all times; if the wind were blowing from the river side you would not get much of a circulation.

Q. Suppose they exercised some care about that, could not they reduce the injury that would come from the smoke and the cinders to a minimum, so that it would not amount to anything of any consequence?

A. I don't see how they could.

Q. You never operated a mill?

A. No.

Q. All the experience you have had is down there, in and around an open yard?

A. That is not all the experience I have had.

Q. As far as the railroad is concerned, that is all the experience you have had?

A. Yes, sir.

930 Q. And there are no walls or buildings to protect the yard from the soot and the cinders?

A. That is true, but rough lumber will not damage as dressed lumber will.

Q. Is it not the other way, that rough lumber is damaged the most, because it is not smooth and the dirt can — blow off of it?

A. That is not the case. A little particle of soot on a fine dressed board will make a mark clear across it and ruin it.

Q. Is not this the fact, that you take undressed lumber, the soot and cinders work into the fibers of the lumber more than they would into a planed board?

A. No, sir, that is not so.

Q. You think it would adhere more quickly to a planed board than a rough one?

A. So far as the soot is concerned the planed board will take that quickest, but as far as the cinders are concerned the fibers on an undressed board will catch those and hold them longer.

Q. Who told you that the grade would be 52 feet to the mile right up to the Backus property?

A. That is the understanding I have had of it.

Q. Don't you know that the place where the grade is 52 feet to the mile is from Twelfth street west, to come up high enough to get from Twelfth street?

A. I don't understand it that they reach the height until they reach a point halfway between Twelfth street and the Backus property.

Q. Don't you know that they have got to get up so as to go from Twelfth street 13 feet in the clear?

A. I don't know how that is.

931 Q. And so you assume that the grade is 52 feet to the mile almost to the Backus property?

A. No; I assume that they do not obtain their height until they get to a point halfway between Twelfth street and the Backus property.

Q. In answer to Judge Chipman you testified that one of the things that influenced your judgment was on account of the grade?

A. I was in the court-room yesterday and I heard the same thing.

Redirect examination by Judge CHIPMAN:

Q. You say this dust is explosive, like powder?

A. Yes, sir.

Q. You answered me that it lay on the ground and you touched fire to it and it ran like powder?

A. Yes, sir.

Q. You mean it is explosive, like powder when it is confined?

A. Yes, sir.

Q. In regard to inspecting and handling lumber at that mill, where is that done, inside or outside?

A. Outside.

Q. So that there would be no walls or anything to protect it?

A. No, sir.

Mr. BAKER: Do they inspect it before it is unloaded?

A. It is inspected before it gets to the mill, and it is inspected after it is taken out.

By Judge CHIPMAN:

Q. It is inspected before it is put on the cars to ship?

A. Yes, sir.

932 Q. You mean they inspect to see that the lumber delivered of the grades is in accordance with the orders, to see that they are delivering the article that is ordered?

A. Yes, sir.

Q. How much of a light does it require to do that?

A. It requires a good light.

Q. A bright light, does it not?

A. Yes, sir, and daylight, too.

Q. The more light the better you can do it?

A. Certainly.

By Mr. BAKER:

Q. Is there enough light in the mill now to do it?
A. It is not done in the mill.
Q. Whereabouts?
A. Outside.

By Judge CHIPMAN:

Q. Unless you have a bright light, can you inspect this timber properly?
A. No, sir.
Q. I want to ask you about that yard, what is there at that yard at Eighteenth-and-a-half street to discolor the lumber besides the trains?
A. The weather.
Q. What is there down at that yard?
A. There is smoke and the weather, the only things that I know of.
Q. You say that ordinary lumber piled up and covered does not discolor when it lies in the pile?
A. Take it away from the railroad.
Q. I mean in a place like that, where Backus' yard is?
A. Let me understand the question.
933 Q. My question is, what is there to discolor the lumber in Backus' lumber yard besides the locomotives?
A. There is nothing.
Q. I understand you that the only part of a lumber pile which the weather is apt to affect are the top boards?
A. That is all.
Q. The roof, so to speak?
A. That is all.
Q. How does it affect it?
A. It turns it a dark color.
Q. The action of the sun?
A. Yes, sir.
Q. It acts the same on the top of the roof of an old lumber pile as it would on the top of the roof of an old shed, which we see every day?
A. Yes, sir, and the covering boards of the pile, after they have been used on one pile, they are put onto another, so that you keep the same ones as far as possible.
Q. What is there in the mill property there, in the place where they inspect the lumber to deliver to the cars, when they are shipping it, what is there to discolor and dirty it there, as it is now situated?
A. There is nothing there to hurt the lumber as it is now.
Q. What part of the building do they ship it from?
A. From the River Street side.
Q. How do they ship it on the River Street side?
A. It is taken outside.
Q. How?

A. In carts.

Q. On the Central Railroad side—what do they ship out with?

934 A. It is taken into the car.

Q. Is it inspected in each case?

A. Yes, sir.

Q. When it goes out by carts and when it goes out by car?

A. Yes, sir; it is loaded from the machine onto a cart and taken out doors in order to get light so as to see that the grades are correct; and loaded in the cars or on teams as the case may be, to be taken away.

Q. It is inspected in that locality where it is taken out?

A. Yes, sir; right outside of the mill.

Recross-examination by Mr. BAKER:

Q. Do you testify that there is not light enough in that mill as it is now situated to inspect it inside?

A. That is right; yes, sir.

Q. After you have put the lumber through a planing mill, you put it onto a cart and take it out into the open air before you inspect it?

A. In almost all cases.

Q. Do you not, when you take it to the Michigan Central, to a car that stands on the side track there?

A. Yes, sir.

Q. Is there not a roof over the entire premises up to the side track?

A. On the Michigan Central side there is a roof over that part of the yard not occupied by the track.

Q. Do you inspect it in that open shed that is under a roof?

A. There is a shed that is filled with skylights, and a part of it is inspected under there.

Q. Do you mean near the Fort Street end of the property?

935 A. No; I mean on the Woodbridge Street side.

Q. Is that where you load onto the Michigan Central?

A. Yes, sir.

Q. And it runs along the east side of the main building?

A. Yes, sir.

Q. Is there light enough in that shed to inspect lumber?

A. There is all there is; we have to get along with it.

Q. Is there enough?

A. They get along very well so far as I know.

Q. Would there be enough upon the River Street side if there was a similar shed?

A. That would not be similarly located.

Q. What is the difference?

A. Different kinds of lumber go in different localities.

Q. If you can inspect lumber on the east side under a shed, why can't you on the south side?

A. Some kinds of lumber are harder to inspect than others. It is harder to get them correct.

Q. You take lumber into the open space on the south side of the mill so as to get daylight, and you do not inspect it until you get it there?

A. In some instances it is inspected under the sheds, and in some instances it is inspected on the Woodbridge Street side.

Q. Will you tell us how the elevated railroad will affect the inspection of lumber in that mill?

A. The smoke and the dirt settling down from the trains in passing, while a person is inspecting dressed lumber on the Woodbridge Street side, would smear it all over.

Q. You do not mean to testify that the inspection of the lumber in the mill itself will be affected by the elevated road?

936 A. It is not inspected in the mill.

Q. So that you will have it out there in broad daylight when you do inspect it?

A. Yes, sir.

Q. And it will be inspected between the elevated road and the mill, with daylight to the zenith.

A. I don't know whether it will be daylight there or not.

Q. I suppose you assume that there will be a constant cloud hovering over that place?

A. I don't know; I do not assume anything of the kind; I know there will be a cloud whenever a train passes, and there will also be a cloud from the structure itself.

Q. How much difference do you think it would make a year in the inspection of that lumber?

A. I could not tell you.

Redirect by Judge CHIPMAN:

Q. You speak about the inspection alongside of the Central road. The mill is built to run that product there?

A. Yes, sir.

Q. It is arranged for that purpose?

A. Yes, sir.

Q. In order to do it differently, they would have to change the arrangement of the mill, would they not?

A. Yes, sir.

By Mr. BAKER:

Q. The elevated road will not prevent them from doing it; there will be room left?

A. There will be space enough.

937 WILLIAM H. MALTZ, sworn for respondents.

Examined by Judge CHIPMAN:

Q. What is your business?

A. I have charge of the cleaning and repairing, assistant to George Sutherland, of the Michigan Central railroad.

Q. Cleaning and repairing cars?

A. Yes, sir.

Q. Do you know about the collection of cinders on cars?
A. To a certain extent, yes, sir.
Q. What about it, trains that come in, freight or passenger?
A. I have nothing to do with freight. All I am of is passenger.
Q. Confine yourself to the passenger cars?
A. I find on a great many cars that come in, the platforms are covered with cinders.
Q. Do you find any cinders inside?
A. Yes, sir, to a certain extent.
Q. That is a very common thing, is it not?
A. Yes, sir.
Q. Are you at the depot in this city?
A. Yes, sir.
Q. Do you know anything about the F. & P. M. trains?
A. Yes, sir, I have the cleaning of those trains.
Q. What about the cinders on them?
A. They have a certain amount of cinders on their platform and on the inside of the cars.
Q. What about the D., L. & N.?
A. I have nothing to do with them.
Q. Do you know anything about the cushions being on fire inside of passenger coaches?
938 A. We have had them come in that had holes burned in them.
Q. From the cinders?
A. I could not say.
Q. That was your supposition, was it?
A. That I could not swear to. I would not say whether they were burned by cinders or cigars.
Q. How do you account for it?
A. I have found them burned in coaches, and we merely make a report that they came in burned, but whether caused by cinders or from a lighted cigar, I could not say.
Q. Do they throw lighted cigars about in passenger coaches?
A. They do occasionally.
Q. Do you know of a car coming in within a day or two on fire?
A. Yes, sir.
Q. What road was that on?
A. On the Michigan Central, Canada division.
Q. What kind of car was it?
A. A second-class passenger car.
Q. Where was it on fire, on what part of the car?
A. On the end, a projection under the hood.
Q. The hood is the projection on the front of a car?
A. Right over the platform.
Q. The fire was outside of the car and under this projection?
A. Yes, sir.
Q. How much of a fire was it?
A. It burned out about three feet square of the lining underneath the hood.
Q. Was that lining inside or outside of the car?

939 A. Outside; it burned in under the roof.

Q. What became of that car?

A. We cut it off at Detroit and sent it to the shop.

Cross-examination by Mr. BAKER:

Q. Where did that car come from?

A. From Buffalo.

Q. Used as an immigrant car?

A. It was a second-class car.

Q. Was it an old car?

A. It was just after being overhauled; probably four or five years old.

Q. How did it catch; any place there for it to catch in?

A. Not to any extent. There was not anything there, but it must have worked up into a corner, probably a crevice about the 32d part of an inch.

Q. Was that a painted part up there?

A. Yes, sir.

Q. Of course you don't know where it caught fire?

A. Our reports came back that it caught fire about 18 miles this side of St. Thomas.

Q. Was this car loaded with passengers?

A. Yes, sir.

Q. Did the engine come across the river?

A. No, sir; it stopped at Windsor.

Q. Which road has the most cinders on its passenger cars, the Michigan Central or the F. & P. M.?

A. I never made it my business to examine and see which did have the most.

Q. Can you tell?

A. At times we would find as many on the F. & P. M. as on the Central.

940 Q. You do not usually find as many on that road?

A. I cannot say as we do find as many on the F. & P. M. as on the Central.

By Judge CHIPMAN:

Q. Do you know anything about the engines on the Central having spark-arresters?

A. I understand that on the Canada division they have spark-arresters.

Q. Do you know anything about that?

A. I do not.

By Mr. CHAREST:

Q. When you find a cushion with a hole in it, do you find the stub of a cigar there?

A. No, we do not find the stubs of cigars.

Q. What makes you say it was caused by the stub of a cigar?

A. Sometimes we find where a window sill had been slightly burned, the ashes of a cigar lying on it.

Q. In first-class cars?
A. Yes, sir.

By Judge CHIPMAN:

Q. Do you wish to have this jury understand that every time you find a cushion burned you find traces of cigars?
A. No, sir, I do not mean to say that.

ABSALOM BACKUS, JR., sworn for respondents.

Examined by Judge CHIPMAN:

Q. How old are you?
A. Nearly 67.
Q. How long have you lived in Detroit?
A. 24 years.
941 Q. How long have you been engaged in business here?
A. The whole time, 24 years.
Q. You commenced business here in 1868, did you not?
A. In 1867.
Q. Are you the owner of this property known as the A. Backus, Jr., mills?
A. I am.
Q. The property in controversy here?
A. Yes, sir.
Q. How long have you owned that property?
A. It was purchased in 1871, most of it.
Q. How much land have you where your mill is?
A. About 1¾ acres.
Q. How much front on River street?
A. 238 feet 6 inches.
Q. Where does it run to from River street?
A. It runs to Fort street.
Q. How much front has it on Fort street?
A. I don't know exactly, it is in the neighborhood of 75 feet, it is about 318 feet from street to street.
Q. Will you tell the jury what you have on that property?
A. Our plant consists of the planing mill proper, the lower mill, our dust-room, shavings-room, four dry kilns, our boiler-house, engine-room and sheds on the side of the Michigan Central, running the whole length, 200 feet, in which we store about 15 car-loads of worked material, next to the track.
Q. You also have an office building?
A. Yes, sir.
Q. What is that plant worth, without the real estate?
A. It is worth all it has cost. It could not be built today
942 any cheaper than we built it. The material would cost fully as much, the labor would cost more, and brick would cost more.
Q. You have not told us how much it was worth?
A. It is worth $150,000, and I want to show you why it is worth

that. That includes everything outside of the real estate. I can give you the details of it.

A JUROR: Does that include the stock?

A. No. Sometimes there might be $25,000 worth and sometimes $50,000 worth of stock.

Q. This estimate is exclusive of any stock in the mill and exclusive of the real estate?

A. Yes; that is absolutely the cost, dollar for dollar.

Q. What is the value of that real estate?

A. There is such a variation in the opinion of people, but I will tell you how I have looked upon it.

Q. What do you value it at?

A. I value it at $150,000, I mean from Woodbridge street to Fort street.

Q. The real estate?

A. Yes, sir; we talked it over nine or ten years ago.

Q. What did you pay for it when you bought it?

A. $35,000. That was before the excavation was made, when there was a hill.

Q. Before the railroads were there?

A. No, the Michigan Central was there, the main tracks, before our branches were there.

Q. In order to erect your works and put your plant there, what did you have to do?

A. We had to excavate a hill that cost us something over $8,000 at the start, and afterwards we bought another field and it cost us over $1,000 to get that; the excavation cost us something over $9,000.

943 Q. To excavate it and get a bottom on which to put your plant on a level with River street?

A. Yes, sir.

Q. Did you have to put in a stone wall?

A. We built a stone wall the whole length of the building between us and the Michigan Central.

Q. What did that cost you?

A. We built it two or three different times; it is about 4½ feet thick.

Q. What did it cost you?

A. I could not tell you. A good deal more than $1,000.

Q. Have you any piping there?

A. We laid a pipe to the river. That job cost us over $3,000.

Q. What was the object of that?

A. So that we could get the water independent of the city. We pump our own water from the river.

Q. What was the condition of the Michigan Central property there at that time; was elevator B built then?

A. It was built about that time. I think there were two main tracks down the Michigan Central at that time. They now have six main tracks.

Q. Will you tell the jury what your plant is composed of as regards boilers?

A. Our power consists of four boilers, and the engine we bought of Hodges & Company, 24 by 36, balance-wheel 15 feet in diameter, which gives us about 250 horse-power net.

Q. You have four boilers and a 250-horse-power engine?

A. Yes, sir; five-inch shafting running 60 feet and branches each way, one shaft 110 feet and another 80 feet long. This
944 structure is built very substantially, and it is not like other people's. It is peculiar in itself, in the arrangement; it was built for a purpose.

A JUROR: Why is it not like other people's?

A. It is built a little different—a different plan, for instance; I will make it plain to you before we get through; I have got a better plan, and you may go through the United States and you won't find its equal. My pipes that carry my shavings are laid in the ground. There are three of them, 110 feet long, 32 inches in diameter, made in a substantial way, lined with iron, and my fan is at the end of that. I take my shaving pipes under the floor. I never saw one anywhere else. There are a hundred things about the place that I can explain to you different from anybody's else.

Q. In regard to these engines and boilers, what kind are they as to power?

A. They are steam boilers. James McGregor built them, 54 3-inch flues in each boiler.

Q. What is the length of the boiler?

A. Fifteen feet.

Q. Are they a good article?

A. The best of the kind.

Q. What in regard to your engine?

A. We had it made especially, after asking for bids of the Corliss engine and other places, and we had it built here in town.

Q. What is it as to quality?

A. We call it first class. It is not as expensive an engine as the Corliss, but it is a good engine, what is called a riding cut, flat-valve engine.

Q. How many moulding and planing machines have you in that plant?

A. There are five double-cylinder, sectional pressure, cyl-
945 inders 30 inches long. Those are simply for dressing lumber on two sides, and they are so arranged that they will dress two boards at a time, a thick board and a thin board both, equivalent to 70,000 feet a day.

Q. What is the total number of those machines?

A. Five of the largest.

Q. How many planing machines have you, all told?

A. Nineteen machines.

Q. Nineteen planing machines?

A. Yes, sir.

Q. Describe the uses of those machines to the jury. Five of them plane boards on both sides. Now, what about the others?

A. Three of them dress four sides, used as planers and matchers, tongue and groove and dress both sides, that would make nine.

And then there are three moulding machines, that makes 12; and then there is a jointer, a machine that you can take a piece of lumber out of line and straighten it, that makes 13; and then there are six hand matchers, that feed the lumber from the machine by hand, which rabbet and do very nice work. Those we use to tongue and groove our box-work upstairs, and when the machines are in order, we are able to do very nice work; we glue the joints and make very nice work.

Q. How long have these machines been in use in your mill?

A. We bought them when we built the mill, eight years ago, but there is not a machine there today that is not in as good order as when it was put in. There is one man who does not do much else except to keep them in order. He rebabbitts them and keeps them in trim.

Q. Have you any small matchers and joiners?

946 A. Six, and they make up the 19. There is other machinery.

Q. How many gangs of rip-saws have you?

A. Three gangs where we do car siding and roofing, and then we have what we term a Chicago saw that works by power, practically through gangs.

Q. How many rip-saws have you, all told?

A. Probably 40, cut-offs and rip-saws.

Q. How many what you call resaws, for cutting the board in two?

A. To resaw and make two boards of it, we have four, but there are three in use.

Q. Have you any cross-cut machines?

A. That is what I have referred to; probably 40 saws, 20 of them cross-cuts and 20 rip-saws.

Q. What other fine machines have you there?

A. There is our mitre saw, one small pony planer, a boring machine, gig-saw, perhaps more. Clapboard machines—we dress our lumber on four sides and pass it through the machine, and it saws it on a bevel, making two pieces; one edge is thick and another is thin.

Q. Have you elevators there?

A. We have two elevators, one 21 feet long by 10 feet wide, made very substantial and very strong. That is one of Backus' machines. It has run now for eight years without any repairs. We wore out one every 30 days, and it was a nuisance until I went at it and got mad and built a new machine, and it is there today, just as good as it was the day it was put in. And there is another 12 feet square, used to fetch the lumber down. It comes back by a counter-weight, with two men and six or eight empty trucks on.

Q. Have you any scales?

947 A. We have scales to weigh all our lumber before it is shipped. It goes onto a scale, and it is weighed.

Q. Anything else that you want to describe in the way of machinery?

A. There are two elevating bunks that you saw which carry lumber up. It is beyond a man's comprehension how much work

it will do. It will do more work than you can imagine it is possible to do. It will carry 20,000 feet of lumber up four stories high and deposit it on the platform, and one man swings it around on these trucks.

Q. You have a pneumatic apparatus and fan?

A. A pneumatic tube that carries our messages to the office and brings messages and orders back, so that we put our orders into a little cup and whisper through to the mill, and it is set going by moving a lever.

Q. Saves you walking and running backward and forward?

A. Yes, sir.

Q. Have you anything else?

A. We have electric bells and speaking tubes that reach from the office to the mill.

Q. All these things cost money?

A. They cost a great deal of money, and yet they do not show.

Q. Have you telephone apparatus there?

A. There are several telephones in the place.

Q. How many, do you know?

A. Four or five.

Q. Have you dry kilns there?

A. We have five dry kilns, four of them of the capacity of 60,000 each, 240,000 feet, and the other is 20,000, making 260,000 of lumber at a time.

948 Q. What about this exhaust blower?

A. We have an arrangement that we have used, but we have discontinued it for the present.

Q. Have you a number of emery grinders?

A. Yes, sir.

Q. What are they used for?

A. One large emery grinder stands in the engine-room, and is used to grind our planer knives. That is under the supervision of the engineer, and it is automatic in its working. It grinds back and forth until it grinds to a certain point and then it stops; and then there are several smaller emeries which we use to make our moulding knives. The improved kind of moulding knife is something that requires a good deal of care, you cannot see to do that without bright light. They have to be made to a pattern. That is one of our specialties. We do fancy work; when we got an order from New York for fancy work, for inside finish, we work to patterns, and we have to make our own knives.

Q. What kind of floors have you in that mill?

A. The flooring on the mill in the three upper stories is two thicknesses, inch and a quarter pine, an inch and a quarter maple on top of it. The floors are smooth and solid, like an office floor, so that we can move heavy loads anywhere. The mill is built in the most substantial manner, so that it will carry a hundred tons weight anywhere. It stands upon substantial foundations.

Q. How many trucks have you?

A. Something over 200 in the mill. Trucks and boxes for carrying the stuff away. They are all on casters.

Q. How many traveling belts?

A. Two, to carry lumber from the first floor onto the upper
949 floors, and their capacity is beyond a man's comprehension—20,000 feet an hour, as fast as they can put in two or three boards at a time. It travels 200 feet a minute.

Q. Have you canvas hose and stand-pipes?

A. Eight hundred feet of canvas hose for fire protection, in working order and can be put in operation instantaneously.

Q. And stand-pipes—for the same purpose?

A. Yes, sir.

Q. Have you steam pipes running through the building to warm it?

A. On every floor.

Q. Have you fire on any floor?

A. No fire in the place.

Q. I see you have some force-pumps, what are they?

A. Three force-pumps that can be used for fire purposes, in addition to our stand-pipes to carry our city water; we pump water directly from the river, and we use pumps.

Q. Two large water tanks, what are they for?

A. One of the tanks is made of iron and receives the condensation after the exhaust from our engine goes through the dry kilns. It condenses and comes back in water. Of course, that is distilled water. That is free from lime or any other impurities, and it is worked over in our boiler, pumped from them into our boiler constantly; and there is a large tank from where we get our supply as we pump it from the river.

Q. So that by that arrangement you get water which is perfectly free from impurities, so as not to foul your boilers?

A. Yes, sir. If by any mishap anything should occur, that we are disabled in our machinery, we are connected with the city water
works so that we can get an instantaneous supply. These
950 stand-pipes come from the city water works and are also connected with our own pump. We have an arrangement by which we can flood the inside of our shavings-room in case we should get on fire.

Q. You are doing the best you can to keep down fire?

A. Yes, sir, that is what we have always done.

Q. That is your greatest enemy?

A. Yes, sir, we burned up there eight years ago.

Q. How much did you lose in that fire eight years ago?

A. More than $100,000 above all insurance.

Q. I see there eight miles of steam pipe?

A. Yes, sir.

Q. What about that?

A. That is absolutely so. We have figured them up and there are over eight miles. We have probably more of steam fitting in our place than in any other place in the country. We are amply provided so as to warm our place like a parlor in the winter time. Every room in that mill is warm and comfortable.

Q. These steam pipes are to heat the dry kilns as well as the mill?

A. Yes, sir.

Q. They are used for both purposes?

A. Yes, sir.

Q. There are shaving tunnels in the ground under the floor?

A. Those tunnels are built of two-by-four scantlings run through a moulding machine and laid so that they are round, and iron hoops made of half-inch iron, and those hoops are placed once in thirty inches. The pipe is 32 inches at one end and 18 at the other, 110 feet long, and I had a man go inside and line them with iron. They are Backus' arrangement. It does better than any one's else. It is perfect.

951 Q. You have three of them?

A. Yes, sir. We are never bothered with its clogging, it always goes, and then these fans stand in the ground, and they fetch the shavings up into the shavings-room, and our sawdust in the same way. You get onto the idea that I am a little different than anybody else, but I get the best arrangement. Other people have their pipes overhead to catch the dust and obstruct the light and to be in the way of the belting. Mine are in the ground out of the way. I can do anything I want to do. I can dress up a white-oak plank that is green and all ice on it. Other folks have to stop and shut down the machine and poke to make it go. These things cost money but it pays better to do it.

Q. I see there is one roll machine?

A. That is a machine to make rollers. We can make rollers three inches in diameter, or we can make curtain rollers ¾ of an inch, 1½, 2 inches or 2½ in diameter. That is a specialty of ours. When we find a customer who wants something of that kind we are able to make it.

Q. I see you have a railroad siding?

A. Yes, sir, 500 feet of it.

Q. Who pays for that?

A. They put the iron down, and we paid for everything else.

Q. Gig-saws, how many have you?

A. I think there is only one.

Q. Reservoir for shavings?

A. There is a reservoir for shavings probably 40 feet long, 20 feet wide and 20 feet high. That is the size of our present shavings-room.

Q. What about your reservoir for sawdust?

A. The sawdust has a room 40 or 50 feet long, 20 feet wide
952 and some 30 feet high. It is very high. That is where the sawdust comes in.

Q. A wood-cutting machine?

A. No, that is on the fourth floor.

Q. Have you one there?

A. We have a saw for cutting up wood and a traveling belt that carries it into pockets, where we can sell it—give a man a load of wood in a minute.

Q. Have you sewers there?

A. Sewers in every direction, laid wherever it is necessary.

Q. Is the ground thoroughly and well sewered?

A. Yes, sir.

Q. Have you all the belting, tools and small machinery to accompany such an establishment?

A. Yes, sir. We have idlers to carry our heavy belts. When we stop a machine everything stops about it, and our belting there is double belting. We run our planing machines with eight-inch belt, double, and it is run with a tightener, and when we shut off a machine this whole thing stops. It does not travel and make a noise. That cost us $55 each set, and I think there are 12 or 14 sets.

Q. Have you all those appliances that I have mentioned?

A. Yes, sir, and probably a great many more. The half is not yet told.

Q. Have you underground pipes to convey the heat to the kilns?

A. Yes, sir; there is a pipe made of galvanized iron, 30 inches in diameter. It must be nearly 100 feet long.

Q. Sheds for keeping your stock dry?

A. The sheds stand on iron columns. The columns, I think, cost us about $500 for those sheds. There are a great many of them.

953 Q. Platforms all around the railroad track?

A. Platforms and paved yard, paved with cedar blocks, and sewerage so as to carry the surface water off the yard to keep us dry always.

Q. Have you an office building?

A. We have an office that is comfortable, 32 by 40, two stories, 15 feet between joists.

Q. A pretty fine office?

A. I will leave you to say.

Q. Vaults in your office?

A. Vault to keep our papers, and a burglar-proof safe without any money in it.

Q. Have you carpenter and repair shops?

A. I have got a place set apart for a carpenter shop, nicely warmed with steam pipes, bench and tools, and most anything that is wanted.

Q. About what is the capacity of that mill, the daily capacity?

A. I could not tell you. We never have had work enough to fill it. We could work up 300,000 feet of lumber in a day if we had it.

Q. What do you average?

A. We probably average 75,000 to 80,000 feet. 100,000 feet would be a fair daily average, if we could get the work, if we were supplied with the work.

Q. On an average, how many people do you employ in that mill?

A. Our pay-roll, I think, is about 130, but we probably average about 150 the year round.

Q. All these items which you have gone over here to the jury have cost you money?

A. They have been done with as much economy as we
954 could study to get that which was good. In addition to that, we have a yard at the foot of Eighteenth-and-a-half street, and we have a great many trucks and horses, and everything in good order to do business.

Q. All to run in connection with this mill?

A. Yes, sir.

Q. I want to ask you what you manufacture?

A. We manufacture anything that we can sell.

Q. I want the jury to get some idea of your business.

A. Flooring, clapboards, ceiling, moulding, wainscoting. We do not make sash and doors. With blinds, we confine ourselves to getting out coarse material. We sell to retail yards throughout the country anything that they ask for—pickets, casing, car siding, cornice; car siding is one of our specialties. We work for a great many car companies—panel stock, pattern and finishing lumber and box chutes, racks for different purposes.

Q. Box chutes is one of your main products?

A. That is our main hold. We got an order Monday for four car-loads coming in from A, B and C from all over the country.

Q. Water tanks?

A. Yes, sir, for railroads.

Q. Pickets?

A. Yes, sir.

Q. Tub and pail stocks?

A. Yes, sir.

Q. Stretcher stock—what is that?

A. That is used for a variety of purposes. When they work split leather, and make three or four or five thicknesses, they have these stretchers to stretch it out.

Q. Backing for picture frames?

955 A. Yes, sir; we try to accommodate almost anybody.

Q. Sign-boards?

A. Yes, sir.

Q. There is a great variety of stuff manufactured there?

A. Yes, sir; in all kinds of wood, hard and soft.

Q. You do a great deal of very fine work there?

A. Yes, sir, and we try to do it in such a way that when we send it away people will be satisfied, so that they will trade with us again.

Q. Do you recollect how much your dry kilns cost?

A. I can only approximate. They probably cost us $10,000. That mill, with the machinery, shows that it has cost us, dollar for dollar, $116,000, that is for the mill alone. Our office account foots something over $15,000, including the furniture and fixtures. You noticed the wall was covered with Lincrusta Walton, very nicely decorated. We had three men working two months decorating.

Q. Does that include the warehouse?

A. No, sir.

Q. How many dry kilns?

A. Four proper and one over the boilers, making five. Those four dry kilns, we know, cost us more than $10,000.

Q. You have been laying out money on that mill ever since you built it?

A. Yes, sir.

Q. You built it about eight years ago?

A. Yes, sir; our plant cost us $150,000. It is made up of $116,000 for the main mill. $10,000 for the dry kilns, $15,000 for the office, $3,000 for the water pipes, that makes $144,000. Then there is the labor of two men, for a good share of the time, for eight years, re-
arranging, setting up machinery, making changes, and that
956 has always been charged to the expense account, which
should properly be charged to construction account.

A JUROR: You have to allow something for wear and tear?

A. We keep it up with these two men making changes.

Mr. TRAUB: We consider it worth quite a fortune to be situated at prominent railways to make signs for the travelers to notice, and thus save a great deal of money advertising in the papers. You know that Mabley probably spends $20,000 a year in advertising?

A. We never advertise in that way. The money that we spend is by making a personal application. I go and tire a man out by talking to him. I blow my own horn and he always gives me an order to get rid of me. I do not advertise, but I keep our machinery in good order.

Mr. TRAUB: You are so conveniently arranged that the trains passing you—the people can see you without advertising in the papers?

A. That does not amount to much. We advertise by making special effort, getting acquainted with the men and using them so well that they will never leave you. I have men on my books that have been there 15 years right along. You could not buy them off, you could not scare them away with a club. I want to state this, that way back in the year 1870 I established the precedent of making box chutes and shipping them to the eastern cities. I was the first man to make box chutes and ship them east, and they gradually worked up an extensive trade. I didn't know enough to keep the business to myself. I built a large mill in 1871–'72—built that mill that was burned down, and the press thought it would be
a very nice thing to write me up and I gave myself away, and
957 from that time forward I began to have competitors, and
probably in a year I had 30 or 40 competitors; probably 50 or 60 doing the same class of work, so that it is not always wise to tell. Mr. Adams told me I was making a great mistake when I put the new engine into my planing mill. He says, "We are taking out a 16-inch cylinder and putting in a 12, and you are putting in a 20 by 26." Later on I had to take that out and put in a 24 by 36, and we never had any too much power.

Q. Is the planing-mill business a business in which much advertising is done?

A. No, sir.

Q. Do you know of any planing mill in the city of Detroit that advertises?

A. I never advertise any.

Q. Can you tell me of any?

A. I could not.

Q. Business is done with builders, or men around town here?

A. Our business is largely abroad.

Q. But I mean in town here, it is done right with the builders?

A. Yes, sir, they come right and see it themselves.

Q. And for the business abroad advertising in the city here would not do you any good?

A. No, sir.

Q. Mr. Adams, in his testimony here, undertook to criticise your ways of doing business. I will ask you, now, have you made a success of your business?

A. From Mr. Adams' standpoint I have not, but from my standpoint I have.

Q. About what are you making a year out of that mill?

A. If that is a pertinent question, I can explain: Some
958 years we have done very remarkably well, and some years we have not done so well, but we have always held our own.

Q. About how much have you done; I see in your testimony before you told it?

A. There are years we have made very nice money; years ago.

Q. How much, $75,000?

A. Yes; $70,000, $56,000, $35,000, $30,000, $25,000, $52,000, $70,000. But there are years when we have had to work very hard to make our living.

Q. Have you paid for that property out of the mill itself?

A. I can say that in our fire, 1882, we lost more than $100,000, and today we have just about caught up, I guess.

Q. You have a storehouse on Fort street?

A. Yes, sir.

Q. You have also seven acres of land down the river there?

A. Yes, sir, Eighteenth-and-a-half street.

Q. Mr. Thompson thought perhaps your yard was a little too far from your mill?

A. Yes, sir.

Q. Just tell us about that; tell us what it costs you to handle your lumber there, and how many teams, compared with him.

A. We handle probably 20,000,000 feet of lumber a year, and I think our horses are 14, if I am not mistaken; but there are four of those that we might consider fancy horses; that is, we drive them in our phaeton; that would leave us ten horses to do our business. Mr. Thompson, I think, as I have been advised, has 34 horses; we have ten to do our work.

959 Mr. BAKER: He testified that he had to do that work.

A JUROR: How many do you use between the yard and the mill?

No answer to juror's question.

Judge CHIPMAN: Two horses to haul those trucks in the yard; that was the testimony.

WITNESS: Mr. Thompson is delivering lumber; he runs a yard here in town and handles a great deal of lumber, and has got a great many horses.

Mr. BAKER: He testified that he used two horses down there to supply his mill.

Judge CHIPMAN: I speak of the number of horses that you use and that he uses in your lumber businesses.

A. We have to bring most of our lumber by water, nineteen-twentieths probably is brought by water; I have been looking over it this morning; one-twentieth comes in by rail, nineteen-twentieths by water; it is landed on our dock; it has to be sorted up in qualities, in thicknesses, widths and lengths, and it has to be piled, number 3, 4, 5, and so on; by actual count on our yard we have 611 piles 18 feet wide to pile this lumber, and it is sorted into ten-inch, into box quality and other kinds to put into the respective piles; and we have what we call Mormon trucks, we have 26 of them; Mr. Thompson says he has 150; we have 26; these Mormons consist of two wheels four feet in diameter, with four-inch tread, and an axle in here, and rollers on it, that rests on a little, small truck, with two wheels, that is hitched to a tongue, and we hitch onto one or more trucks, and we call them Mormons because one will marry on them all. Now, here is the lumber left on the dock, 15 or 16 feet high, running here for 300 or 400 feet, and we have a plank running here, and these trucks will come here, and we set a
960 three-wheeled bench under the end of this truck; here is 26 of them along here in a row, and the man who is on top of the pile sorts the pile, and he marks them. Here is No. 3, 4, 5, or according to the quality, and the men take hold of this lumber; this is select lumber, that goes to that truck; this is fine common, that goes to that truck, and so on. They handle 150,000 or 200,000 feet in a day. Mr. Thompson uses two horses, Mr. Backus uses two horses, but Mr. Backus can get away with more lumber than Mr. Thompson can; with these two horses, driving them together, hitching onto this, he moves 100 loads in a day and distributes it—it will average from 1,200 to 1,500 feet to a load—and he takes this load and goes off to that pile—there is seven alleys—and he drops it here and there; the man who is driving goes to work to take this lumber, and he will get away with 100 loads with this one team. We have to have a place to sort and store this lumber. Mr. Adams' idea is to have his mill and lumber together; Mr. Backus' idea is to have them separate.

Q. Mr. Thompson you mean?

A. Mr. Thompson and Mr. Adams both; I wanted to get into the city where I could distribute my stuff and sell my kindling. Backus delivers seven loads of boxes to his customers each day; Mr. Thompson delivers two. Mr. Thompson's way is all right; Mr. Backus' way is all right.

Q. Mr. Thompson said that if you could handle that lumber for ten cents a thousand you could handle it very cheap?

A. Yes, sir.

Q. How much does it cost you to handle it?

A. It probably costs eight cents a thousand to put it on the truck; there is a man on the pile and another man on
961 the truck, and there is about six to eight men used to load these trucks all the time. They understand how to do it. This man on the truck knows how to take this lumber. So it probably costs us eight cents a thousand to put on those trucks; if we put it on a car it would cost us twelve cents. The labor of taking this lumber from this place to the mill is about ten cents. The teamster himself never loads or unloads, we dump the load; we take from 2,500 to 3,000 or 4,000 feet to a load, and the teamster drives up and backs up in behind the machine, and the man at the machine, or the foreman—the teamster does not attach this thing, but the man at the machine or the foreman tips a little lever, and this stuff rolls off, as I understand, in half a minute or so; and he goes back and he makes from ten to twelve trips a day with his team.

Q. He does not wait at all?

A. No, sir; there is no confusion, no loose men there; there is no dead flies around it, we are all going right to business. I don't know who can do it any better.

Q. He says if you delivered from the yard to the mill at ten cents a thousand it is cheap?

A. I can deliver on an average about 3,500 feet a day; the team and the teamster, that would be $3.50, at 10 cents.

Q. How many teams does that take to deliver the lumber?

A. I think there is three teams employed on that—three and four; some lumber has to go to the dry kilns and be handled over twice, and we have to change around; we have to bring lumber from the dry kiln up here, and once in a while send a load up to town.

Q. Your sons are in that business up there?

A. Yes, sir.

Q. How many have you?

962 A. Two sons.

Q. It is a corporation now?

A. Yes, sir.

Q. Who are the stockholders there?

A. Myself and two sons. My two sons have a little more than half. They have got so that they have got the old gentleman tight; they can control him.

Q. You own the real estate there; do you rent it?

A. The real estate is rented to the corporation.

Q. For how much a year?

A. $18,000.

Q. For the real estate?

A. Yes, sir. That is divided, $1,000 on the warehouse, $5,000 on the mill, $12,000 on the dock.

Q. The mill property, the real estate, you are getting $5,000 a year for.

A. Yes, sir.
Q. That comes to you personally?
A. Yes, sir.
Q. As the landlord of the company?
A. Yes, sir; and they pay the taxes besides. The measure of the value can be based on that.
Q. How much are the taxes?
A. I don't know; some $3,000, I think, on the whole property.
Q. I mean on the mill property?
A. I don't know.
Q. But they pay you $5,000 a year for the site of the mill—and they pay the taxes besides?
A. Yes, sir.
Q. What other business have your sons been in?
A. No other business.
963 Q. Have you brought them up with this business?
A. I nailed them to the mast before they knew it.
Q. What are their names?
A. Newton Dennis and Henry Nelson.
Q. How old is the oldest?
A. Thirty-eight.
Q. And the other?
A. Thirty-six.
Q. How long have they been in this business?
A. Ever since they were 16 or 17 years old.
Q. They have been in it since they were boys?
A. Yes, sir.
Q. And have been in with you ever since?
A. Yes, sir.
Q. There is a great deal said here about this dust-bin. Have you any burlap in there?
A. I have got the best appliance.
Q. First, have you any burlap there?
A. Twenty-seven hundred yards of burlap.
Q. I wish you would go on and tell the jury in your own way what sort of appliance you have there, why you think it is the best; what you think are the dangers to which that machine gives rise, and generally give an account of it. Give us the shape and purposes of that dust-bin, and its liability to fire, according to the way the wind blows, and which way the wind blows down there, and all that?
A. In order to run a planing machine and make your room available, it is necessary to get rid of the shavings and sawdust as fast as it is made, and the most practical way to do that is to use a large fan, an exhaust fan, that draws the stuff from the machines and throws it into a large reservoir, wherever it is; in order
964 to have it work properly it has got to be a large place that will have free vent; if you undertook to throw it into this room it would not come in here, it would work against itself; you have to give it a free vent; if you do not, the shavings and dust go out and that makes it a nuisance every way. It has been a great

study with everybody in this business for a great many years. I have been very much exercised over it myself; I tried a great many schemes; away back in 1873 I got a kind of an idea of blowing it in at the openings, but I never got relief until I got onto this idea gradually of burlaps, and gradually it developed into a perfect success; I took out a patent, and I have built probably a hundred of them, for some of the largest institutions in the land, and without exception they all say it is superior to anything else; many of them have been exchanged for other appliances, but they come back and say, "Backus, yours is the best." This runs automatically, requiring no power; the others require a good deal of power, and this gives us perfect relief, and free from dust, leaves the shavings and sawdust in the room where you want it. So I have adopted that. Hand me that little model there.

(The model is handed to witness.)

Q. Just explain how that burlap acts and the necessity for ventilators on the top, and the dangers you are trying to counteract?

A. Our room over there is very lengthy; it takes in two rooms as much as 70 or 80 feet long; this is six-inch board, and six-inch crap all along, and 20 to 26 feet wide, and I put burlaps 12 feet high on that place, and in all I have got 2,700 yards of burlap; the way it goes in here through these open cracks and comes out here; the wind comes out free, because there is no pressure
965 on it, and there is so much surface that it is like a man putting his head in a woolen sack, he can breathe free; if he put it in a flour sack he could not; the wind raises it and these things puff out, swell out, and when you shut down your mill they collapse, that breaks the dust loose, and they fall down; consequently it is automatic. Mitchell & Rowland, of Toledo, use one; Sanger & Rockwell, of Milwaukee, also; Anson Eldred, of Port Howard; and the big men of Chicago, Palmer & Fuller; these large carriagemen at Fort Wayne, Studebaker, put in a large one. I have put in 100 of them in different places; the pencil-makers in New York, and the car works.

Q. Have you a patent on it?

A. Yes, sir.

Q. Well, go on with your statement?

A. Of all the devices that have ever been put up, that is the most substantial and reliable one; it is bulky and costs money, but when you get it in you can go to sleep nights, and think it is all right, because it will do the work. Crampton & Bolton said, when one was put in there, "When I start my fan it will crack my fan all to pieces." My man who was putting it up, said, "No it won't." He told him to wait until he started the engine, and to be very careful. He started up the engine, and this thing didn't even flutter; and he says, "All right, go ahead." That was Crampton & Bolton.

Q. Is this the size of the thing you put in there?

A. No, sir, that is a little model.

Q. How big are they?

A. In mine it is quite 2,700 yards.

Q. What is each of these divisions?
A. It is about a yard wide, 40 inches wide, and run-up 15 or 16 inches high.
966 Q. Have Clough & Warren, the organmen, got one?
A. Yes, sir.

JUROR:

Q. What quantity do you gather daily in these burlaps or in the dust-room?
A. I don't know. We make in our place probably 10 cords, more too, in a day.
Q. That would be 20 loads?
A. Yes, sir.

ANOTHER JUROR:

Q. If that was covered by a cloth, would not that work well?
A. No, sir, it would not work as well.
Q. What is your objection?
A. I should not hardly know how to do it.
Q. But I suppose it could be done?
A. Oh, I suppose it could be done, but it would be a pretty serious expense. That is not exposed there (referring to model), that is under lattice-work; the cloth is not exposed. Understand that that is not perfection; a little fine dust will creep out of this, but in such infinitesimal quantities that it will not accumulate in great quantities; still on a dry day, without much wind, they will lay on the roof; so it is exposed to that trouble we are speaking of, this exposure to the fire.

By Judge CHIPMAN:

Q. In regard to a wire cloth being put in there, what would be the objection to it?
A. It would be too expensive and too complicated?
Q. Would it be flexible enough?
A. No, sir; it would choke right up; the wire cloth would
967 not do; we have tried that; they tried it in Brooklyn, they tried it in a large place in Brooklyn; they had this wire arrangement, but it choked up; the dust will collect, and it choked up; they had the wire in place of this cloth, and it clogged.
Q. Why do you use the burlap?
A. Because it is flexible; it works just like that (illustrating); when you blow in, it will just go so; when you shut down your mill it collapses, and that breaks the dust loose.
Q. Does this burlap prevent the dust from going through?
A. That is in the main, it does.
Q. Would the wire cloth do it?
A. No, sir, not so well, because it is too coarse; this is a very fine mesh.
Q. There is a fibre inside of this that catches the fine dust?
A. Yes, sir.
Q. In the burlap?

A. Yes, sir.

Q. The upper part of this dust-room is open?

A. No, sir; there is a roof over that.

Q. But there are these slats along?

A. Yes, sir; on the sides.

Q. The purpose of these slats is to let the air in?

A. Yes, sir; to give a free vent; this, you understand, is in the upper part of your shavings-room, your place where you are housing your shavings and dust, that is in the upper part, overhead.

Q. The pressure would be so great that it would either take the roof off or take the dust all out of doors, if you had it closed on top; it would be apt to take the roof off?

A. You could not work it.

968 Q. If it is open, and there is nothing to obstruct the dust, it will go streaming out?

A. Yes, sir.

Q. Now, the wind, of course, according to the direction in which it blows, goes into these slats on top?

A. If it blows from this way, it works through the slats?

Q. If any dust comes out, then it will come out on the opposite side of the wind?

A. Yes, sir.

Q. If the wind is blowing in this direction, and there is a spark from a locomotive, or anything else, a live coal, and it goes in there and touches that, it will go off, won't it?

A. I will give you a few illustrations: The Standard Oil Company built this thing in Cleveland, a very large one, 3,000 or 4,000 yards, that worked to perfection, and one day a man was a little careless and the dust fell down, the door was open, and we happened to have the doors open to the fire, and it kind of smudged right in, and it blew the whole thing up; that is one instance. In the Columbus Buggy Co.'s place in Columbus, they sent a man up above to sweep it out; it was six stories high; and he swept it over, and he left his fire-door open below, that is, the ash-pit door was not closed, and that dust, as it came here, sputtered right in here, and it blew it up, and the man was burned so that he died. And here in Croghan street, a few years ago, their dust business blew up there, and it came near burning them up.

Q. They didn't have any arrester there?

A. No, sir; they didn't have this, but it shows the dust is very combustible. And here out at Owosso at Crutch's place, that blew up the same way. It is almost as practicable to blow that

969 thing up as though it was a train of powder; if a spark goes in there it has got to blow you up, and there is no fire department that can prevent it.

Q. Why did you put that dust-bin, or whatever you call it, where it is?

A. To get away from the exposure.

Q. What exposure?

A. From the Michigan Central. The Michigan Central is on the east side, and I put it over as far as I could to get it away.

Q. With all these buildings in between?
A. Yes, sir.
Q. Then the danger in this dust-arrester would be, if the wind was in the right direction, that it would bear in or suck in a spark if it came—is not that so?
A. That is true, and it is certain to work that way.
Q. And of course there is a suction there?
A. The wind is always up or down the river, that is, it is pretty near, and as it comes it will float this, if a train is coming this way, it will float it this way, and if it is coming this way it will float this way (illustrating).
Q. Have you observed the prevailing winds?
A. I have.
Q. In connection with your mill?
A. Yes, sir.
Q. Do they blow towards your mill, or away from it—the prevailing general winds?
A. The prevailing winds suck up through under the bridge, and if it is an east wind it kind of works up right through, on the Michigan Central.
Q. In regard to this elevated road, which way would the wind be generally, as carrying their sparks and cinders and dust?
970 A. If it is an east wind or easterly wind, or southerly wind or westerly wind, it is sure to find us.
Q. It bears it in towards your building and your plant?
A. Yes, sir, east, south or westerly wind, it is sure to find us.
Q. Those you say are the prevailing winds?
A. Yes, sir.
Q. What do you consider the precise dangers and the precise detriment to your plant there by this structure being put in front of it?
A. I consider it is an absolute ruin to our business.
Q. Go on and tell the jury in your own way why.
A. I don't think it would be a practicable thing for us to run it, for the reason in the first place that it would not be but a little while before we would be burned up; it is inevitable; because you must remember that works like powder, it is a thing that is very combustible, and they are exposing me every few minutes, sometimes when you least expect it; it is not necessary that all the sparks should go there, but one spark would set me on fire; if there is not much wind this dust collects, it lays inside, a little dust lays here; that is the stuff that will burn like powder, and if this spark finds us it will destroy us before we know it, and even if our property is insured, it is going to cost us a great deal of money; in my candid opinion, as I have looked it over, it will cost about $6,000 a year to pay extra insurance.
Q. How much insurance are you carrying at present?
A. I cannot say exactly, but in the neighborhood of $80,000. It would cost us $6,000 more than it costs us now. We carry about half. We consider we have got a nice risk now. It would cost us $6,000 a year more probably.

971 Q. How much insurance are you carrying?

A. About $80,000.

Q. About how much of the risk do you carry without insurance?

A. About as much more.

Q. You value the property at about $150,000 to $160,000?

A. Yes, sir.

Q. Including the stock?

A. Yes, sir, we calculate that we have got to carry, it would not be less than $160,000, because there is $20,000 or $30,000 stock in the mill.

Q. Half of that you calculate to have insured?

A. Yes, sir.

Q. And the other half you take the risk yourself?

A. Yes, sir.

Q. In case this extra danger from fire comes there, you would feel like insuring all of it?

A. Yes, sir.

Q. Then you would insure $160,000?

A. Yes, sir.

Q. What premium do you pay upon your present insurance, or what rates?

A. We have been insuring in these mutual companies, and I think that costs us about three and a half per cent., but if we insure in those stock companies—I heard Mr. Jones' testimony the other day, that he charges us five and a quarter on the mill and four and a half on this dust-arrester part, and he says he will have to increase it two per cent. on the mill, and that he won't insure the other at all. But if we are paying now, we will say $4, that would be $32 for $80,000, we have got to pay $2,000 more on that, two per cent. would — $1,600 more; then we have got to
972 insure at seven per cent.; he says he will raise it two per cent.; that will be seven per cent. on sixty, that will be $4,200 more; that will be $6,800.

Q. You mean on $80,000?

A. Yes, sir.

Q. That is seven per cent. on $80,000. You calculated it on sixty?

A. Yes, I want to insure $80,000; that is a question that can be figured up. I have got to pay two per cent. additional on $80,000, that is $1,600 a year. Then I have got to pay seven per cent. on $80,000; that makes between $6,000 and $7,000 more.

Mr. BAKER: Have you got it finally fixed at $7,200 additional insurance?

No answer.

JUROR: Could you not build a new structure there; tear down the old and build a new, build out to the walk, and build a new four or five story wall, an extra structure?

Judge CHIPMAN: He means to put up a new structure at your expense, to keep out the sparks from that company.

A. That would shut out all my light. They say that the fittest survive. We are not the fittest, we will have to step aside, but it is hard to do that; here I am 67 years old, and just commenced it seems, and now they come and trip me up, and destroy me. It is a shame.

Q. Do you understand that you are called on, in order to help a railroad company, to alter your property and go to an extra expense and change your plant, in order to help any company or any public improvement?

A. It seems I am.

Q. Do you understand that to be the law?

973 A. I understand that they are to pay this damage. I have offered to sell out to them. They have never made me any approach, but Mr. Moran came to me and wanted I should make a proposition, which I did; I looked the thing over carefully, and I made an equitable proposition to sell to them for $250,000, and I take my machinery and go away, and I would let them have the buildings; the buildings are in good, substantial shape; they could utilize it and make a machine shop of it on the fourth floor if they wanted it, and I could have gone away.

Q. Could you find such a convenient place?

A. I think I can find a convenient place.

JUROR:

Q. Don't you think there is any danger from sparks now?

A. In the way I am fixed, the Michigan Central did not injure me a bit; I have been there 20 years. The wind always takes it up and down. We have never had the first intimation that there is any danger. My exposure is from the west side; it is not possible to get anything there.

Q. What was the occasion of your fire in 1870?

A. My watchman burnt me up carelessly; the man shoved the shavings down there, and the whole mill was in flames in half a minute.

Judge CHIPMAN: Do the Michigan Central's locomotives come by there near you?

A. They pass right by me. The engine never has occasion to come in. The engine comes and takes the cars.

Q. Let me ask you how far do the Michigan Central's locomotives go from your plant there?

A. It is probably about 100 feet; they run right along, when they get up towards the other end they are nearer then, they are within probably 20 or 25 or 30 feet of my shed at the further end.

974 JUROR:

Q. The dust-arrester is facing east?

A. The west.

Q. The part that is facing east is entirely open, is it not?

A. We tore it down there at the further end.

Q. Now, trains passing over the Michigan Central, are you not troubled with sparks from the locomotives?

A. No, sir; I never saw a spark come over our shed in the world.

By Judge CHIPMAN:

Q. You have got that high, big mill between the dust-arrester and that?

A. Yes, sir. There are no sparks come over our shed, and the shed is close by the railroad; it is up pretty well, probably 25 feet high.

Q. The main body of your mill is there?

A. The main body of the mill is further down, over there to the south.

Q. Does not the main body of your mill come between the Central railroad and your dust-arrester?

A. Oh, yes.

Q. It comes between?

A. Yes, sir.

Q. Now, your dust-arrester is open at both sides, at the top, both east and west?

A. Yes, sir; but it is 200 feet away from the Michigan Central railroad, and it is probably 30 feet high; it is 30 feet above the Michigan Central track, and it is 200 feet away; the dust-arrester is about 200 feet away.

Q. Beyond the danger from fire, what other detriment do you consider this elevated road to be to your property, as to light, as to cinders, as to impairing your machinery, air, and everything?

975 A. In the first place, we have quite a retail trade. People come there to get lumber from us, and it is going to obstruct that. The day before yesterday we had quite a mishap there; one of our old customers came in there with his team, and it seems our foreman got on with him, and they were passing that place where they were driving spiles with their little engine, and the team took fright and ran, and it was represented to me that the man said he would never come in there with his team. I know that will be the result, people will not come in there.

Q. They are driving spiles for this same elevated road?

A. Yes, sir.

Q. Go on.

A. And a man is setting his machinery, planing knives and mouldings, and there comes along a train of cars; this light is going to flicker—every car that passes it will create a streak of light in there.

Q. It breaks the light, just as though you were sitting on the track on a car and a train passes you?

A. Yes. The man who is setting these knives cannot do it until this train passes. By a fair estimate it is going to take two and a half minutes for a train to pass. That will occur a great many times in a day, and of course that is going to be done at my expense, and every time the smoke and cinders comes along here, it is going to darken my windows; you cannot keep it out; with a

wire screen up there, it would obstruct the light. We cannot do our business.

Q. If you get a wire screen there fine enough to arrest sparks and keep out dust, what effect would it have on the light?

A. It would obstruct our light and our circulation of air. Our mill is so arranged that all the light we get in the lower
976 story comes through the doors; the doors are 11 feet high and 9 feet wide, and they are left open and the light comes in it so, underneath, and if we built this structure up here, it is going to obstruct that light very materially—it is going to make it so dark that I don't believe it will be a practicable thing for us to run it without enough light.

Q. Some of the jurors have asked about putting wire screens in front of these windows. A wire screen fine enough to keep out dust, cinders and smoke—what effect will it have on the light?

A. I would not think of it myself. I would dry up. I would not do business there that way.

Q. A juryman suggests you could enlarge your windows. Don't you think the next step would be to pull down the mill?

A. When the old mill was built it stood on the edge of the street, and we used to drive through an opening and go the other way. We thought we should change it. We made a mistake in doing it; we ran it about 36 or 38 feet back from our light to the face of this wall. Now we drive in and back in, and the result is we get our light through these openings, through these openings the whole length of the mill; we cannot get it from any other source; if we had built that wall on the line here, as we contemplated—we thought we would do it a couple of years ago, but we discussed the matter, and we found it would make us so dark that we had better not do it—our machinery would have to be set in further, and we did not do it. Now, this structure comes in the same way, and it will make it so dark as to practically exclude us from the light. The question of surveying our lumber has been brought up. In all lumber, as we ship it, after it is dressed, it shows its im-
977 perfections, and you have to have a bright light to see it; you send it to New York, and if it is not absolutely in line, they will kick right off; and in order to see the quality you have to get good light; it cannot be done in the mill; after it is in the machine every imperfection shows; we run it in the shed, and the light comes in there, and we discern whether it is second or third or fine common or uppers or whatever it is, and it is classed according to the quality, and it goes to market, and if we keep our standard up we are good fellows, and if not we are busted.

Q. If the quality is not right, if they kick, what do they do?

A. We have to let them have their own way. We have to make a deduction of 5, 6 or 8 or 10 dollars a thousand.

Q. They take as big an advantage as they possibly can?

A. Yes, sir.

Q. This grit or cinders coming in, what effect will it have upon your fine shutters?

A. That has been explained; these cinders are gritty, and it will

take the sharp edge off your knives, and you will have to stop three or four times a day and file your knives, and a man would have to stop three or four times to file them up.

Q. How about your saws?

A. The saws are on the same plane; they dull easy, and they would have to be filed up.

Q. Do you keep one man filing saws all the time?

A. Yes, sir.

Q. What kind of light does he need for that?

A. The very best.

978 Q. What kind of light does he need for sharpening knives?

A. He has got to have good light. We have to have the best of light to set them; in filing a knife a man can do it without so much light, but he has to have an extra light to set them.

Q. In moulding knives?

A. You must not have any grit about them.

Q. And how about the light to fix them?

A. You have to have good light to set your knives to make mouldings or to do any kind of work.

Q. The moulding knives have complicated shapes?

A. They have got to be worked very nice; only experts know how to do it.

Q. As it is, you keep one man doing nothing but filing your saws?

A. Yes, sir.

Q. Your small saws?

A. Yes, sir.

Q. What do you do with the resaws?

A. They are filed by the men that run them. He has got to file them three or four or five times a day; it depends, if he has this gritty lumber he has to file them every two hours.

Q. How is it about your knives?

A. The men that run the machines attend to them.

Q. Anything that would be gritty and take the edge off your knives, or the set off your saws, or dull either the saws or knives would make so much more work?

A. Yes, sir; that depreciation comes from the stuff being on the lumber when it comes on the material.

Q. But anything of that kind has that effect?

979 A. Anything of that kind is objectionable.

Q. And it would only make so much more work in the mill to keep the tools in order?

A. Yes, sir; that is so.

Q. And that you would have to pay for?

A. Yes, sir; and besides that it is going to discolor your good lumber—it is going to muss it, darken it, make it dingy, and in the work that it is used for it will bring it down in streaks, and that will never do.

Q. How about the hands of your workmen in taking hold of a clean board?

A. That would dirty it; it should be clean.

A JUROR: Would it not be a good plan to make an estimate of the cost of removing all the machinery to the other side of the building?

A. I could not do that. We have got it arranged now; we have got a nice, happy arrangement so that we can handle more lumber than Mr. Thompson can.

Judge CHIPMAN: Where do mean?

JUROR: On Fort street.

Q. Where is the front of your mill?

A. On Woodbridge street.

Q. You have expended about $9,000, leaving that front out on purpose to get down to that level there, so as to do business?

A. Yes, sir.

Q. You have expended for your water there, bringing it on that level, some $3,000 more?

A. Yes, sir.

Q. You have expended money on all your sewers, bringing them in there?

A. Yes, sir.

980 Q. You have all your pneumatic and steam apparatus fitted to that level?

A. It is built just situated as we are, because we wanted the railroad facilities, and it is not every day we can get those facilities; it is in the heart of the city, and we deliver seven loads of boxes a day; Mr. Thompson delivers two with the same labor.

Q. Could you, for an expenditure of $50,000, change that mill front around, so that you could operate it and make the front on Fort street?

A. It would not be possible.

Q. Could you do it?

A. No, sir.

Q. Could it be done for $50,000?

A. No, sir.

Q. Could it be done without building a new mill?

A. It tires me to think of it.

Q. We are all tired, the counsel and the jury are tired, but we want to know.

A. Mr. Baker has a way of doing it; he is going to bring cars up——

Q. I am coming to that in a minute; but could you do it for $75,000?

A. I would not fool away my time in that way, because it would be simply preposterous and boy's play; I could go down on the Rouge and build a mill and do it for less money and get it so I could handle it, but we are all constructed here; let us alone; put your railroad across the street and let us have our place as we calculated to have it; we have been there 20 years, and we had no

981 thought of this thing coming up, and we built this thing as we thought was right, and we have used it and made a success of it up to today, and we want now to be let alone, that is all.

Q. Mr. Baker yesterday suggested, when Mr. Thompson was on the stand, that you might have tracks run inside alongside of your planers, to take the place of these trucks that he says he runs in?

Mr. BAKER: The wagons that Mr. Backus uses.

Q. Now, they have got those trucks up into your second or third story; which would it be; it would run to the third story?

A. Yes, sir.

Q. Would it be practicable to run railroad tracks in among your planers, and run and take a flat car in with a load of lumber, and feed from the flat car to your machines?

A. No, sir. The trouble is this: When you bring your lumber in there, you have a certain thing to go through——

Q. But I want you to confine youself to this. Now on the third story, or we will say it was down on the first story, down on the basement, or whatever you choose to call it; could you run alongside of every planer; would it be practicable to put there a railroad track to carry in a flat car of lumber and feed your machine from it?

A. No, sir.

Q. Would it be practicable to feed your machines from the third story situated as they are now?

A. It is not possible.

Q. Would you not have to take them all upstairs?

A. I don't know. Mr. Baker can tell you about that.

Q. Would you not have to take them all upstairs and alter the entire arrangement of your mill?

A. We can do better if we want to, by buying a new mill.

Q. I ask you if it would be a possibility in this case?

982 A. No, sir.

Q. Would not these changes in these guards, in these protections, all of which have been suggested here, from various sources, the fire-walls, the making of bigger windows, the putting up screens, the changing of your arrangement for your dust-room, and taking a planer up in different parts of the building from what you are now, would not that amount in effect to building a new mill?

A. Worse than building a new mill. I could build two mills sooner than change that one.

Q. Is there a lot of stuff you would lose there—piping and such things, if you made a new arrangement; piping and tubing and such things?

A. Yes, sir. There would be very little value, although that machinery cost us a great many thousand dollars. The machine that cost us $1,100, you could not get today $400 for it.

Q. To move it?

A. Yes, sir. These saws that cost me $750, you could not get $300 for. I did find the customer for one for $300.

Q. You bought these machines to use there?

A. Yes, sir.

Q. These things are of full value as they stand there?

A. Yes, sir; I could not buy them for any less if I had to buy them again today.

Q. And you make just as much money with them now as when you first put them in?

A. Yes, sir.

Q. And you have got them correctly set and running smoothly and nicely?

A. Our appliances are better today than eight years ago.
983 Our machinery is settled down to business; if there was anything proved frail we have replaced it with something that is substantial.

A JUROR: Do you mean to say that your machines are just as good today as they were eight years ago?

A. Yes, practically.

Judge CHIPMAN: Does not the mill work better today than eight years ago?

A. Yes, sir; everything is adjusted gradually to its purpose.

Q. It takes some time before you get all the parts adjusted and working harmoniously?

A. Yes, sir. Many mills are built three or four times before you get them to work harmoniously and well. We have not got a mill there that is second hand.

Juryman Traub suggests that it would be well to have a committee of experts as to the value of the mill and machinery.

Mr. BAKER: We will show the value of the mill before we get through. When we put in our evidence we did not go into the value of the mill; we just proved the value of the real estate. Mr. Backus is going on and trying to tell you what that mill is worth. In rebuttal we will show you what we think it is worth, and we will do it by expert men.

Q. What else have you to say in regard to the value of this property and the damage that this road will do you there?

A. If I was to build the mill over again today in that place it could not be done for a dollar less than we have done it for. We did everything as economically as possible. You could not buy your brick or get your labor as cheap as we did. We have
984 made no charge for our services. I worked there all through this, and my boys. We make no charge for that; we throw that in. It cannot be done any cheaper and it cannot be done any better.

Q. It is the result of long experience?

A. Yes, sir. Here is a mill that is constructed to carry 100 tons weight anywhere; it does not settle. My shafting is in line; it runs easy. My belts are double, two thicknesses, endless iron twiners; everything in first-class order. The shafting is straight and true.

Q. Did it take any time to get all this?

A. It has taken me my whole life; it has been my life-work. You cannot do this thing in a short time; you have got to work it over and over and over and over.

Mr. BAKER: You have done that since 1882?

A. Yes, sir, but I have used my experience.

Judge CHIPMAN: You mean the experience that you gained befor 1882?

A. Yes, sir.

Q. You built a better mill in 1882 than your first mill?

A. We aimed to.

Q. You know you did, don't you?

A. We have learned a great many things that we didn't kno when we commenced.

Q. Have you observed the running of locomotives?

A. Yes, sir.

Q. Do you know anything about the efforts that have been mad to get smoke-consumers?

A. Oh, yes.

Q. Don't you know—I suppose the jury know it, but I have go to prove it—don't you know that for years patent after patent ha been taken out, and effort after effort made to get something tha would stop the cinders—fire and cinders, from escaping from engines locomotives or others?

985 A. There have been a great many appliances adopted.

Q. Have you ever seen one—I am not speaking of yours—have you ever seen one outside of yours which effected the pur pose?

A. No—practically. That one that we were on the other nigh did it when it was in the hands of an expert fairly well, but that i not a success, it is far from it.

Q. You observed the sparks and cinders coming out from tha now and then?

A. Yes, sir; but it did it pretty well compared with others, but i is not a practical thing.

Q. You said it did it pretty well, and yet you said it was not a practical test. Will you tell the jury why? You have given a good deal of attention to this subject.

A. I will tell you how they come to do it the other night, to all appearances, but I can tell you why it won't be a success. In the first place, they used what they call the Orvis & Hutchinson patent blowing the steam in among these cinders; they managed so tha in this smoke-pipe below there was no supply; to illustrate, suppose they start from Chicago and come here; when they come here they have got this all full of cinders, and as they come in it will blow these sparks out more than it will do now, because they did not have them in the other night when they started; it was all empty, and they were using as much steam to generate as they had; that is the scheme that has been used many years, the Orvis & Hutchinson smoke-consumers, blowing the steam into the fire, and of course a great deal of that steam will put out a great many of these sparks; but they do not get onto the true principle; it is air they want to make a fire—oxygen; it is just as essential to have oxygen as to have coal, and the secret is how to blow it in, how to get

986 the air in there, to have the air get to the screen sheet before it burns; I have seen this thing occur: when the man opened

the door to throw the coal in, if he left it open a minute or two minutes, they would have to put that engine in the shop and caulk all those flues. This thing you had the other night will spoil your flues in the same way; it is not a practical thing. But what has that got to do with this subject?

Q. That is what I asked this jury.

A. It is wasting time; it has nothing to do with this subject. When they come down there with a locomotive it is going to burn us up, dead sure.

Q. (Showing lamp.) We had an illustration here with this lamp the other day. Where is the draft, where does the oxygen get into this when it is on fire here?

A. What is this?

Q. It is a gas lamp. It is the principle of all lamps.

A. The air comes right in here and goes round, and if you close this up it will smoke.

Q. In other words, it is like making a fire generally; when you make a fire and blow from underneath you are apt to blow the oxygen in and make the fire blow out?

A. It is the air that makes the fire.

Q. And if you blow on top it is pretty hard to get a fire burning. Did you ever try to kindle a fire by blowing on top of it?

A. It is hard.

Q. On these locomotives, as I understand it, they check the fire by cutting off the draft from underneath with the dampers?

A. They close the dampers below and open the door, and that will check it right down.

987 Q. They check the fire by opening the damper, which is underneath?

A. By closing the dampers.

Q. Now in a coal stove, and in most stoves, the damper is generally put above the fire, in coal stoves, at any rate——

A. They have them both sides of the fire, one back of the fire and one in front.

Q. I mean the regular damper.

A. You should get Mr. Moran to tell that.

Q. But they have them so that the air comes in right on top of the fire, and opening the door lets the air on top of the fire instead of underneath it?

A. Yes, sir, that will cool your crown sheet and make your flues leak and spoil your business.

Q. You say that this engine they had the other night, under the process it was working, if it made a run of any distance, there would be such a tremendous accumulation of cinders forward that it would not work?

A. It would throw the fire.

Q. Did you ever see that engine working at any other time than that night?

A. I think not.

Q. Engine No. 35?

A. I saw it a night before; I saw it Wednesday night and Satur-

day night, and they were not looking for me then, and she threw fire then a great deal more that night than when we went down to the Rouge, and when they blew that steam in you could hear a noise just as though she was blowing off; she was using as much steam as she would generate when she stood still.

Q. When you and I looked at her before she started that night, what was going on in that engine before she started?

988 A. I went up and looked at the steam-gauge and saw she was losing, she was not making steam; instead of having 135 pounds, she had got down to 120 or 125, and you could hear her roar, but it was going into the fire and going out of the smokestack, and what sparks would get in there would be naturally squelched with that steam. But what has that to do with our subject? I am tired and I wish you would let up on the jury.

Q. In other words, this steam that she was using was going to quench or put down the fire and to absorb those cinders, as it were?

A. It is not a practical thing, in my opinion: I don't believe it is a practical thing to do. It is a thing that was applied 18 or 20 years ago; those patents that covered that thing have become obsolete; it has not been in working order; I have seen a great many of them.

Q. What was done with those that were tried?

A. They passed off. He had this thing patented 17 years ago, I believe.

A JUROR: The last one is not patented yet.

Judge CHIPMAN: But the general principle is.

A. That is the same principle; it is the Orvis principle.

Mr. BAKER: Mr. Barnes says it is something new.

A. They blow it in; they put a jet of steam here, and it puts them out here.

Judge CHIPMAN: You have studied this subject and taken out patents on this same thing, have you not?

A. Don't tire me.

Q. You have studied the subject and taken out a patent?

A. Of course; I have taken out a good many patents that were not worth a cent.

Q. But on this smoke-arresting business, you have made a business study of it?

989 A. Yes, sir.

Q. Is there anything new in this Barnes idea, that he advances here, except that he does not use a screen; he uses a plate with holes in it?

A. He uses the same appliances, I guess; only he applies this steam, as I understand, at the front end; just as it goes out of the smokestack he lets a jet of steam go in here that puts it out. He has got an expert there to manipulate it; it is important to have an expert, a man that knows how. He will find it very difficult to make the thing go after he gets through with this trial; this thing will die out; it will not be heard from again, probably.

Adjourned to Friday, July 3, 1891, 2 p. m.

On Friday, owing to the non-attendance of a juror, the matter was further adjourned to Monday, July 6, 2 p. m.

MONDAY, *July* 6, 1891—2 p. m.

ABSALOM BACKUS, JR., continued.

Cross-examination by Mr. BAKER:

Q. You say you bought the land where your planing mill stands, or the most of it, in 1871. Do you remember of whom you purchased it?

A. William Darmstaetter was one, and George Prentiss, the lumberman, I think he was the man.

Q. Did the property that you purchased of Darmstaetter run through on both streets?

A. Yes, sir.

990 Q. How many feet did you purchase of Darmstaetter?

A. I could not tell you.

Q. Do you remember how much a foot you gave him for it?

A. It cost me $16,000, the first purchase. I had to pay $1,000 to get a man off.

Q. The price to Mr. Darmstaetter was $15,000?

A. I think that was the price.

Q. What was it used for at that time?

A. Boiler shop and for drying hair.

Q. This was a yard that was connected with it?

A. The boiler shop was on Woodbridge street, and the drying hair on Fort street.

Q. Did they have a building there?

A. A cheap, temporary building.

Q. The tenant you gave $1,000 to?

A. Yes, sir.

Q. So that the Darmstaetter property cost you $16,000?

A. Yes, sir.

Q. You don't remember the frontage of that property?

A. No, sir.

Q. You purchased that in 1871?

A. Yes, sir.

Q. What other purchase did you make?

A. I bought from Appleyard and Coveau.

Q. Where was the Darmstaetter property situated, on the mill property, the extreme westerly side?

A. The mill proper stands on the Darmstaetter property.

Q. Did you buy between the mill and Steadly?

A. Yes, sir, that was the Coveau lot.

Q. How many feet did you buy of Coveau?

A. If I remember right, 33 or 34 feet.

991 Q. What did you give him for it?

A. I can't remember.

Q. Does his lot run through to Fort street?

A. No, sir.

Q. You don't remember the consideration?
A. No, sir, I do not.
Q. What other lot did you buy there?
A. The Prentiss lot.
Q. Where was that situated?
A. Right in where the mill stands.
Q. Between the mill and the Mary Specht property?
A. No, that was Appleyard's.
Q. Where is it situated?
A. The Mrs. Coveau lot was where the dust-house stands, and then the Prentiss lot came in. I think it was 60 feet, or something like that.
Q. Where was it situated on that property?
A. Next to the dust-house, where the mill stands.
Q. How many feet?
A. I think it was 60 feet, or something like that.
Q. How much did you give them for it?
A. I can't tell you.
Q. Where is the Appleyard property situated?
A. Right where our sheds are, the railroad tracks.
Q. How many feet did you purchase?
A. 40 or 44.
Q. What did you pay for it?
A. I think that is $4,000.
Q. What year was that purchase made?
A. I can't say; perhaps five or six or eight years after we bought the first.
Q. Does the 44 feet run back to Fort street?
992 A. No, it came up to the Michigan Central railroad.
Q. Where is the Prentiss property?
A. Next to the Coveau property.
Q. The only property that you bought that went through to Fort street was the Darmstaetter?
A. Yes, sir.
Q. And that did not go all the way through?
A. Yes, sir.
Q. Is there not a jog there?
A. The property on the back side of the mill measures something like 300 feet.
Q. Is there not a jog there, so that the lots on Fort street extend further west than the lots on Woodbridge?
A. Yes, sir; the width of Mrs. Steadley's.
Q. Of whom did you buy that property directly north of Mrs. Steadley?
A. Darmstaetter.
Q. His property did not run through to River street?
A. His property lays around the Prentiss lot.
Q. Only a portion went through, then?
A. A portion of it lay on the Michigan Central road, this jog of the Prentiss lot and Mrs. Steadley's lot.
Q. Was your first mill erected upon all this property?

A. My first mill covered the property that is now covered by the mill and the dust-house, and the open space in front out to the street.

Q. Did it cover the place where the office is?

A. The mill did not cover it then.

Q. Did you own it then?

A. Yes, sir.

Q. When did your mill burn up?

A. In October, 1882.

993 Q. How long had it been built at that time?

A. About ten years.

Q. Did that mill property have a frontage on the Michigan Central property, upon the northeast corner?

A. Yes, sir.

Q. And it always has had that frontage on the Michigan Central, has it not?

A. Yes, sir.

Q. And you owned all this property that you occupy now when your mill burned in 1882?

A. Yes, sir.

Q. Immediately after that fire, you proceeded to rebuild, didn't you?

A. Yes, sir.

Q. Did you try to buy the Steadley property so as to go through the same width to River street?

A. I tried to buy it.

Q. What did you offer Mrs. Steadley for it?

A. She was offered $8,000.

Q. What did she ask you for it?

A. I think it was $9,000 and not five cents less.

Q. You refused to pay it, didn't you?

A. Yes, sir.

Q. It was not worth it?

A. I felt as though it was not worth it at the time.

Q. It was not worth the $8,000 you offered for it?

A. It would have been to us.

Q. To any outside purchaser, it was not worth that amount of money, was it?

A. We wanted it.

Q. You wanted it and you offered more than it was really worth to get it?

994 A. We did not consider it was more than it was worth; we wanted it so bad that we were willing to pay $8,800.

Q. Do you think it could have been sold to anybody for as much money as you offered for it?

A. I don't think she could have got that for it.

Q. What I want to prove is that you made a good, fair liberal offer for it, but that you did not get it because she wanted $9,000 for it. How many feet did she have?

A. I think it is 64 feet.

Q. Running halfway back?

A. Yes, sir.

Q. Your dust-room is a long, red strip on this map on the westerly side of your property?

A. Yes, sir.

Q. That is built on the line of the Steadley property, is it not?

A. Yes, sir.

Q. The Steadley property is 65 feet wide and it represents the property that lies south of the yard where your dry-kilns are on this map. Your office is on Fort street. You go into your property on the west of your office?

A. Yes, sir.

Q. But you only go back halfway, to the southeast corner of the large square marked yellow?

A. It is more than halfway, about 165 feet.

Q. The Steadley property is the River Street property that lies right in front of that, is it not?

A. Yes, sir.

Q. With a frontage of 65 feet?

A. Yes, sir.

Q. Mrs. Steadley lives there?

A. Yes, sir.

995 Q. For 65 feet of that property you offered $8,000, and she refused to sell it to you, and wanted $9,000?

A. Yes, sir.

Q. Was that after your fire in the fall of 1882?

A. Yes, sir. You want to understand that there was a hill, an excavation about nine feet deep.

Q. We will come to that. Your property, from the southwest corner of the dust-room to the west side of the second track from the mill, that was the extent?

A. Yes, sir; 238 feet and a fraction.

Q. How far is it back to this jog?

A. I understand it to be 150 feet.

Q. How wide is this jog?

A. Sixty-four feet.

Q. And then it goes through to Fort street; how much frontage had you on Fort street?

A. Sixty-eight feet.

Q. The Michigan Central owns a right of way that bounds you diagonally—right across like that?

A. Yes, sir.

Q. And Mrs. Mary Specht owns a small brick building and a lot just east of you, that also runs back to a diagonal line on the Michigan Central?

A. Yes, sir.

Q. And the Michigan Central owns east of her?

A. Yes, sir.

Q. Did the Michigan Central own this right of way when you located there in 1871?

A. Yes, sir.

Q. Did the Michigan Central own this strip, 14 feet, running to River street?

A. No, sir; I bought it.

996 Q. You bought that after that; what did it cost you?

A. I don't remember what I paid for it.

Q. Seventeen feet of it?

A. Yes, sir; I think it was $2,000.

Q. How long ago was that?

A. I could not tell you.

Q. Was it before or after your mill burned?

A. I think it was after. What makes me think it was after—Mr. Specht, when they took the photograph of the rooms, he stands there, and I think he lived there.

Q. You bought that and conveyed it to the Michigan Central, and they put in a side track for you?

A. Yes, sir.

Q. And they gave you just what the land cost?

A. Yes, sir.

Q. Who built the side track?

A. I think the Michigan Central did.

Q. Did you have to pay any of it?

A. There was a consideration.

Q. What was the consideration?

A. They wished me to convey them the right to lay a large water pipe through my premises, and said if I would do it they would lay me the side track.

Q. Did they do it?

A. Yes, sir.

Q. Where is this water pipe?

A. Right under that track.

Q. Running to the river?

A. Yes, sir.

Q. Right under this same property that you deeded to them?

A. No, sir; it was under the side track.

997 Q. You bought this property and deeded it to them for $2,000, just what it cost you, and they put in the side track and built it entirely at their expense, in consideration that you would let them lay a water pipe under the track by which they connected with the river?

A. Yes, sir.

Q. You don't seem to remember what you paid for this property?

A. I know very nearly. I know we paid Appleyard $4,000, we paid Mr. Prentiss $6,000 or over, we paid Mr. Darmstaetter $15,000, and I paid $1,000 for getting a man off, that made it $16,000, and Mrs. Coveau, I forget whether it was $3,500 or $4,000.

Q. Altogether the property didn't cost $30,000—the purchase price?

A. More than that.

A JUROR: That would be less than $30,000, as you have stated it—$29,500.

A. We calculated it cost us about $9,000 to excavate.

Q. I am not talking about that, I am talking about what you paid for the real estate?

A. You have pretty nearly got it.

Q. And you purchased that property in 1870 and since then?

A. Yes, sir.

Q. How late was the last purchase?

A. Appleyard's was the last.

Q. When did you do this excavating?

A. The great share of it was done in the winter of 1871 and 1872.

Q. Was not the natural lay of the land on River street very near to the level of the river?

998 A. It was right at the sidewalk, but it immediately raised very fast.

Q. Has not the grade of Fort street, in the construction of the Fort Street bridge, been considerably raised at each time the bridge has been reconstructed?

A. Yes, sir.

Q. How many feet has that street been raised in front of your property there?

A. The last time it was raised about four feet.

Q. The first time, how much was it raised?

A. I can't tell you.

Q. It was raised a couple of feet or more?

A. You know better than I do.

Q. Don't you know that when you went there in 1871 that the bridge had been built, that the approach had been built to that bridge, and that the street was higher than the adjoining property? The approach was to a wooden bridge when you went there?

A. Yes, sir; we had to fill it up several feet.

Q. You had to fill it up in front where your office stands and where your yard stands. You have not filled it up since they raised it this last time?

A. No, sir.

Q. They have put it now some two or three feet above your yard, haven't they?

A. They have this last time.

Q. It is two feet or more above your yard, is it not? You have to go down hill to get into your yard?

A. It is nearly four feet.

Q. The city did that when they put in the new bridge, or the Michigan Central, between them they did it?

A. Yes, sir.

999 Q. Considering the natural lay of the land, will you tell us how many feet you had to excavate to get down to the level of River street?

A. I think we had to excavate about nine feet back for 150 feet.

Q. How much is Fort street now above River street in front of your property?

A. I think it must be 16 feet.

Q. You excavated from River street back so as to get a basement

story there and to have a yard in front on Fort street, at your second floor?

A. We had to fill that up. We filled it up three or four feet.

Q. The land lay to advantage to do that?

A. We put some dirt there.

Q. River street was considerable lower than Fort street?

A. Yes, sir.

Q. So that the land was the shallowest on the River Street side, and you simply excavated it there just about as you would for any yard, didn't you?

A. We drew that dirt down and filled our dock.

Q. Down there you had some property where you wanted to fill it up, didn't you?

A. Yes, sir.

Q. When you talk about $9,000, you talk about the expense of hauling the dirt from this mill property down there?

A. Yes, sir.

Q. You got the full value of the $9,000?

A. We took it there because we had no other place and we wanted it.

1000 Q. For every cubic foot of land that you took away you got a cubic foot more below?

A. Yes, sir.

Q. And you docked out so that you have some seven acres and a half of land?

A. Yes, sir.

Q. And, at least, half of it is made land?

A. No, sir.

Q. A third of it?

A. You are telling it, I don't know.

Q. A quarter of it?

A. We filled in probably 400 feet in the water.

Q. And when you talk about $9,000, it was the entire expense and putting it below?

A. That did not cover it all.

Q. We are talking about the excavating.

A. I would not want to lead you astray.

Q. See that you do not get astray yourself, never mind me.

A. The Appleyard lot was a hill, and we had to move that afterwards later on.

Q. Where did you take that to?

A. We drew a good deal of it down there.

Q. So you drew it all down there, didn't you?

A. Most of it.

A JUROR: You improved the lot by the excavation at the same time?

A. That is the way I always do, make one hand wash the other if I can.

Q. You have only a trifle over 300 feet on both streets, 238 and 38?

A. That is right.

1001 Q. Did you realize that you swore that that property was worth something like $500 a foot?

A. I realize that I have always counted it as worth $150,000.

Q. Did you realize in giving that testimony that you were testifying that that property was worth, the land itself, $500 a foot?

A. Yes, sir. The property just across the road, without any improvements, was sold for $500 a foot.

Q. Do you adhere to your testimony that in your judgment that property, the naked land, is worth $500 a foot?

A. I say this much, that land has never been for sale.

Q. Answer my question.

A. I will answer it in my own way. That land has never been offered for sale, and I have counted it worth $150,000 for this reason, it was leased to our company for $5,000 a year, and I was offered $150,000 for that land and take off all the buildings, and that figures up to more than $500 a foot.

Q. Who offered you $150,000 for the naked land and take off the buildings?

A. Luther Beecher; do you know him?

Q. Is that the only reason you have for stating that it is worth $500 a foot?

A. No, sir; we have held it for that for years past.

Q. You say you think it is worth that because you rented it for $5,000 a year?

A. That is one of my reasons.

Q. Was that not a bargain made between you as owner, with your two sons and yourself as the members of the corporation?

A. Of course it was.

1002 Q. It is in the family?

A. Of course it is.

Q. It was a bargain that extended over a great many years?

A. Yes, sir.

Q. Beecher owns the property just this side?

A. Yes, sir.

Q. Are you sure he owns it?

A. I have always been told he owns it.

Q. Don't you know that the Detroit Railroad Tunnel own that property?

A. I don't know.

Q. Do you know what your property is assessed at—the real estate?

A. I do not.

Q. You say one of the reasons you gave for testifying it is worth $500 a foot is that the property right across the road sold for $500?

A. I gave that as a comparison.

Q. Was not the property across the road sold for $400 a foot?

A. I read, and it has been told me, and I have got it I don't know where, that 160 feet sold for $80,000. Figure it out yourself, and a sewer under it at that.

Q. How many feet?

A. 160 feet.

Q. And it extends from River street to the channel bank of the Detroit river?

A. Yes, sir.

Q. You could not buy it for $2,000 a foot?

A. Yes, sir.

1003 Q. Was not that a strip that belonged to the D., L. & N. that ran right through the Michigan Central yard?

A. I suppose so.

Q. On this river frontage?

A. Yes, sir.

Q. Do you mean to testify that river property, upon the south side of River street, extending to the channel bank, the value of the privileges to the riparian owner is not worth more than property upon the north side of the street, situated as your mill property is?

A. It is not necessary that I should testify that way. I can grant that it is worth more. You could not buy it for $2,000 a foot.

Q. The river front is worth a good deal more?

A. It would be, of course.

Q. It is worth twice or three times as much?

A. It depends upon what you want of it.

Q. Suppose it is advantageously situated along the Detroit river, is it not worth, as a general proposition, at least three times what the property on the north side of the street, running back the depth the ordinary lot, is worth?

A. It depends upon the location of the other lot.

Q. Generally speaking, up and down this river?

A. We are talking about these premises of mine. I bought these in 1871, to get cheaper facilities, so that I could load my cars. You cannot load cars from any other source.

Q. I am not talking about your purchase in 1871, I am trying to find out the present value of this real estate. Do you still desire, as the owner of this property, to testify that you base your opinion of $500 a foot upon the fact that river property upon the other side of the street has recently sold for that figure?

1004 A. No, sir, I do not. I base it upon the fact that my property is valuable, for the reason that it controls a certain method of shipping, a certain point where I can ship to any part of the country.

Q. You located there, did you not, because you could get shipping facilities with the Michigan Central?

A. Yes, sir, or any other road.

Q. And you bought a strip of 17 feet and paid $2,000 for it, and you gave that to the company for the same price, and in addition to that you gave them the right of way for a sewer through other property of yours in order to get another side track, did you not?

A. We had the side track before.

Q. You did that in order to get another one?

A. They laid the other track on the 17 feet and gave us a lease of it, built the track and gave us the lease of it.

Q. Charged you rent for it?

A. $1 a year.

Q. But finally you bought the property for them and gave them this right of way, and they own the property and maintain a side track and you use it?

A. Yes, sir.

Q. Does this model substantially represent those side tracks?

A. Yes, sir.

Q. Do not the Michigan Central main tracks run along by here on an angle?

A. Yes, sir.

Q. With your tracks connected with them?

A. A little this way.

Q. How long has your property been situated as it now is?

A. Ever since it was built.

1005 Q. And these sheds were built there in 1883?

A. Yes, sir.

Q. And they have been there ever since, have they not?

A. Yes, sir.

Q. Do you pile lumber under there as represented here?

A. We use them to load our lumber into cars.

Q. Do you pile your finished products under there like that?

A. We use them to pile our lumber before we get a car-load.

Q. Under those sheds are there not at all times several thousand feet?

A. Yes, sir.

Q. And you have been using that in that way since 1883?

A. Yes, sir.

Q. With the Michigan Central trains passing by here?

A. Yes, sir.

Q. With it all open like that, so that the sparks and cinders can go right in upon the cars as they are standing on the side track?

A. I never saw any sparks go in there.

Q. Did you ever see any cinders go in there?

A. No, sir.

Q. So that the Michigan Central yard has been maintained there without injury to your premises?

A. We never have been injured. You understand the Michigan Central runs on an angle.

Q. It is all open between the engines and the trains and this lumber that is piled under there?

A. That main track is probably a hundred feet from there, 80 to 100 feet from that corner.

1006 Q. It is not far, is it?

A. It is probably 80 feet.

Q. Is there any building or fence in the way?

A. No, sir.

Q. How far do you testify it is?

A. I should judge it is about 80 feet.

Q. Have you measured it?

A. No.

Q. Have you ever had occasion to build a fence or put up a wall or do anything to protect the lumber under these sheds?

A. No, sir.

Q. How many tracks has the Michigan Central right adjacent?

A. I think there are six tracks.

Q. And they are in constant use?

A. These tracks next to us are the freight tracks—the way tracks.

Q. Their engines are working back and forth on these tracks constantly?

A. They do not many of them come out this way.

Q. The engines that have constantly set fire to the wooden bridge that was there passed right along in front as they went under the bridge, and in a dry time would frequently set it on fire?

A. Yes, sir.

Q. How near is the nearest track of the Michigan Central to the line of the posts?

A. I should presume one track may be within thirty feet.

Q. And then following right along are six tracks, are there not?

1007 A. The main thoroughfare; the width of the road is some 100 feet, and the center of that would be 50 feet.

Q. Right after you come to this first track there are six others put in about as thick as they can be?

A. I think it is 150 feet wide.

Q. I am sure I don't know how wide; there are six tracks put in there close together?

A. The track that does the business, where the trains pass out on that corner, is probably 80 feet.

Q. Are there not four main tracks, two passenger tracks and two freight tracks?

A. I think there are.

Q. And there are twe others that could be called main tracks?

A. Six tracks in all.

Q. How often does a locomotive go up and down there?

A. Pretty often.

Q. Are not a number of switches situated right there, so that they diverge from a point that is south of the railroad bridge, of the Fort Street bridge, so that when they go into River street they have 13 or 14 tracks instead of six?

A. I think the switches are put this way, two of them.

Q. Some of them are up towards the bridge and between the bridge and River street; do not the tracks change from six to 13 or 14?

A. Not till they get way past our place.

Q. Are there not a number of switches that are right in front, diagonally across there in front of your property, at which switching is being done day and night, the entire 24 hours?

A. I think there are two switches.

1008 Q. And they have been working there like that ever since 1882?

A. I should judge so.

Q. Do you have any lumber brought in on these side tracks?

A. Very seldom.

Q. Do you occasionally?
A. There has been such a thing done, but it does not work very well.
Q. Do you make a business of it?
A. No.
Q. You use these two tracks for your output and for shipping away the finished products of your mill?
A. That is what they are used for.
Q. Your mill is four stories high on River street?
A. Yes, sir.
Q. And three stories on the Fort Street side?
A. That is the condition of it.
Q. On the first floor in the mill proper you have some planing machines and resawing machines?
A. There are four resaws there.
Q. Have you a planing machine there?
A. There are eight planers there.
Q. And four resawers?
A. Yes, sir.
Q. By a resawer, as I understand it, you mean a circular saw with which you split lumber in two?
A. Yes, sir.
Q. Take an inch board and make a half-inch board of it?
A. Make two boards of it.
Q. What other machinery is there on that floor?
A. There are fans and drilling machines, emery wheels
1009 for grinding and making our knives and several moulding machines.
Q. A machine by which you make mouldings for buildings?
A. Yes, sir.
Q. That is a basement, is it not, as far as the River Street front of it is concerned?
A. It is a ground floor.
Q. Are there any windows along the Fort Street side of it?
A. No, sir, not any.
Q. Are there not windows upon the east side of it under this shed?
A. I think there are two small windows.
Q. Are there any windows upon the River Street side of it?
A. There are six windows in the large doors, but the doors are standing open, consequently it is an open space.
Q. So that all the light you have in there is furnised substantially by those open doors?
A. It comes through those open doors.
Q. Are there any windows upon the west side?
A. I think there is one. It would not give us much light.
Q. This dust-room is beyond and on the other side of a small alley?
A. Yes, sir.
Q. Is it not true that your planing mill already stands in a dark place?

A. Of course it is, most decidedly.

Q. Can your men operate your machines there successfully?

1010 A. Yes, sir.

Q. And they have done it for years?

A. Yes, sir.

Q. Have you ever put in an electric light plant to accommodate those machines?

A. No, sir.

Q. Or in any part of your mill?

A. No, sir.

Q. Is there light enough at the present time to operate the machines successfully?

A. Most of them. The light comes through these doors.

Q. With no windows upon the other side?

A. No, sir.

Q. Is all the lumber that you consume in that mill taken in at those six doors?

A. Not all of it.

Q. Where else about your mill do you take in any other lumber?

A. On the second floor on the Fort Street side.

Q. Have you an entrance at which you can deliver lumber upon the Fort Street side of the mill?

A. We take in lumber there.

Q. Is there not a yard on the Fort Street side of your mill that is on a level with the second floor?

A. Yes, sir.

Q. So that a team can go into your open court or yard there and unload a load of lumber upon the second floor of your mill?

A. Yes, sir.

Q. And you frequently do unload lumber there, do you not?

A. Certainly.

1011 Q. About how many thousand a day?

A. I can't tell you that.

Q. Do you deliver at that entrance one-tenth of your lumber?

A. I should think we did.

Q. Do you deliver one-fifth?

A. I don't think we do.

Q. On the Fort Street side in this yard you have a place, have you not, for loading stuff to have it carried away for the local trade?

A. The business that goes through there is principally this box department.

Q. Have you not in your third story, on the Fort Street side the second story, a slide by which you slide your products down into wagons?

A. Yes, sir.

Q. And you deliver a large amount of material there, do you not?

A. Yes, sir.

Q. Do you take that around the city or pile it up under the sheds in that court?

A. It goes around the city.

Q. Is your local trade supplied from that entrance?

A. The box department is.

Q. What proportion of your business consists in making boxes and box shooks?

A. I ought to have had that figured out.

Q. You know?

A. I can't tell you.

Q. Is it a quarter of your business?

A. That goes the other side.

1012 Q. I want to see how much or what part of your business is making these boxes and box shooks?

A. Divide it.

Q. Can't you tell in a lump without dividing it?

A. If you go into the business you want to understand it, the boxes go up——

Q. No one has said anything about going into the business. What part of your business consists of boxes and box shooks?

A. Perhaps one-tenth consists of boxes.

Q. What part of it consists of box shooks?

A. It is pretty difficult to jump at it.

Q. I don't want you to jump at it, I want you to give us your opinion about it?

A. I should think half of our entire business goes into box shooks.

Q. By a box shook I understand you to mean the boards cut into the right size to be nailed together for a box?

A. Yes, sir.

Q. Put up in bunches so that anybody can nail them together and have a box?

A. Yes, sir.

Q. You say you introduced that business of putting them up in that shape and shipping them over the United States and Canada?

A. Way back in 1870.

Q. The boxes that you put up are delivered here in the city?

A. The boxes that are nailed up are delivered on the Fort Street side and go into the city. The box shooks go down the elevators and go into the cars.

Q. When you want to send boxes away you put them up in shooks to save the freight in bulk?

1013 A. We put them up in that way so as to handle them conveniently.

Q. What do you use the lumber for that is delivered at the Fort Street entrance?

A. For boxes, box ends principally. We do not resaw on that floor, it is all cut up, worked there and cut into ends principally.

Q. Where is the lumber that is delivered at that entrance from, the yard at the foot of Eighteenth-and-a-half street?

A. Usually.

Q. You take there lumber that you do not resaw?

A. Yes, sir.

Q. Have you a number of planing machines upon that floor?

A. There are two large machines there.

Q. Two of the largest machines you have?

A. Not the largest, but large machines.
Q. They are close to this entrance?
A. Yes, sir.
Q. Are they fed from the north end?
A. Yes, sir.
Q. What else have you on that floor?
A. We have two traveling belts that go up through that floor and the elevators.
Q. What other machinery?
A. A jig-saw, boring machines, mitre saw, hand matchers, matching machines.
Q. Is there any other large machine there?
A. No, sir.
Q. So that the only place- that you now have for delivering lumber to the machines are upon the River Street entrance and this Fort Street entrance?
1014 A. Yes, sir.
Q. When you bring lumber into the River Street entrance, do you dress it upon the first floor if you do not resaw it?
A. We dress all the lumber that comes on the first floor, on the first floor.
Q. And all the lumber that comes on the second floor, you dress it there, if it has to be dressed?
A. Yes, sir.
Q. Have you any resawing machines upon the second floor?
A. No, sir.
Q. If the lumber is to be resawed it is taken to the River Street entrance?
A. Yes, sir.
Q. If it is resawed, it is dressed upon the same floor?
A. Yes, sir.
Q. Put through a planing machine?
A. Yes, sir.
Q. Do you dress all your lumber down there?
A. Dress all the lumber that is delivered on the lower floor; it is all dressed there.
Q. Every foot of lumber that comes in is dressed?
A. Yes, sir.
Q. You do not send out any product in the rough?
A. No, sir.
Q. So that if it has to be resawed it is delivered at the River Street front and put through the resaws and then put through a planing machine?
A. Yes, sir.
Q. And dressed on both sides?
A. Sometimes one side and sometimes both sides.
Q. Do you pass that through machines that are used for the purpose of cutting that lumber up into shooks?
1015 A. No, sir.
Q. Upon what floor are your cutting machines?
A. On the second floor and fourth floor, and also on the outside

on the east end of the mill, and also at the south of the mill next to the street.

Q. In the court next to the fence where the six big windows are?

A. Yes, sir.

Q. When you take lumber up on the first floor upon River Street and resaw it and put it through the planing machines and redress it, how do you take it to the fourth floor?

A. On a traveling belt, generally. Sometimes it goes onto a truck and goes on the elevator that comes up.

Q. That is a series of belts and pulleys, by which you carry a board right to the fourth floor?

A. It consists of an endless belt, rolling on rollers, and the lumber goes in and is held down by the rollers until it lands on a platform in the upper floor.

Q. When you get it on the fourth floor you cut it into shooks of the right size?

A. We separate it into widths and thicknesses.

Q. The ultimate end is to make it into shooks?

A. Yes, sir.

Q. What do you do on the fourth floor?

A. That is used for storage largely. Still there are three or four supply sheds.

Q. You send your lumber up and sort it and pile it so as to have a quanity of the different kinds on hand?

A. Yes, sir. It has to be stored in widths and thicknesses, and it lies on the trucks, and is not taken off the trucks. They load one truck with four or five thousand feet and shove it off and let
1016 it stand, and another truck is sent, and by and by they whisper up that they want lumber so and so, and there is a truck already that is put on the elevator.

Q. You store it and have it upon trucks?

A. Yes, sir.

Q. What sort of work do you do on that floor?

A. There is a good deal of our local business done on that floor.

Q. Have you some cutting machines there?

A. Yes, sir.

Q. How many?

A. I think there are three.

Q. What other machines have you, any moulding machines up there?

A. No, sir.

Q. What have you besides the three cutting machines?

A. There is a saw where we cut wood, kindling wood.

Q. In bringing this lumber in and assorting it you have pieces left that you make kindling wood out of?

A. Yes, sir.

Q. Is that sawed up there?

A. It is sawed on the fourth floor.

Q. If it is shaky you will have pieces thrown out when you assort it?

A. The waste.

Q. Where does that wood go to when it is sawed?

A. Goes out into the room over one of the dry kilns, and there we sell it to peddlers.

Q. There is what I call a straw-carrier that carries it down there?

A. There is a belt that carries it out and tips it onto another and is loaded into the wagons.

1017 Q. When you want to use that lumber, do you use it on that floor or take it below?

A. It is taken below largely.

Q. How is it taken below?

A. It goes down the elevator and then is wheeled behind the saw.

Q. It is on a truck and is loaded on the elevator and taken down to the next floor and wheeled on that floor?

A. Yes, sir, and there is a man that is manipulating the saw that does not get out of his tracks all day long. He stands there and shoves this lumber back and forth when the lumber is wanted to be cut.

Q. What have you got on the third story, what do you do there?

A. There are six or eight saws.

Q. What are they for?

A. Cutting and ripping lumber.

Q. And making these shooks into the right size?

A. Yes, sir.

Q. Making shooks you have to make the ends and sides of the boxes the same depth accurately, do you not?

A. Have to work them to dimensions.

Q. Do you glue them together?

A. Sometimes.

Q. So that that room consists principally of a room where you make these shooks into the right dimensions?

A. The third story is devoted to the cutting of different lumber.

Q. To this cutting it up into the ends and sides of boxes?

A. The ends are cut on the second floor.

Q. And you make the sides there?

A. Yes, sir.

1018 Q. What do you do on the second floor?

A. Cut the heavy work there.

Q. You have these two planing machines there to start with?

A. Yes, sir.

Q. What other work do you do?

A. Those machines are supposed to dress the lumber into widths and lengths on the floor for the heavy work.

Q. Where are your box shooks put into packages and bundles?

A. Some of them on that floor and some of them on the third floor.

Q. Are as many put up on the third floor as the second?

A. I should think there were more.

Q. You say your box shooks constitute about one-half of your business?

A. Yes, sir.

Q. And more than half of that, the finished product is on th third floor?

A. Yes, sir.

Q. If you want to ship those shooks at the present time, you hav to take them down in the elevator?

A. Yes, sir.

Q. And take them out to this side track on the Michigan Cen tral?

A. Yes, sir.

Mr. DICKINSON: Are they weighed outside?

A. Yes, sir.

Q. Before they go on the cars?

A. We weigh these shooks; that is on the lower floor.

Q. What have you got to weigh them with?

1019 A. Scale ten feet wide and 22 feet long; we weigh half a car-load at a time.

Q. Do you have any difficulty in weighing them?

A. No, sir.

Q. Did you personally superintend the reconstruction of this mil in 1882?

A. I did.

Q. Did you personally plan and superintend the construction o your boiler and engine room and your dust and shavings room?

A. I did.

Q. I suppose you had had large previous experience in such things?

A. I always worked at it.

Q. Is it not true that what you call your dust-room is at the south end of this building?

A. The dust-room occupied 150 feet in length.

Q. There is a door, is there not, close to the street here?

A. Yes, sir.

Q. With a gate?

A. Yes, sir.

Q. Is not that the place where you load sawdust?

A. Yes, sir.

Q. It is not a place where you load shavings?

A. No.

Q. Will you state how you load that sawdust?

A. The principal part of it is shoveled—back the wagon right into the room and shovel it up and put their canvas on.

Q. Is it not a fact that the sawdust comes down in a pit in the rear of that entrance?

A. Yes, sir.

1020 Q. And you put it upon the wagon?

A. That building is a room 30 feet high, 20 feet wide and 60 feet long.

Q. Do you put that sawdust into the wagons with shovels?

A. I think most of it.

Q. That is a brick wall?

A. Yes, sir.

Q. It is a solid brick wall all round it?
A. Yes, sir.
Q. And the only entrance to it from the street is through this entrance?
A. Yes, sir.
Q. You have another place where you load shavings?
A. Yes, sir.
Q. That is some 50 feet back of the front line of the building, is it not?
A. I think it is just 60 feet from the front to that.
Q. What do you load there?
A. Shavings.
Q. Does the building for shavings come down to the ground?
A. The shavings are above and they come through a slide.
Q. Is it not true that you back a wagon into that entrance and load it with a chute?
A. Yes, sir.
Q. So that the shavings come down from above into the wagon?
A. Yes, sir.
Q. As you would unload corn out of an elevator?
A. Yes, sir.

1021 Q. Will you tell us whether or not this sawdust-room and the shavings-room have any opening between them, the two vaults. How do you get the shavings and sawdust apart?

A. There is a brick partition g ing clear up to the bottom of this dust-arrester.
Q. There is a brick partition that runs up solid the whole distance?
A. Yes, sir.
Q. So that your shavings vault and your sawdust vault are two separate rooms?
A. Yes, sir.
Q. How do you take your shavings and sawdust from your mill into these vaults?
A. They are blown in there by large fans.
Q. Do these pipes across there represent the tubes through which the sawdust and shavings go?
A. They do.
Q. How many shavings vaults have you?
A. One large shavings vault.
Q. Have you separate pipes?
A. Yes, sir.
Q. That carry shavings?
A. One comes from one bin and the other the other.
Q You have one pipe that carries sawdust?
A. Yes, sir.
Q. A smaller pipe at this end?
A. Yes, sir.
Q. So that your shavings and your sawdust are drawn from this mill through pipes and the draught is maintained with fans?
A. Yes, sir.

Q. You invented this dust-arrester, did you not?
1022 A. Yes, sir.
Q. Did you get a patent on it?
A. Yes, sir.
Q. You made a good deal of money out of it, didn't you?
A. Made some.
Q. When did you get a patent on it?
A. May 2, 1882.
Q. How many did you ever put in?
A. I could not tell you.
Q. About how many?
A. I presume 80, a great many.
Q. You patented that when you rebuilt this mill?
A. No, sir, before.
Q. How long before?
A. In 1882.
Q. You rebuilt the mill in 1882; when did you get the patent?
A. It is on here in 1882.
Q. Are you still putting these in?
A. We do not give much attention to them.
Q. When did you go out of the business, sir?
A. We have been giving our attention to something else.
Q. When did you go out of the business?
A. I did not go out.
Q. How long since you put in one of those for anybody else. You say you are not out of the business, let us see how long since you were in it?
A. I think within the past year.
Q. Whereabouts?
A. The last one, if I remember right, was put in in Wenona, Wis.
Q. For what firm?
1023 A. I can't tell you that.
Q. Don't you remember for whom you put it in?
A. I do not.
Q. How long ago was that?
A. I think it was about a year ago.
Q. Wasn't it two years ago?
A. I think not.
Q. How long before that did you put one in?
A. I could not tell you.
Q. Had you put in any, with the exception of the one you put in at Wenona, within two years?
A. I think not.
Q. Have you put in any, with the exception of the one in Wenona, within three years?
A. I can't tell you.
Q. Don't you know that you have not?
A. Time flies faster than you realize.
Q. As a matter of fact, is it not true that this dust-arrester has been displaced by new inventions?

A. There is no doubt about that.

Q. So that while you have not gone out of the business, you have not been in the business for three years, have you, as a business?

A. That is about the size of it.

Q. And you own the patent still, don't you?

A. Yes, sir.

Q. Do you not know that a dust-arrester like this is a very dangerous dust-arrester, so far as fire is concerned, and that a number of mills have been burned up by them?

A. No, sir, I do not.

Q. Do you not know that it is the most dangerous dust-arrester known to the trade?

1024 A. I don't know that.

Q. Do you not know that this dust-arrester does not work satisfactorily or safely, and that other dust-arresters are being put in generally all over this country?

A. No, I don't know any such thing. I do know this, that that dust-arrester is the most practical dust-arrester on the face of the continent today.

Q. You own the patent?

A. Yes, sir.

Q. You naturally are anxious to explain the merits of that?

A. Pay no attention to that.

Q. Don't you know that firm after firm throughout this country have taken those dust-arresters out and put in new ones, because they do not work satisfactorily, and because they were dangerous?

A. No, I don't know it that way.

Q. How do you know it; let us hear you state it?

A. A great many things, if you do not attend to them, they crowd you to one side. A thing that is defective, a thing that has no merit will take the place of a meritorious thing. This dust-arrester of mine has filled the bill. There are merits to this that people overlook. This runs without any power; it takes no power to run it. It gives absolutely free relief; it is very little trouble. It takes a little more trouble to put it in, but when it is built it is a perfect relief. There have been a great many establishments in the country that have had this and worked with it satisfactorily, and by and by they have been displaced by one thing and another, with something else which does not begin to fill the bill that this does. I have a good many, and I can give them to you where that has been the case; they have set mine out and put in the other, and then put mine back afterward.

1025 Q. Name me a mill where they tried another and put yours back?

A. Sanger & Rockwell, of Milwaukee.

Q. When did they do that?

A. They built mine a good many years ago, and here is the letter dated June——

Q. I don't care anything about your letters. When did you put this in for Sanger & Rockwell?

A. Here is a letter——

Q. Will you answer my question, When did you first put in one for them?

A. It must have been in 1884.

Q. When did they take this out and put in another one?

A. A year ago I stopped at Milwaukee and called on them, and they said, Mr. Backus, we took your dust-arrester out because we were advised that this other plan would work better; but we find that we are much disappointed; it takes so much power to run the other that we think very strongly of putting yours back. This was Mr. Sanger. He said if they could have their way about it, they would replace it. He said it takes about 15 horse-power to run it more than it did with mine, that would be 30 horse-power.

Q. Have you finished your answer?

A. I am telling you the circumstances.

Q. Did you not just testify that you had——

A. Not—I had not got through.

Q. They told you that they thought of doing it—do you know whether they have?

A. I don't know.

Q. Then you were wrong when you testified they had put the others out?

1026 A. I did not so testify.

Q. Do you know what dust-arrester the firm of Sanger & Rockwell are now using?

A. A centrifugal motion.

Q. It is not yours, is it?

A. I don't know, I can't say. They told me they thought of putting mine back.

Q. Did they ever apply to you for one?

A. They had one, they paid me for one.

Q. They never applied to you for leave to put in another?

A. They would not have to, they had the right.

Q. Is it not true that these new dust-arresters are in general use throughout this city and all other cities where planing mills and light machinery are in use?

A. They have been adopted in a good many cases.

Q. Do you not know that Mr. Thompson has the centrifugal?

A. I heard him say so.

Q. Do you not know that the Peninsular car works in this city had your dust-arrester in and took it out and put in a centrifugal?

A. They put in about 12 or 14 of them.

Q. And did that although the owner of the patent lived in the same town?

A. Go ahead.

Mr. CHAREST: Did you ever receive any letters stating that the dust-arrester was a good one?

A. Yes, sir.

By Mr. BAKER:

Q. You received those when your dust-arrester first came out?

A. I have had letters lately.

1027 Q. Do you not know that if any one approved of your dust-arrester lately it is because they did not know about the others?

A. I don't know any such thing.

Q. Do you not know, as a man of experience in this sort of thing, that your dust-arrester is absolutely worthless?

A. I do not.

Q. And is not in use any more?

A. I want you distinctly to understand that my dust-arrester has merits superior to the others. I can give you reasons for it. I do not run down anybody else, but I have a dust-arrester that absolutely fills the bill. There is no back pressure on it and it gives free relief every time. D. M. Ferry & Co. had my dust-arrester when they burned down, and it burned up.

Q. Didn't it set fire to the building?

A. The building set fire to that, and it burned up, and they put a centrifugal in, and they are using about 15 horse-power to run it.

Q. Is not the centrifugal dust-arrester a great deal safer than yours?

A. I don't know why it should be.

Q. Do you testify that it is not safer?

A. In certain positions.

Q. Do they have any wood or burlap in connection with it?

A. They have dust all over the roof.

Q. This dust you refer to, isn't it on your inside?

A. In the other it blows out and settles all over the roof and all over the lumber yard and every place.

Q. Do you mean to say that the Peninsular car works and Mr. Thompson, and manufacturers generally, do not understand the merits of your dust-arrester?

1028 A. I wish to be understood that they do not understand the merits of mine, because they have got something that is cheaper.

Q. And that they think is better?

A. I don't know what they think; I know that it takes 15 horse-power to whirl it.

Q. With the exception of the Wenona case, do you know of a man that has put this in for three years?

A. I don't think any of mine have been put in in four years.

Mr. CHAREST: Do you advertise your dust-arrester as a business?

A. We have made no effort to introduce it or to get it before the public in the past five years, but this man at Wenona wrote last summer and wanted permission to put it in, and we sold it to him. There are three of them at Wenona. He gave us $160 for permission to put it in.

By Mr. BAKER:

Q. Is it not true that at one time you did a large and profitable business in putting in this dust-arrester?

A. We never neglected any other branch of our business.

Q. Is it not true that at one time you did a large profitable b
ness in putting in the dust-arrester?

A. I can't answer that.

Q. Haven't you stated to me during this trial that you mad
large amount of money out of it?

A. Yes, sir.

Q. If you were making money out of it, why did you go ou
the business; will you explain that to this jury?

A. If a man wrote me from New York that he wanted me to
in my dust-arrester if I would send a man down the
1029 would send a man down there to put it in; if a man w
me from Hoboken, I did the same; from Green Point, I
the same; from Bridgeport, I did the same; from Boston, I did
same; from Wenona, I did the same—wherever they called fo
That was years ago, and I never neglected my business to do it,
when I got an order I sent my man to put them up. I put up s
in Canada—several in Toronto; a big distiller in Toronto, t
wrote us and we put it in, and it was a daisy for them; and M
& Co., of Toronto, put in one, and later on they were told that
other was better than ours, and they took ours out and put
other in; and later on they wrote and said they were very m
disappointed in the other—the Cyclone, it takes more power t
we can spare, and we think of putting yours back, and if you h
any improvements to make, I recollect well, when you put it
you did not build it according to your instructions, but shorte
it up. He wrote he was on the point of putting in something

Q. You have stated here repeatedly, or undertook to have
jury believe, that they had put yours back in there after try
another one; will you name us a single firm that ever actua
did it?

A. Macy & Co., of Toronto, wrote us particularly in relation t

Q. Did they actually put yours in?

A. I don't know; I never was there after making the first o
I have not been there since.

Q. You don't know of a single case where they actually put yo
back?

A. In my own case we have tested that thing——

Q. Will you answer that question? Can you name me a sin
firm in the United States or Canada that took your machine
that ever put it back, as a matter of fact?

1030 A. I don't think I can.

Q. When did you get the letters that you speak of, appr
ing of your dust-arrester?

A. We will produce them.

Q. When did you get them?

A. I cannot say.

Q. More than three years ago?

A. I guess a less time than that.

Q. Do you not know that your machine has been generally
placed throughout the United States and Canada?

A. I do not know it.

Q. Do you not know that it has largely been displaced?
A. No, sir.
Q. And that there are but few now in use?
A. No, sir, I don't know that.
Q. And is there any in use in this city besides yours?
A. Yes, sir.
Q. Where?
A. Wilson Brothers, Clough & Warren. There are two or three others; I cannot name them. Backus & Company.
Q. Besides your own?
A. D. M. Ferry had it, and it was burned up.
Q. And they put in another kind?
A. Yes, sir.
Q. There are over a hundred planing mills and similar institutions in Detroit, are there not?
A. Oh, no.
Q. Did not Mr. Thompson testify to something like that?
A. There are not half of that.
Q. Do you know of any more than two dust-arresters, like yours, that are in use in this city, of the entire manufacturing industries of the city, where they need them?
1031 A. They have got a similar one at the Michigan car works put up by Koch. He stole my right and went on and built it.
Q. What is that made of?
A. Fine cloth.
Q. Cheese cloth?
A. Yes, sir.
Q. Where was that put up?
A. Two years ago—it is the same principle.
Q. You have testified, have you not, that you have put up over 80 of these?
A. Yes, sir.
Q. And you put them up between 1882 and '85 and '86, did you not?
A. Yes, sir.
Q. Then the trade quit on you?
A. Because I didn't follow it up.
Q. Did you testify that the trade ceased because you did not press it; do you testify that the trade fell off because you did not press it?
A. A man could go in and put up the centrifugal on a wood-shed roof, and they would take it; they put them up in Grand Rapids, and they put them up in other places, and I have been there and seen them, and they would say it answers the purpose; but it takes a good deal of power.
Q. Is it not true that those dust-arresters drove you out of the business?
A. No.
Q. Do you testify to that, sir?
A. Yes, sir.

Q. Do you tell the jury that the other dust-arresters did not drive you out of the business?

1032 A. I can put up this dust-arrester today, by giving it my attention, and it is a better one than any of them.

Q. You mean to tell the jury that you abandoned a profitable trade voluntarily?

A. I could not neglect my main business.

Q. You did neglect it for three or four years?

A. No, I did not neglect it.

Q. Did you not follow up this business of putting in these dust-arresters for three or four years?

A. No, sir.

Q. Did you not have a profitable trade in putting them in?

A. Certainly I did.

Q. And didn't you put them in all over the United States and Canada?

A. No, no.

Q. In a good many places in the United States and Canada?

A. I put in a good many, where I could get an opportunity to put them in; I sent a man to put them in.

Q. Is it not true that this new patent dust-arrester is made of metal?

A. I have understood so—sheet iron.

Q. And they are small in dimensions?

A. They do not take up very much room; that is what makes them so popular; they do not require much outside display.

Q. Is it not true that three of them could be put on your roof there in place of those burlap dust-arresters, and do the same work as these do?

A. No, sir, that is not true, could not do a quarter of it.

1033 Q. Is it not true that where they put this in it reduces the insurance?

A. I could not say; I do not know.

Q. Did you ever operate a mill with these new dust-arresters?

A. I have tried it with ours where that open place was cut out.

Q. When did you try it?

A. Three years ago.

Q. What dust-arrester did you try there?

A. One from Jackson.

Q. The machine made at Jackson?

A. Yes, sir.

Q. Who made it?

A. I can't tell you that.

Q. What other have you tried?

A. We tried that and we built three or four ourselves on the same principle.

Q. If you had the best dust-arrester in the world, what did you try those for?

A. To satisfy ourselves in regard to the merits.

Q. Although you had the best in the world, you tried others?

A. We never knew it until we tried the others.

Q. How many others did you try?

A. That one from Jackson, and then we built three machines after that and threw them all out.

Q. Did you ever employ the builders of any other patented dust-arrester to put one in for you, as it ought to be, in your mill?

A. Yes, sir.

Q. Who?

1034 A. I can't tell you his name. He came from Jackson.

Q. Is that the only one.

A. That was enough.

Q. Is the Jackson dust-arrester in general use?

A. I believe that is where it started from, the Cyclone dust-arrester.

Q. Do you know of such a dust-arrester as the Vortex?

A. I don't know them by name.

Q. The only one you ever tried was the Jackson dust-arrester called the Cyclone?

A. Yes, sir.

Q. You say you value this building and machinery at $150,000?

A. Yes, sir.

Q. What could that mill and machinery be duplicated for today?

A. Not a cent less, not a cent less. We can bring you the inventory, the bills all the way through, every item, and if necessary, we will do it. You cannot buy a machine for any less than we bought it. You cannot buy your brick for any less. You cannot hire your labor for any less. I did not charge a dollar for my labor.

Q. Can that entire mill as it stands there today be duplicated for less than $100,000?

A. No, sir, never.

Q. What is the machinery in that mill worth; what could you duplicate it for, right from the machine shop?

A. Not a cent less than we paid for it.

Q. What did you pay for the machinery?

A. I could not tell you. I have not got it separate. We have got the bills and everything, and it foots up $116,000. When we bought the brick, we bought it of Mr. Hall for $5.50 a thousand.

1035 A JUROR: Whether the machinery is free from the building, whether it can be removed. You claim it is just as good as new?

A. You could not move any of the machinery and ever realize half of it. The moment you move machinery it is second-handed.

Q. You claim it can be moved and used again?

A. Yes, sir.

Q. How high is your smokestack from the ground?

A. One hundred and fifteen feet.

Q. Do you know the height of the mill on the corner?

A. 42 or 45 feet.

Q. How many trucks have you for hauling lumber with teams?

A. I think we have 22; we had some burned up.

Q. How many were burned?
A. Two or four.
Q. When?
A. A good many years ago, when our mill was burned.
Q. How many have you now, that you have used since 1882?
A. I think 22.
Q. Those are large trucks with rollers on them?
A. Yes, sir.
Q. So that you can slide a load off?
A. Yes, sir.
Q. What did those trucks cost apiece?
A. Some of them cost us $300, and some of them $200.
Q. What did they average?
A. They will average $200.
Q. Can you buy those trucks new for $200 apiece?
A. Probably they would cost about that.
Q. What is their capacity?
1036 A. All a team can handle—five or six tons.
Q. How many thousand feet of ordinary lumber?
A. From 2,500 to 6,000.
Q. What is the ordinary load for one of them?
A. About 3,000 feet.
Q. That is a good big load?
A. Yes, sir.
Q. That is more than you take on an average?
A. We hardly ever handle a load less than 2,500 feet.
Q. What is the average?
A. Say 2,700 or 2,800.
Q. Is not that a little large?
A. I don't think it is.
Q. How many teams do you keep on hand when your mill is working to its ordinary capacity?
A. Three teams will do the work in the lumber yard and the mill.
Q. How many teams have you in use?
A. Three teams.
Q. Six horses?
A. Yes, sir.
Q. How many horses have you down there that are capable of going on these trucks?
A. Maybe we have four teams in all.
Q. At times do you have more?
A. No.
Q. Do you have to hire teams?
A. Often.
Q. What do your teams cost on an average?
A. When we hire teams we have to pay five dollars.
Q. What do they cost to buy them?
A. About $550 a span would be the average.
1037 Q. You have very heavy horses?
A. Very nice horses.

Q. You use principally Clydesdales and Percherons?
A. I use heavy horses. Some came from Canada.
Q. Most of them came from Canada; they are heavy draft horses?
A. Yes, sir.
Q. They will average more than $250 apiece?
A. Pretty near $300 apiece.
Q. They are the very heaviest kind of draft horses. How much do they weigh?
A. 1,600 or 1,700; 1,600 or 1,650.
Q. How many teams have you down there that are used in hauling lumber in the yard?
A. Three.
Q. I mean other teams?
A. We have four teams in all.
Q. That are in the truck business. How many teams have you that haul the products to town?
A. I guess we have five horses, or something like that.
Q. Where is your barn?
A. At the warehouse.
Q. Do you keep all your horses there?
A. We keep a span and three single horses; five horses there that we work.
Q. Where are the others; have you a barn down at the yard?
A. We have eight there.
Q. And how many here?
A. Five.
Q. How many have you at the house?
A. Not any.
1038 Q. None connected with the business?
A. No, sir.
Q. Where do you keep that little white mare?
A. At the warehouse.
Q. How many loads of lumber on the average do you take to your mill daily?
A. It is pretty hard to tell.
Q. You can tell us how many thousand feet you saw up there on the average?
A. I should think probably we took 30 loads a day.
Q. How many thousand feet?
A. There would be 25 or 2,700 feet to the load, as you figured that out, but a great many of those loads would be 3,000 feet.
Q. And thirty loads a day?
A. Yes, sir.
Q. So that there would be 90,000 daily?
A. Perhaps 80,000, sometimes 100,000, we would have no difficulty, if we needed them, we could draw 100,000 with three teams.
Q. You use those three teams, then, to take on the average from 80,000 to 100,000 feet of lumber daily to your mill?
A. We are getting some lumber that comes direct from the cars; it may be drawn from Twentieth street or from the Wabash.

Q. But it has to be hauled. Do you haul it with those teams?
A. Oh, yes; we have four teams.
Q. Four teams that are engaged in hauling lumber to the mill?
1039 A. No, sir; three teams that work to the mill, and other teams occasionally.
Q. What do you have to pay the man that drives one of those teams?
A. One dollar seventy-five, I guess.
Q. And he boards himself?
A. Yes, sir.
Q. How many oats do you give those big horses a day?
A. We give them four quarts in the morning and six quarts at noon.
Q. How much at night?
A. I guess four quarts.
Q. Could you keep them in good working condition on that amount of feed?
A. I think so. Somebody else can tell you about that better than I can.
Q. That is 14 quarts a day?
A. Yes, sir.
Q. Do you feed them hay?
A. Yes, sir.
Q. About how many pounds of hay a day?
A. I cannot tell you.
Q. Do you keep a man in the barn there to take care of the horses, or does each man take care of his own team?
A. We have a watchman at night.
Q. Does he take care of the horses?
A. I don't know.
Q. Don't you know whether your teams are taken care of by a man that is there for that purpose or taken care of by the teamsters?
A. The foreman has charge of that.
Q. You have a foreman down there?
1040 A. Yes, sir.
Q. And you have a watchman?
A. Yes, sir.
Q. Have you a barnman?
A. No, sir; I think the teamsters do the work.
Q. And you have also another barnman at the warehouse?
A. Yes, sir; for a watchman.
Q. About how many thousand feet constitutes an ordinary car of lumber?
A. Probably 15,000.
Q. That is, the minimum is 10,000 and the maximum about 20,000.
A. Yes, sir.
Q. It would average 15,000?
A. Yes, sir; shipping a car-load of lumber 10,000 or 12,000 makes

a load; a large car will carry 15,000; a minimum car would be 10,000; we can ship a great deal of lumber by a car.

Q. 10,000 is regarded as the minimum load?

A. Yes, sir.

JUROR:

Q. What does your lumber cost you per thousand to haul from the yard to the mill?

A. We calculate it costs about eight cents a thousand to put it on the truck.

Q. I mean the handling and all, after you get it on the truck?

A. You might say safely 20 cents a thousand will take it from the pile and put it behind the machine in the mill. That is a safe estimate.

1041 Mr. BAKER:

Q. How much is that for the hauling of the team?

A. 12 cents for hauling.

Q. 12 cents for the teaming?

A. Yes, sir.

Q. And eight cents for loading?

A. Yes, sir.

Q. And the unloading is done very easily?

A. That does not cost anything.

Q. You don't figure anything for shoving it to the machine?

A. The men that are loading, sorting, and all one kind is put on this truck at the particular time; it is going for a particular purpose.

Q. But you don't figure in that expense the wages of the man that feeds the machine?

A. No, sir.

Q. You do figure the wages of the men that take the lumber at the pile and put it on the truck?

A. Yes, sir.

Q. And the teamsters?

A. Yes, sir.

JUROR:

Q. What would it cost by taking your lumber to the mill by railroad, per thousand?

A. That would tangle you right off. It will cost 12 cents to put the lumber on the car; I don't think that would do it; you see it has got to be handled twice; you have got to have a man to put it on the car, then it has got to be hauled to the mill by some power at some expense, and then it has got to be unloaded, and then it has got to be put into the mill from the car, which would be an
1042 impossibility, the business could not be handled that way.

We sort our lumber when it is landed on the dock; the man there sorts the different qualities, widths, thicknesses, and this kind is put into one pile, and so on, No. 3, 4, 5, 6, this is rip lumber, this is resaw lumber, this is No. 5 lumber, that goes into box-work; and

then when we have an order that comes for a carload of box shooks, we can make it out of No. 3, we send an order down, "Give us five loads of No. 3," and the men put it right on and it keeps coming.

Q. But I mean the same kind of lumber; I wanted to know what it would cost to take the lumber up from your mill to the car; you have stated what it cost by team; now I want to know what it would cost by car to do the same work, per thousand.

A. We would not handle it in that way.

Q. You can make an estimate?

A. It has got to be put on the car.

Mr. BAKER:

Q. And it has got to be put on a wagon, has it not?

A. The lumber has got to be put on the truck and hauled to the car; this car is not where our lumber pile is.

Q. Is it in the yard?

A. The lumber is in the yard, but it has to be hauled 300 or 500 feet.

Q. But you have small trucks and it can be on tramways?

A. It cannot be hauled less than that. It is in a big pile, and put on the truck, and got to be taken on a car; that makes two handlings, and by the time you get it on the car it will cost you 16 cents.

By JUROR:

Q. You do not understand the question thoroughly. You have the lumber piled, and there are alleys between the piles?

1043 A. Yes, sir.

Q. Could you not place your truck right in the alley?

A. No, sir; it could not be possible; it is not a practicable thing.

Q. If it costs 20 cents with horses to take that lumber from your yard now, and take it right back of the machine, how much would it cost by rail to the same place; make an estimate, how much more would it cost?

A. In the first place, it would be an impossibility; it could not be done that way.

Mr. DICKINSON:

Q. Tell them what you think it would cost to do it.

A. It would cost 30 cents.

Q. And then you say it is not practicable at all?

A. It is not practicable; it is an impossibility. And we handle our lumber probably as cheap as it is possible to be done; I think I handle my lumber cheaper than Mr. Thompson.

Mr. BAKER:

Q. You say it costs eight cents a thousand to put it on your wagons?

A. Yes, sir.

Q. How much would it cost to put it on the cars per 1,000?

A. About eight cents more.

Q. Why do you add the eight cents?

A. Because it has got to be handled by two men, and it will take just as long to put it on the car as on the truck, from the pile; and, besides, we will throw the team-work in; we will not charge anything for that.

Q. Do you, in making your estimates, contemplate that
1044 you will use the teams down there for the purpose of loading it into cars?

A. We never have, but I say I will give you that thrown in.

Q. But, in your own estimates, do you look at it that you should load it on your trucks there in the yard, to haul it in the cars?

A. Certainly, you could not do it any other way.

Q. Don't you know lumber yards where they have tramways and small trucks running on tramways all through the yard, by which they handle the lumber?

A. Yes, sir.

Q. Will you tell us why that could not be done in this yard?

A. Yes, sir, I will tell you. Three years ago I handled all our lumber from the vessels onto our dock, discharged every vessel myself; at the end of the season I figured it up and it cost me 13 cents a thousand; I went to Chicago, and I saw them doing it there, and it cost them 30 cents a thousand, as against my 13. I know it is an impossible thing to do it in the way you speak of; you have to have your trucks loaded, and we are not doing a business sufficient to make that outlay.

Q. Is it not true that in the lumber yards in Chicago they load the lumber onto the cars by means of trucks that run on tramways alongside of the piles?

A. I never saw one, and I have been there a great many times, too.

Q. How do they load the lumber on the cars in the lumber yards?

A. Mostly by putting it onto wagons and drawing it onto cars. There may be such instances as you speak of, but I never saw any.

1045 Q. You never saw any yard where they use tramways to load onto cars?

A. No, sir, I never did.

Q. Do you testify that it is usual in large lumber yards in Chicago to handle that from the piles to the cars by teams and wagons?

A. That has been my observation. There may be some exceptions where they do it that other way, but the most of them put it onto wagons and draw it to the cars.

Q. Is it not true that in those large yards they have a large number of side tracks that run by the piles?

A. I presume there are.

Q. Where they load directly from the piles onto cars, without the intervention of a team?

A. Most of them handle it from these side tracks on the carts or wagons, and draw it on this platform.

Q. Most of them do it that way?

A. Yes, sir.

Q. Would there be any physical difficulty in putting tramways in your yard, up and down those alleys, so you could take your small hand trucks and load your lumber onto cars cheaply?

A. It would not be a practicable thing.

Q. Why?

A. Because it would make so much expense.

Q. What would make expense?

A. We have to sort, to have so many piles; we have 611 piles in our yard, 18 feet wide, and we have one kind of lumber in one pile and another in another.

Q. How many alleys have you running up and down there?

A. Seven alleys.

1046 Q. Could you not have seven tramways running up these seven alleys?

A. Oh, you tire me, Mr. Baker. It would be absurd.

Q. Could you have them?

A. It would not be a practicable thing.

Q. According to your testimony, then, you are going to load this all onto wagons in order to take it to the cars?

A. And onto trucks; you could not have your car right where you wanted it. We want 10,000 feet of this, 14,000 feet of that, or 2,000 feet, and so on.

Q. Why could you not load your cars and take them up and stand them on a side track on your premises?

A. It would be an impossibility.

Q. And then slide them right to the machine, practically feed from the cars into the machine?

A. Mr. Baker, may I ask you a question?

Q. Yes.

A. When you will demonstrate to me the practicability of taking the steps that come up there, the stone steps, to get into that large building, and set them up to come into this large building, I will make your plan a success; if you will put your steps and put your trap to the roof, if you will do that, I will tell you then.

Q. Do you want to submit your case upon that proposition?

A. Certainly I do, by all means. There is no sense to the proposition you are making me, that is to say, it is not a practicable thing; you cannot do it and make your ends meet; that is a positive fact; I have been through the mill 100 times and I know all about it.

Q. Did you ever try it?

A. Mr. William M. Dwight has.

1047 Q. Whereabouts?

A. Here on his lumber yard.

Q. What did he have there?

A. What has he got now?

Q. What did he have there?

A. He had everything at one time—those trams.

Q. Did he have trams and handle lumber the way I speak of?

A. He has got tracks, and then he handles it from those tram cars instead of the wagon.

Q. Is not the mill in operation?

A. Yes, sir; but does he make money?

Q. So that there is a mill in this city that is in operation just as I have suggested?

A. No, sir.

Q. Pretty near?

A. No, sir, nowheres near.

Q. Does he have tramways running to his piles?

A. That he shoves by hand on narrow cars; why I can beat him all out of sight.

Q. Just answer my questions and don't argue quite so much. Has he got tramways?

A. What do you mean by tramways; will you tell me what a tramway is?

Q. What does he run those hand cars on?

A. A little track about two and a half feet wide.

Q. What do you call that?

A. A tramway.

Q. How many has Mr. Dwight got there?

A. I could not tell you; he has got them leading to different places.

Q. How much of a lumber yard has he got there?

1048 A. It covers a good many acres.

Q. Has he got a planing mill?

A. Yes, sir.

Q. What else?

A. I could not tell you.

Q. Does he receive all his lumber by rail?

A. Yes, sir.

Q. He has no shipping facilities by boat?

A. No, sir; he receives on side tracks, then he unloads onto these little cars, and then shoves them wherever he wants them.

Q. How does he feed his mill?

A. Brings it in on those little cars, I think.

Q. How long has that mill been in operation?

A. I could not tell you; a good many years.

Q. Is it in operation now?

A. I guess it is; I don't know.

Q. A larger mill than yours?

A. I guess not.

Q. As big as yours?

A. I think not.

Q. How much does it lack of it?

A. Three stories.

Q. All on one story?

A. Yes, sir.

Q. How much lumber do they manufacture there daily?

A. I could not tell you.

Q. How long is it since you were there?

A. I never was there to look through it much; I have been by there three or four times.

Q. Your local trade here is small compared with your aggregate trade?

1049 A. Yes, sir, compared with the aggregate.

Q. Your trade outside of this city, and in other States and Canada, is ten times greater than your local trade, or twenty times greater?

A. Three times greater.

Q. How many thousand dollars' worth did you sell to the local trade this last year?

A. I could not tell you.

Q. How many thousand dollars' worth did you sell to the trade outside of the city?

A. I don't know; our trade, perhaps, was $300,000.

Q. $300,000 worth?

A. Yes, sir.

Q. The total sales?

A. Yes, sir; that is, net.

Q. Do you keep a complete set of books down there?

A. Yes, sir.

Q. Do you know what you have made and lost ever since 1871?

A. Pretty near.

Q. How many years of that have you done a successful, paying business?

A. I thrived very nicely up to the time we got burned out.

Q. How much did you make a year, before you got burned out, in 1882?

A. In 1877 I took my boys into company.

Q. I am asking you now how much you made a year from 1871 to 1882, the time you burned out?

A. In 1877—I could not tell you before that—in 1877 I took my boys in company, and the first year we made $25,000.

1050 Q. The next year?

A. $35,000.

Q. The next year?

A. $52,000.

Q. That is three years?

A. Yes, sir.

Q. What years were those?

A. 1877, 1878 and 1879.

Q. What did you make in 1880?

A. I think it was $50,000 in 1880.

Q. What in 1881?

A. $70,000.

Q. What did you make in 1882?

A. That is the year we burned out.

Q. Do you know what you made, if anything?

A. Yes, sir.

Q. How much?

A. Well, we made about the same, about $70,000 or $75,000.

Q. That is in 1882?
A. Yes, sir.
Q. Now, in 1883, after you got rebuilt, how much did you make then?
A. We were burned out; we lost our grip.
Q. You rebuilt it right off?
A. Yes, sir.
Q. What did you make?
A. Since that time, we have just got catched up.
Q. What did you make in 1883?
A. I could not tell you?
Q. What did you make in 1884?
A. I could not tell you.
1051 Q. What did you make in 1885?
A. I could not tell you.
Q. What did you make in 1886?
A. I could not tell you.
Q. How much did you make in 1887?
A. I could not tell you.
Q. How much in 1888?
A. I could not tell you.
Q. How much in 1889?
A. I could not tell you.
Q. How much in 1890?
A. We made about $27,000.
Q. How is it that you can tell what you made in 1890 and cannot tell for the five or six years previous to that?
A. The reason is that we were struggling to get this thing catched up, and we didn't strike any balance.
Q. Didn't you lose money all those years?
A. Will you tell me? I think we didn't make any money for the past five or six or seven years before that; we just lived and held our own.
Q. As a matter of fact your institution was run without a profit for five or six years?
A. Yes, sir.
Q. And you could only show a balance on the profit side in 1890.
A. Yes, sir.

By JUROR:

Q. Did you sell any lumber at the yard?
A. Oh, yes.
Q. Was that profit all made from the mill?
A. We put all in together.

1052 By Mr. BAKER:

Q. The whole business is in the name and belongs to this corporation, known as A. Backus, Jr. & Sons?
A. Yes, sir.

Q. The entire business, the warehouse, the factory and the lumber yard?

A. Yes, sir.

Q. The warehouse is simply a place to store the finished product principally, that is, the dressed lumber and the ceiling, etc.?

A. It takes the overflow from the mill.

Q. That is mostly retailed out here in the city?

A. Yes, sir, largely.

By JUROR:

Q. When you said you didn't make anything during five years, you mean to say that you have lost $100,000?

A. We had to pay up for building this mill.

Q. You didn't lose anything then?

A. No, sir; we just held our own, and lived, and paid our debts.

By Mr. DICKINSON:

Q. What was your insurance on that fire?

A. $38,000.

Q. What did your mill cost you?

A. It cost $116,000 to build the mill, but there was probably $30,000 worth of lumber in the mill; we had a finished product ready to ship to the Lorillard people at that time.

By Mr. BAKER:

Q. I have this witness and will continue my cross-examination. Mr. Backus, do you mean to say you were paying for the mill during these years?

A. Yes, sir.

1053 Q. Do you mean to say that your business showed a profit in these years where you said you could not tell what you made?

A. Well you can see. It absorbed this——

Q. What absorbed?

A. What we made was absorbed for the paying for the building of this mill.

Q. When you rebuilt that mill you used your insurance money, didn't you?

A. I suppose we must.

Q. Did you borrow money?

A. Oh, yes.

Q. During those years do you mean to say that you paid your indebtedness?

A. Just about.

Q. That you kept paying on the principal?

A. Just about; well, we had to pay and get up again.

Q. Don't you owe just as much money now as you did in 1882?

A. I think probably just about.

Q. Is it not true that for five or six years there you didn't make any money in that mill?

A. Why, I said that half a dozen times.

Q. That is the way I understood you, Mr. Backus.
A. Yes, sir.

Mr. BAKER: I would like to ask Mr. Backus a few more questions in the morning; but Mr. Joy is here now, and I want to put him on now, because he wants to go to New York tomorrow, and he may go to Europe, and I won't have an opportunity to examine him unless I do it at this time.

The examination of Mr. Backus was discontinued for the present, and Mr. Joy took the stand.

1054 JAMES F. JOY, recalled in behalf of petitioner.

Examined by Mr. BAKER:

Q. I believe you testified when you were on the stand before that you drafted this law of 1881, by which the property of one railroad company may be condemned by another railroad company under certain circumstances.
A. I don't think I testified that. I said I might have drawn it.
Q. What is your recollection now about it?
A. I am not certain that I drew it now. I might have drawn it.
Q. Do you think you understand the provisions of it?
A. I think I understand them perfectly.
Q. As a railroad man, will you tell us whether or not the Fort Street Union Depot Company, or any other corporation, could condemn a margin of the Michigan Central railroad property down there for a union depot or other railroad purposes?
A. They could not.

Mr. DICKINSON: We desire to object to this as testimony as to a conclusion of law, which is a usurpation of the province of the jury; and as in any case incompetent testimony, for a lawyer to go upon the stand and swear what the law is, especially if he is interested. And we take an exception.

Q. You are a member of the bar?
A. Yes, sir; I have practiced law a great many years.
Q. And you have been connected with the railroad business ever since you left the general practice of your profession?
1055 A. Yes, sir.
Q. Will you tell this jury why the Fort Street Union Depot Co. could not condemn a right of way along the margin of the Michigan Central property?
A. There are two reasons; one of them is that by general principle of law, when the property has been appropriated to a public use by one corporation, under authority of law, on general principles—and it is universal law—no other company can go and condemn that property, or any part of it.
Mr. DICKINSON: Not by express statute?
A. I speak of the general principles, and by common law. A legislature, if they deem that it is important to take the property of one company and give it to another for the public use, in the special

exercise of a power for that purpose, can condemn it, just the same as if the Government wanted to erect a fort for national defense upon the Michigan Central grounds; the public defense of the country is more important than the business of the Michigan Central, and the Government might take it to place a fortress there for the purpose of national defense; if they deemed it necessary for the public use, the Government of the United States might do that.

Q. Under a statute?

A. Yes, sir; but it would have to be an express purpose, passed on purpose, and for nothing else.

Mr. BAKER:

Q. I suppose you have been familiar with the legislation in this State ever since the State was organized?

A. All the time, sir.

Q. You were here when the State was a Territory?

A. I was.

1056 Q. Will you state whether the legislature of this State—and I suppose you are familiar with the statutes——

A. Yes, sir.

Q. —has ever passed any statute or any law under which the Fort Street Union Depot Company or any other corporation, could condemn a right of way along the margin of River street or any other place, through their grounds?

A. They never did; and this law which Mr. Dickinson asked me a question about the other day, I wish to explain it. He brought this law to my notice the other day. This law is drawn with reference to the general principles of common law, and if I drew it I could not have drawn it more carefully than it is drawn, to protect one company from the invasion of another. I will read it: "When any part of the land of any railroad company in this State, in or adjacent to its depot grounds, is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company organized as aforesaid, needing such land for the purpose of a depot or terminal facilities, to acquire the same in the same manner as may now be done for such purpose from individuals." First, it must not be in actual use, and then if it is not needed; there are two considerations. In the first place, if it is in actual use, you cannot touch it; and if it is not in actual use, but is needed by the company, you cannot touch it. Those are subjects to be controverted, and when you come before a jury, or when you go before a judge to ask for a commission to condemn the property, you would have to allege in this case, if you wanted to condemn any portion of the Michigan Central ground; suppose you wanted

1057 to condemn their whole front, you would have to allege in your petition that it was the property of the Michigan Central.

Q. That is the fact?

A. Yes, sir. I have done it a hundred times. These petitions are familiar to me.

Q. But you know that is the property of the Michigan Central?

A. Yes, sir; I know it.

Q. You know it is in use?

A. Yes, sir; I know it is all in use.

Q. Now, could any one truthfully swear to a petition under that statute?

A. No, sir; of course the law requires that it shall set forth who owns the property; if it belongs to the Michigan Central Company, you must state that, and you must state that it was not in actual use, and you must also state that it is not needed, in your petition. If you do state those things in your petition, the law gives the opposite party the right to come in and controvert that fact; they would join issue before the judge; one would allege that it belonged to the Michigan Central Company and was in actual use, and if it was not in actual use, would allege it was needed for that company; if that appears, that it was not in actual use and not needed, the opposite party has a right to controvert the fact, and in his answer he would say that it was in actual use, and then it would be tried by a judge, and if it was in actual use, no judge would issue an order to condemn it.

Q. In order to institute any such proceeding, it is necessary to swear to the petition?

A. Yes, sir.

1058 Q. Would not that of itself be an insuperable obstacle to the condemnation of a right of way along the property of the Michigan Central?

A. It would unless you could assume that some one would file a petition and swear that what was in actual use was not in actual use.

Q. It has been my practice to verify that; some attorney or officer of the company has to swear to that?

A. Yes, sir, always.

Q. And the very first step to condemn land would be that the attorney or officer of the company would have to commit perjury, to take this step?

A. Yes, sir.

JUROR: What difference is there between a charter for a street car company, given a street car company for 30 years, say, and a charter given to a railroad?

A. A street car company does not condemn property at all. They have no right to condemn. They are not similar things at all; they do not condemn property at all.

Mr. DICKINSON: They are authorized in Bay City by their charter.

Juryman Charest says he wants to know the difference between a charter given a city railway and a charter given a railroad.

By Mr. BAKER:

Q. Is it not the settled law in this country that where an ordinary horse street railway is built along a street, and the street is wide

enough to accommodate them without any special injury, that street railways may be built in the street without paying the adjoining proprietors damages?

A. I think that is the law always.

1059 Q. You are familiar with the history of this city, and no street railway company in this city ever paid the adjoining proprietors anything?

A. No, sir; they acquire no exclusive property at all.

Q. But under some recent decisions of the supreme court, if a street is so narrow that a team cannot pass between the curb and the car, where there are peculiar circumstances, there are some indications that they would require them to pay damages; that is the present situation of it?

A. That may be, but that is not the usual law.

Q. There was a controversy in New York in regard to the elevated roads, and it was finally settled that, because of the way they are constructed, they have to pay damages to the adjoining proprietors?

A. But the surface roads do not.

Q. The Broadway railway was built without paying any damages to the adjoining proprietors?

A. Yes, sir; and so were the other street railroads. The difference between a street road and where a railroad company acquires a large quantity of land for a yard is this: a street railroad acquires no property in the street; they acquire simply a right to run along it; they cannot shut anybody else out of it; they cannot prevent the city granting any other rights which is not inconsistent with theirs; the city can grant, I think, a right to build an elevated road right over the other roads, simply because the roads below have no property there at all; they have a right to run along the street as we have; a right to travel along there; nothing but a right of way; when you get to a piece of property like the Michigan Central yards, to acquire or condemn—and a great deal of the Michigan

1060 Central yards were condemned for public purposes by that company—when you want to go and touch that property, if you ever do want to go and touch it, you have got to get some law to authorize you to do it; the laws, as they exist, do not authorize you to do it; and this law which Mr. Dickinson brought to my notice recognizes that fact, and it says that when the property is not in use by another company, and when it is not needed by another company, then a new railroad company may take that part which is not in use and not needed, but they cannot touch the ground which they use and occupy. That is not only the general principle of law, but the actual statute.

By JUROR:

Q. Does the Michigan Central Railroad Company use the space in the air?

A. You cannot set your posts on the Michigan Central; it is in use there; they have a right to build freight-houses; they intend to build freight-houses, they assure me, down clear to the passage where the railroad crosses River street.

Q. Do they need them now?

A. They need every inch there; they have a right to use it to build their freight-houses there.

Q. They could build the freight-houses under the elevated road?

A. No, sir; they could not do that.

Q. They have stores and hotels under the elevated roads in Germany, in Berlin?

A. I don't know anything about that, that may be; but you cannot in this city or in this country condemn the land for the purpose of setting posts there and run over it, to say nothing of other inconveniences.

1061 By Mr. BAKER:

Q. Is there any legislation that would authorize you to build an elevated road across their property, as distinguished from a surface road?

A. None whatever.

Q. That is, the limitation is general?

A. The limitation is universal.

Q. That is, if the legislature would pass an act authorizing you to go overhead, it could not be done?

A. If they specially did it; yes, sir.

Q. But they never have?

A. No, sir.

Q. So that they have given no authority to either go on the surface or overhead?

A. No, sir, not at all.

Q. This company was organized in July and August, 1889?

A. Yes, sir.

Q. And there was a session of the legislature that had ended that year?

A. Yes, sir.

Q. And you have been proceeding as rapidly as possible with this union depot and with this route ever since?

A. Yes, sir, we have.

Q. And you had to lay out your route, make your survey and lay out your route under the law as it then stood?

A. We could not do it otherwise.

Q. And you could not do anything without complying with the then statute?

A. No, sir.

Q. So that the years 1889 and 1890 elapsed before the legislature met again?

A. Yes, sir.

1062 Q. And in the meantime you had progressed with this work?

A. Yes, sir; we were compelled to progress because we were required to finish it within a certain time.

Q. Do you think it would be possible for the Fort Street Union Depot Company to get a bill through the Michigan legislature

authorizing you to go over the property of the Michigan Central railroad?

A. No, sir; it would not be possible.

Q. In the first place, any such legislation would have to be by general law?

A. Yes, sir.

Q. And if you undertook to curtail the facilities or the business of the Michigan Central it would meet with general opposition?

A. Oh, it would be opposed everywhere. There is no possibility of getting any such act at all.

Cross-examination by Mr. DICKINSON:

Q. You say that the general rule throughout the country is that an ordinary street railroad, for horses, can run upon the streets without condemnation?

A. As a rule, yes, sir.

Q. Is that the rule in New York State?

A. It is in the city of New York.

Q. In the State of New York?

A. I think it is in the State of New York.

Q. You are as positive about that as of any legal proposition you have made here?

A. No, sir; not as to the law of that State.

Q. Did you know that in Bay City the supreme court had
1063 sustained an injunction against the horse railway company laying a track before the property it had not condemned for a horse-railroad track?

A. I didn't know that; but I will tell you what I do know about Bay City. The Bay City railway, by its organization, has a right to use a locomotive on that road.

Q. I am talking about the street-car road in Bay City.

A. I speak of that; I speak of what is a horse car in the daytime and a locomotive in the night; that is Bay City.

Q. I speak of the horse street railway. Now, Mr. Joy, would it surprise you, after your statement on direct examination as to the rule in New York, to know that the court of appeals held there that a horse-car road could not be put through the streets of a city without condemning the right of way as against abutting property-owners?

A. If it is the law, it is under some special statute.

Q. You would be surprised at that?

A. No, sir; there is some special statute. Unless there is some special statute, I would.

Q. In this State did you get any authority for the union depot company to build an elevated road?

A. The order of the commissioner.

Q. Did you get any authority by law to build an elevated road?

A. We got authority to build a railroad.

Q. Nothing about an elevated road?

A. No, sir; but that is settled by the commissioner. The commis-

sioner has a right to order it, and so the supreme court said; he has a right to order that we should build it up in the air.

Q. The commissioner can always, for a crossing, order any kind of a crossing, to protect the public from danger?

A. Not any kind.

1064 Q. He can order the crossing to be made overhead, as he did here?

A. Yes, sir.

Q. It had nothing to do with the question of whether you were going to build a surface or an elevated road; the commissioner could order you to make a crossing in a certain way, under the statute?

A. He could order us to make a crossing above grade or below.

Q. Now you say that the general rule is, the universal rule is, that where property has been taken for one public use, it cannot be taken for another public purpose without authority from the legislature?

A. Yes, sir.

Q. Will you please tell us whether you know that under the constitution of this State you cannot pass a special act?

A. The railroad companies are under general law.

Q. You could not pass a special act conferring a right upon the union depot company to take a portion of the Michigan Central property?

A. No, sir.

Q. Special legislation is forbidden by the constitution, is it not?

A. Special legislation for corporations is prohibited, but the legislature might, if they saw fit, in a general law, provide in certain circumstances, and upon certain proof, that a court might authorize them to condemn property.

Q. I will ask you whether this legislation would be valid under the constitution of the State: An act to provide a right of way for the union depot company by taking part of the depot grounds of

1065 the Michigan Central Railroad Company, and going on, section by section, to provide that the Fort Street Union Depot Company might take that property of the Michigan Central Railroad Company. Would not that act be unconstitutional, because it is special legislation?

A. If it was special legislation authorizing a certain company to do that, it would be.

Q. So that the only way would be to pass a general act that would apply to all companies?

A. Yes, sir.

Q. And you think that if a general act was passed providing that the property of one company might be taken by another, that would be legislative authority sufficient for the purpose?

A. No, sir.

Q. Then how are you going to get your legislation?

A. I don't think you can get it.

Q. Do you mean that because it is unconstitutional or because you cannot get the legislature to do it?

A. In the first place you could not get the legislature to do it; that would be impossible. What I know is, that it never has been done in the world.

Q. Was it not done in Massachusetts, in a special case, where the situation was different from ours?

A. They have a right to pass a special act——

Q. Suppose the legislature was willing; you speak of the legislature refusing to do it; but suppose the legislature should pass an act providing that one railroad might take the property of another railroad company, upon making a showing that it was needed, would that act be valid, would that act be constitutional?

A. Do you mean a specific piece of property?

Q. Providing that one railroad company under the cir-
1066 cumstances named in the act might take the depot grounds of another railroad company?

A. I don't think it could be done here.

Q. Could you make a constitutional act by which you could take the property of the Michigan Central?

A. I am not discussing questions of constitutional law. I know it has never been done and cannot be done.

Q. If you cannot pass special legislation, will you tell me what constitutional act could be passed?

A. That section especially provides you shall not take any special property.

Q. Suppose the Michigan Central was fenced off, and they were not using it and they did not need it, you would concede that you could do it under this section?

A. Yes, sir.

Q. And you could not do it if that section was not passed?

A. I think if they were not using it and did not need it.

Q. If they did not need it and did not use it, you could take it under this section which you think you drew?

A. I think so.

Q. Do you remember why you drew that section?

A. I don't think on the whole that I did draw it, but if I did do it, I could not have drawn it more carefully to protect the rights of the depot company.

Q. You have read that second paragraph?

A. Yes, sir.

Q. "The question of actual use and of necessity for the aforesaid purposes by said railroad company owning and not using said land, shall be determined in addition to other questions as provided by law in cases of condemnation of land for the purpose aforesaid, and the same proceedings in all respects, as near as may be,
1067 shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals." Will you tell us to what tribunal shall be referred the question of such use and necessity; what are the same proceedings as herein referred to; is it by commissioners or by a jury?

A. It is a petition to the court.

Q. Is it finally to be referred to commissioners or to a jury?

A. No, sir.

Q. Just read that portion of the law which provides for a trial, which is referred to there. You have got to file a petition that it is not needed and is not in use.

Mr. BAKER: And they deny it of course.

Q. Where does it go to be determined. You are familiar with this railroad practice?

A. Yes, sir.

Q. Is it not the general railroad law under which you have practiced for forty years?

A. Yes, sir.

Q. Just refer back to what proceedings will be taken?

A. I will. Here it is. (Witness reads from General Railroad Laws:) "In case any railroad company is unable to agree for the purchase of any real estate, property or franchises required for the purpose of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act; but there shall be no power, except for crossing, except to take the track or right of way of any other railroad company, except when any road-bed or part thereof has for five years remained, or shall hereafter for five years remain, in an unfinished condition, and without having the ties and iron placed and continued thereon up to the time measures are instituted to appropriate the
1068 same as hereinafter authorized, any other railroad corporation shall have the right to acquire title to the same and to the real estate and easements held by such company for use in connection therewith, in the manner prescribed for obtaining other property or franchises required for its use, and in such case proceedings may be instituted in a court of record in any county wherein a part of such road-bed sought to be acquired may be situate, and all of such road-bed and property aforesaid within this State, or only a part thereof, at the election of the applicant, may be included in one proceeding." That is, where the road is not finished.

Q. But as to the trial of the question?

A. "For the purpose of acquiring such title such company may present a petition to any court of record for such county, praying for the appointment of three commissioners. Said petition shall be in the name of the company, shall be signed by one of the directors or the engineer, or the attorney of said company on its behalf, and shall be verified by the oath of the person so signing the same, and shall contain the description of all the real estate, property or franchises, or so much thereof as the company seeks to acquire under such petition in said county; and that said company is duly incorporated; that it has a railroad, or a railroad tunnel constructed, specifying the points from and to which the same is in operation, or that it is the intention of said company, in good faith, to construct, finish and maintain a railroad or a railroad tunnel from and to the places named for that purpose in its articles of association; that the capital stock of the company has been in good faith subscribed by this act to organize such company; that the company has surveyed the route of its proposed road in
1069 said county, or of its railroad tunnel, as the case may be, and

made a map and survey thereof, by which said route is designated; and that it has located its said road or railroad tunnel, according to such survey, and filed a certificate thereof, signed by a majority of the directors of said company, in the register's office in said county; that the property described in the petition is required for the purpose of constructing, operating or repairing the railroad, or its appurtenances, or the railroad tunnel or its appurtenances, as the case may be; and that the taking thereof is necessary for the public use, and that the company has not been able to acquire title thereto, and the reason of such inability. The petition must also state the names and place- of residence of the parties, so far as the same can with reasonable diligence be ascertained, who own or claim to own and have estates or interests in said lands or property; and if any such persons are infants, their ages, as near as may be, must be stated, and if any of them are idiots or persons of unsound mind, or unknown, it must be so stated, together with such other facts and allegations as to encumbrances or otherwise, as will be sufficient to show who have or claim to have interests in said lands, real estate or property, and such other matters as the company may see fit to make. A copy of such petition, with a notice of the time and place, when and where the same will be presented to such court, must be served on all persons whose interests will be affected by the proceedings, at least ten days prior to the presentation of the same to the court, as follows, viz., first, 'If the person on whom service is to be made resides in this State, etc.;' that is immaterial; second, 'If any person on whom such service is to be made is under the
1070 age of 14 years, etc.;'" that is immaterial. The third, fourth and fifth subdivisions here are immaterial. Section 20 is, "On presenting such petition to said court or the judge thereof at chambers, with proof of service of a copy thereof, and due notice as aforesaid, all persons whose estate or interest are to be affected by the proceedings may show cause against the prayer of the petition, and may disprove any of the facts alleged therein, and said court or judge shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, said court or judge shall make an order appointing three disinterested and competent freeholders as commissioners to ascertain and determine the necessity for taking such lands, franchises or other property, and to appraise and determine damages, or compensation to be allowed to the owners and persons interested in the real estate or property proposed to be taken in such county for the purposes of the company."

Q. Read the jury clause there?

A. Yes, sir.

Q. You will see we are not bound to take commissioners, but may demand a jury under that statute?

A. You have a right to demand a jury, but it goes to the court first, and the judge is to consider whether that petition is to be granted. That is the law. The parties have a right to contest the facts set up in the petition before the judge. Now, suppose you filed a petition to condemn a portion of the grounds of the Michi-

gan Central railroad, it comes before the judge; the judge is to determine whether commissioners are to be appointed; that is his duty; if it appears that you are seeking to condemn the yard
1071 of any other railroad company actually used by that company, the court will say your petition shall not be granted.

Q. You think the court would?

A. Yes, sir, certainly: and is bound to do it, could not help doing it, because you have to state those facts, and the law expressly prohibits the issuing of a commission to condemn the yard of another company; you cannot do it at all; it would never get to a jury in the world.

Q. You have read the provision as to the point of commissioners. Where and by what tribunal, at the election of any defendant are the questions of fact to be decided?

A. The questions of fact are to be decided by the judge, so far as those questions are concerned, always.

Q. You think by the judge?

A. Always; the law so states.

Q. The law states that you can contest the facts stated in the petition, as to whether there has been a proper negotiation to come to an agreement?

A. You could contest every fact.

Q. Suppose a petition is filed by the Fort Street Union Depot Company against the Michigan Central, and verified, stating that the Michigan Central does not need or use this property, this margin, and the Michigan Central came in and asserted that they do use and need it, to whom does that question of fact go?

A. That question of fact is settled by the court.

Q. Then you say that this provision refers to the court?

A. Yes, sir.

Q. "The question of actual use and of necessity for the aforesaid purposes by said railroad company owning and not using said land shall be determined, in addition to other questions as pro-
1072 vided by law in cases of condemnation of land for the purpose aforesaid, and the same proceedings in all respects as near as may be, shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals." Do those proceedings referred to in that section refer back to what you have read?

A. Yes, sir, exactly; they cover it; and when it appears before the court that you seek to condemn the land belonging to another railroad company in actual use, the court will not let you go any further.

Q. The proceedings are similar to the proceedings taken in this case?

A. Yes, sir.

Q. Will you tell us when you filed a petition in this case to condemn a right of way in front of Mr. Backus' property, what the court did with your petition?

A. Hand me that book again.

(Counsel hands book of statutes again to the witness.)

Q. How did we get here to the jury?
A. The court appointed a commission.
Q. In this case?
A. No, sir, not here; they got a jury.
Q. Will you please tell us when you filed your petition against Backus in this case, how the court came to order this jury?
A. Simply because you demanded it.
Q. To pass on what question?
A. To assess the damages Mr. Backus might sustain.
Q. Anything else?
A. Whether it was public necessity to have this route come up here.
1073 Q. Did the court undertake to decide that in the first place, whether it was a necessity?
A. I think they referred it to the jury.
Q. If the question of whether the depot company whose lands are sought to be taken needs the property or uses it, shall be referred and treated in the same way as in the case of the condemnation of the property of private individuals, it would come up in precisely the same way?
A. No, sir; I think not. I think it would appear before the court in a petition. That court would never refer it to a jury. That is a question for the court, not for a jury.
Q. What is there for the court in this case you are trying here?
A. Public necessity.
Q. For the court?
A. The court was to ascertain first certain things——
Q. When in the world, in your history as a railroad lawyer, did any judge pass upon any question of necessity under the constitution of 1850?
A. I mean they referred those questions to this jury.
Q. Has any judge in the State of Michigan a right to pass upon the question of necessity?
A. No, sir.
Q. Or to pass upon the question of damages?
A. I think not.
Q. Does not the constitution of this State say that the question of necessity and use has to be referred to a jury?
A. Those questions are; but if there is any good reason in the mind of the court why the petition should not be granted in full, the court does not grant it to a jury.
Q. But in practice, does not that go to the constitutional question of whether the petition is in proper form?
1074 A. No, sir, it goes to all questions of fact there are there.
Q. Suppose some one should go into court and make his appearance before the judge, and deny the question of public necessity, and the necessity of taking his property, would the judge pass upon it?
A. No, sir; I think he would refer it to a jury; but if you attempt

to assess lands which are used as a depot by another company, then the judge would have to pass upon that; he would not refer that to a jury, because the law especially prohibits that no commission shall be issued to condemn land under such circumstances.

Q. Does it?

A. Yes, sir.

Q. You have read the law. Will you refer to it again. I will read the section and you will see it does not cover the question.

Mr. BAKER: It says there shall be no power except for a crossing.

Q. This act that you read from was passed many years ago, was it not?

A. Some years ago.

Q. Section 17 here provides—of the old general railroad act, still in existence, as follows: "In case any railroad company is unable to agree for the purchase of any real estate, property or franchises, required for the purpose of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act; but there shall be no power, except for crossing, to take the track or right of way of any other railroad company, except when any road-bed or part thereof has for five years remained," etc.; does that refer to depot grounds?

1075 A. That does not. I did not read it for that purpose.

Q. That provides that it shall not be taken. It would seem to assume that it might be taken for something else, that any other property might be taken, because it only provides that you shall not take the track or right of way. Is there any prohibition against taking the property of another railroad company, in that general act, except that; is there any prohibition against a railroad company or a depot company or any one else taking the property of another railroad company, except the provision against taking its tracks or rights of way?

A. Yes, sir; this is a prohibition: "When any part of the land of any railroad company in this State or adjacent to its depot ground, is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company organized as aforesaid, needing such land for the purpose of a depot or terminal facilities," to acquire it by condemnation, but you shall not in any case when it is occupied by any other company.

Q. It does not quite say that?

A. Yes, sir, those are the exact words.

Q. But is there any prohibition against taking the property of another depot company, except the prohibition against taking the track and right of way; is there anything else except what you have just read?

A. I don't think of anything else just now.

Q. Those two sections, section 17 of the old railroad act and section 44 which you have just read, are the only provisions?

A. I think there is another provision which I can refer
1076 you to: "In case any railroad company is unable to agree for the purchase of any real estate, property or franchises required for the purpose of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act; but there shall be no power except for crossing to take the track or right of way of any other railroad company," except by the consent of such company.

Q. That is the only thing. That is a repetition of the same thing?

A. There is a provision against taking the track and against depot grounds.

Q. The prohibition against taking depot grounds is the one?

A. That is the act that prohibits it.

Q. The act that I called your attention to, and that you may have drawn yourself?

A. Yes, sir; but also by general law, always universally you cannot take the property which has been appropriated to public use by one company, to appropriate it to the same public use by another, unless you have a special act authorizing it to be done.

Q. But you cannot have a special act in this State?

A. But you can frame a general act to cover the conditions under which it could be done; you could draw an act, and so could I, as a general law, that under certain circumstances you might take the property of another company.

No answer.

Redirect examination by Mr. BAKER:

Q. Is it not true, as a general rule of law, that railroad and other corporations only have such powers as are conferred?

1077 A. Yes, sir.

Q. That is, in order to exercise the right of eminent domain at all, they have to have it granted to them by the legislature, either by a general law or a special act?

A. Yes, sir.

Q. Now, in this State, there has never been any legislation that authorized one railroad company to take the property of another, except for a crossing?

A. That is all.

Q. There has never been any authority conferred upon any road or depot company to build an elevated road across the property of another?

A. No, sir.

Q. And in the absence of such authority it cannot be done?

A. It could not be done unless—I don't think it could be done in any event, but if you could span from side to side of the Michigan Central depot grounds, if you wanted to cross them and put a span so as not to touch their grounds, they might grant such power.

Q. Would it be possible to make such a span?

A. I don't think it would.

Q. But there has no authority ever been conferred to do any such thing?

A. There has never been any authority, or anything like it ever been passed by the legislature of this State.

Q. And every act that has been passed, all the legislation that exists, especially provides that you shall not do it unless it is not in use and is not needed?

A. Yes, sir.

Q. With reference to legislation, under our constitution,
1078 it would be necessary to make any such bill general, would it not?

A. Yes, sir.

Q. And to give authority to depot companies, or other railroad companies, to lay out their routes or depot grounds upon the property of other companies?

A. Yes, sir.

Q. So that it would put every depot ground and the railroad property of every company at the mercy of a competing company and the whims of the locality?

A. No such law as that would ever be passed; but, I think, this might be done: No such thing would be ever likely to arise in a city like ours, but there might be a set of circumstances where one railroad company might be a great deal more important than another, and where one company, although they were actually using the yard, had more than they actually needed, or they might acquire property on the other side; in passing a law the legislature might provide that where such exigencies as that arose, and it was absolutely necessary for one company to take a part of the depot of another company, they might provide a tribunal which should determine what the public necessity there required, and if the public necessity did require such a thing, and they provided such a tribunal to ascertain it, possibly that thing might be done, but that could only be done by an act authorized and framed with great care and on purpose to accomplish that thing.

Q. That would have to be a general law?

A. Yes, sir.

Q. And the limitations upon the power given would have to be such as to be expressly such a case?

A. They would.

1079 Q. And it is possible that a general law, framed in that way, could be passed in a special case, where the public necessity was very great?

A. It is possible.

Q. Do you think that the union depot company, with the aid of Mr. Dickinson, or anybody else, could have got an act passed through the last or any previous legislature that would authorize you to build an elevated road over the Michigan Central property?

A. No, sir; it never could have been done.

Q. At any rate it has not been done?

A. A railroad company must have entire command of its yards, according to the exigencies of its business: it has to shape and

reshape its tracks; the Michigan Central has been relaid with tracks, I think, 20 times since it existed, and every new accession of business requires a change of tracks in the yard, and the posts in the yard, upon which an elevated road would stand, would be immensely in the way; we had the utmost difficulty in getting across the Michigan Central railway, with the few tracks they have in the street there; in the yard there it would be an intolerable nuisance.

Q. Is it not a fact that where you cross on the triangular space down there you actually destroy track-room enough for two cars to stand on?

A. Yes, sir.

Q. They assented to that, and so no question arose as to that?

A. Yes, sir.

Recross by Mr. DICKINSON:

1080 Q. You had no difficulty in the last session in getting an almost unanimous vote authorizing the city of Detroit to close two streets for the union depot company?

A. I had a good deal of it.

Q. It passed by a unanimous vote?

A. No, sir.

Q. Have you had any difficulty in getting any legislation you wanted for the union depot company?

A. Considerable. There was one bill passed by a unanimous vote, and I will tell you what it was: We had so much obstruction put in the way of this depot company by the Michigan Central Company, a long controversy with them, so much so that the time was likely to expire within which we were limited to complete this work; we were required to finish this work within two years.

Mr. BAKER: To have it done the first of August of this year?

A. I think it was some time in August. It had got to such a pass, by the delays, that I was afraid we would not get through by that time. I got some member of the legislature to introduce a bill to have the time within which this work should be done extended one year. That passed unanimously. The other did not, because a great deal of opposition comes from private parties who are injured, who want to be paid before it is done.

Q. That would have passed unanimously if it had not been for a man on Baker street, who had a pull on one of the senators?

A. That would have passed undoubtedly.

Mr. DICKINSON: Do you know how many square feet the Michigan Central recently acquired on this 160-feet front running through to the river; how large a territory?

A. I don't understand that.

1081 Q. You don't know that the Michigan Central have within six months purchased of the Detroit, Lansing & Northern, one of the concerns that are going in your depot company, 160 feet front on River street, running through to the river?

A. Yes, sir.

Q. Do you know how many square feet there are in that lot?

A. The lot I think is 50 feet wide on River street, running through the same width to the river, and also ten feet more, but the ten feet is subject to the city, to have a sewer cross it; there are 60 feet therefore, but ten feet subject to the right of the city to build a sewer in it.

Q. Where did they get the 100 feet? There is 160 feet altogether. They did get 160 feet wide there; can you tell me how far they are from River street to the river?

A. Somewheres about 300 feet I think. There is another piece of property there which was acquired by the Lansing Company, and it was acquired when I was president of the Michigan Central road; the Michigan Central road, as I construed the charter at that time, had acquired all the property by condemnation which it had the right to acquire, because it is limited by its charter to a certain width on each side of its road; but the Lansing road was there, running there, and I got an act of the legislature passed, and I guess it is merged in these general laws, which authorized any one of two companies who were occupying the same ground to acquire by condemnation any land which might be for the interest of both to acquire, and I condemned that under the Lansing charter, and the Lansing acquired it by condemnation. That property also was sold to the Michigan Central when it was compelled to leave the Michigan Central, because they cannot do business there.

1082 Q. But it has not left there yet?

A. But they have been notified time and time again that they must go.

Adjourned to Tuesday, July 7, 1891, 2 p. m.

TUESDAY, *July* 7, 1891—2 p. m.

GEORGE V. N. LOTHROP, sworn for respondents.

Examined by Mr. BAKER:

Q. How long has the city of Detroit been your home?

A. Very nearly fifty years.

Q. How long have you practiced your profession, or at what time did you commence the practice of law?

A. In the spring of 1844.

Q. In this city?

A. In this city.

Q. And you remained in active practice until what year?

A. Until 1885.

Q. Were you at any time the counsel of the Detroit, Lansing & Northern railroad?

A. I was.

Q. Were you the counsel of other railroad corporations?

A. I was the general counsel for the Michigan Central for a good many years, from 1854 or 1855, and I think I resigned about 1880, but I do not remember the year exactly.

Q. Were you the counsel of the Detroit, Lansing & Northern when Mr. Mulliken was the general manager?

A. I was. I should say that I was the general counsel of the Lansing road for a considerable number while I was also
1083 counsel of the Michigan Central, and I remained counsel for the Detroit, Lansing & Northern after I resigned as counsel for the Michigan Central.

Q. Do you remember, at one time, while you were counsel of the Detroit, Lansing & Northern, that the Michigan Central gave that company notice to vacate the Michigan Central grounds?

A. I remember it very distinctly.

Q. Do you remember the grounds on which the Michigan Central claimed that the Detroit, Lansing & Northern should vacate those grounds?

A. Yes, sir.

Q. What was the reason given?

A. The reason given was that their own business had increased so largely that they required all of the room for depot uses at Detroit, and could no longer accommodate the Detroit, Lansing & Northern. The contract was about to expire. There was a written contract by which the Detroit, Lansing & Northern had depot privileges at the Michigan Central that was about to expire, and this notice was given some time before it was to expire, that they could no longer continue.

Q. Where did the Detroit, Lansing & Northern road terminate at that time its own tracks?

A. Its own road terminated at what is now called West Detroit. It used to be called the junction of Springwells. They came in just west of the passenger station there.

Q. And ran in over the tracks of the Michigan Central?

A. Yes, they came in over the tracks of the Michigan Central.

Q. In connection with that notice that was given by the Michigan Central, were you consulted by Mr. Mulliken or the
1084 other officers of the Detroit, Lansing & Northern as to what could be done in the direction of condemning a right of way over the Michigan Central tracks into the Michigan Central grounds?

A. I never had any such consultation with anybody.

Q. Do you remember of giving Mr. Mulliken any advice as to what the law was upon that subject?

A. I have no distinct recollection of any conversation with him upon the law upon that subject. I would state in that connection, if it shall not be objectionable: under the condition in which the Detroit, Lansing & Northern was placed by that notice, it became necessary to consider what should be done about it, and what condition it would leave the Detroit, Lansing & Northern in, if the Central road should succeed in excluding them from their depot. Conversations upon that subject I remember to have often had with Mr. Mulliken, and with no other officer of the road.

Q. Will you state what advice you gave at that time as to the

power of the Detroit, Lansing & Northern, under then existing statutes, to condemn a portion of the Michigan Central property?

A. As I have no recollection of the question ever having arisen, of course I have no recollection of ever having given any advice to anybody on the subject.

Q. Did you investigate the question at that time?

A. I did not, specially.

Q. Were you familiar with the law upon the subject at that time?

A. In a general way I had to know something of the railroad law.

Q. You have been familiar with the railroad statutes of this State for a good many years?

A. It had been my business to be, and I was somewhat so.

1085 Q. Will you state whether or not, under the statutes as they existed at that time, the Detroit, Lansing & Northern road, which was a road organized under the general railroad law, had any power to condemn the tracks or depot grounds of the Michigan Central?

Mr. DICKINSON: To this we object as incompetent, and desire to note an exception.

A. The Detroit, Lansing & Northern was organized under the general railroad law, and I never supposed that they had any legal authority to condemn the depot grounds of any other railroad company whatever.

Q. If there had been any such statute in Michigan, you would undoubtedly — been familiar with it?

A. I could hardly answer that. That would go to the extent of my diligence and knowledge, and I would not wish to affirm that I did know it. I ought to have known it.

Q. Did you ever learn of the existence of any such statute or any such authority in the law?

A. I knew that under special circumstances public franchises for one use might be condemned, under the authority of the legislature, for another use that was paramount. I knew that, and I have no doubt about it, but I did not know or believe that any authority had been given by the legislature to condemn the Michigan Central Railroad property, the depot grounds here.

Q. That was your understanding of the law?

A. Yes, sir; I supposed it did not exist.

Cross-examination by Mr. DICKINSON:

Q. You were general counsel of the Detroit, Lansing & Northern while Mr. Mulliken was general manager?

A. Yes, sir.

1086 Q. Do you remember whether the question of the entrance of the Detroit, Lansing & Northern came up before or after the old depot company was projected?

A. I don't know that I know when the old depot company——

Q. I don't ask for the date; do you remember generally when the old depot company was projected?

Mr. BAKER: He was the counsel for it.

Q. Were you the counsel?

A. If you refer to the union depot company which came in in connection with the Wabash road, I was counsel for that company to this extent, that I assisted in the condemnation of a considerable portion of the land lying west of the depot grounds proper, for depot purposes, commencing with Mr. Backus' property and extending from that down to the old bay. The last piece of property, I think, was Sibley's, and beyond that one piece of property owned by Mr. Morton, I think.

Q. There was nothing in that depot company's affairs which brought their interests above Twelfth street?

A. Not that I know of, and I had nothing to do with the portion of the property lying between Mr. Backus' premises and Twelfth street, which had been purchased by Mr. Joy by private negotiations, and some portions below Mr. Backus, had also been purchased. There remained, however, several pieces of property that had to be condemned, and in that I acted as counsel.

Q. Can you fix the event of the circumstance, not by dates, but whether the talk about the termination of the Detroit, Lansing & Northern contract with the Michigan Central was before or after the depot affair?

1087 A. Answering from impression, without being positive, my impression is that the conversation was before that.

Q. You were counsel also, were you not, in connection with the union depot company, with reference to the bill that was introduced to form union depot companies?

A. Only to this extent, that I now remember on one occasion at Lansing, at Mr. Joy's request, I appeared before a committee, upon some of the provisions of that bill, I think.

Q. Will you please state whether your present recollection is that your talk with Mr. Mulliken, and your familiarity with the laws which were then called to your attention in connection with this notice of the Michigan Central, was prior to or after the passage of that act?

A. My recollection is, as I said before, that my conversation was prior to that.

Q. Your impressions of the law, which you have stated they were and must have been, prior to the passage of the union depot act, was that the franchise of one corporation could not be taken without statutory authority by another?

A. Yes, sir.

Q. There is no doubt about that at all; but you have no doubt that by express statutory authority the property of one corporation may be taken by another?

A. I think I stated before that I always understood that all property was subject to the power of eminent domain, but that there must be, for the particular purpose of taking one piece that had

already been appropriated for that use, taking it for another use, there must be express statutory authority.

Q. In this State all legislation of this character must be general in its nature under the constitution of 1851?

1088 A. There are some provisions upon that subject.

Q. I am asking you as to your opinion of the constitutionality of this act, an act to enable the Detroit, Lansing & Northern to take depot grounds, or a portion of the depot grounds of the Grand Trunk road, you don't think such an act would be constitutional, do you?

A. I should think I should formerly have been of the impression that it would not have been. I would not dare to answer now.

Q. Suppose an act is passed authorizing one railroad company under certain conditions and limitations named in the statute to take the property of another railroad corporation, or its depot grounds, its right of way, do you think that statute would be constitutional?

A. I should hardly desire to answer the question; but I will ask another question, do you mean authorizing a particularly specified corporation, and nobody else?

Q. No, sir; authorizing railroad companies generally, under circumstances to be detailed in the general act, special circumstances which are to be passed upon by a tribunal, authorizing any railroad company, under such circumstances named in the act, to take a portion of the depot grounds, or a portion of the right of way of another railroad company?

A. I am not quite sure that I understand you, but if I do understand you, I should answer that I do not now see any objection, so that it will operate within the rule that would govern the taking of private property for public purposes.

Q. You have answered the time when you had the conversation with Mr. Mulliken, and your familiarity with the statutory law, the union depot act, I should state to you, in order to refresh

1089 your memory, was passed in 1881, where you were advised, and went before a committee as to some portions of it; it is now in the new compiled laws and was passed in 1881, in June; at the same session of the legislature, in 1881, there was passed this act:

"SECTION 3357. When any part of the land of any railroad company in this State, in or adjacent to its depot grounds, is not in actual use for depot or other purpose pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company organized as aforesaid, needing such land for the purpose of a depot or terminal facilities, to acquire the same in the same manner as may now be done for such purpose from individuals. The question of actual use and of necessity for the aforesaid purpose by said railroad company owning and not using such land, shall be determined, in addition to other questions, as provided by law in cases of condemnation of lands for the purpose aforesaid, and the same proceedings in all respects, as near as may

be, shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals."

At the time to which your attention has been directed, prior to the passage of the union depot act, do you recall that there was any such statute on the books?

A. I don't know of any such before that time.

Q. This is in the general railroad act, and is added to the general railroad act as section 3357. Under this section, to what tribunal do you understand the statute would refer the question of the actual use and the necessity for the aforesaid purpose by the railroad company owning such land, when it was sought to take it.

To what tribunal would the question go, under the provis-
1090 ions of that statute, to pass upon the question of the actual use of the land and the necessity for its use by the company who owned it?

A. Before I should dare to answer a question of that kind I should give the matter of jurisdiction of the tribunal a very quite careful examination, which I never did.

Q. I will ask you the question, whether in the acquirement of land under the general railroad law the tribunal provided was commissioners to be appointed by the court, and at the election of the private individual a jury?

A. Yes, sir, there was originally a provision in the constitution of 1851, which in certain cases was afterward modified, but so far as railways are concerned, I remember that commissioners were authorized, with the right, however, of private parties to demand a jury. The proceedings were to be conducted in some court of record in the State of Michigan.

Q. And at the election of the private individual, under the general railroad law, there should be a jury pass upon the question of necessity and the value of the property?

A. I don't remember any exception to that right.

Redirect examination by Mr. BAKER:

Q. This statute that Mr. Dickinson refers to authorizes the depot grounds, the property of another company, to be condemned, if it is not in use by that company and is not needed?

A. Yes, sir.

Q. Suppose it appeared, in a condemnation case that was instituted under this statute, that the property was in use and was needed, and there was no contradictory testimony, could a verdict in favor of the necessity and assessing the damages be sustained in this State?

1091 A. All these questions of law I shall have to answer with modesty, because I have been long out of practice, but so far as I remember, I never supposed that property that was in actual use and was needed for the use of one railroad corporation, could be condemned and taken by another. I should make perhaps one exception, and that is the crossing of railroads, for which special provision was made. Under that statute I never supposed it was

possible to take land already owned by a railroad company as its depot, and used for that purpose——

Mr. DICKINSON: Was your attention ever called to that statute before?

A. No, beyond this, that my attention was called at every session of the legislature to all this railroad legislation; beyond that I know of no special calling of my attention to it.

By Mr. BAKER:

Q. This statute was passed in 1881. For a number of years afterwards, until 1885, you were in active practice, and you conducted the condemnation proceedings for the old union depot company after that, did you not?

A. Yes, sir.

Q. And you were as familiar with the general railroad law and the union depot laws of this State as any man in it?

A. I dare not say that I was acquainted. It was my business to know, and in a modest way I tried to know the railroad laws of this State.

Recross-examination:

Q. In your practice, under the union depot act, for condemnation of depot grounds for purposes of the old union depot, you had no question to come up as to the need of taking any property of another corporation?

1092 A. None whatever.

Q. So you had no occasion to examine the question, had you?

A. I have answered that the question of this particular statute and its construction never arose except so far as it would naturally arise to a lawyer reading the statute as passed by the legislature.

Q. Of course the question of the actual use and need, under the question asked you by Mr. Baker, if there was evidence of the use and need by the railroad company whose property was sought to be acquired, that would be a use and need in good faith, would it not? There would not be any pretense about it?

A. Certainly not.

Q. And that would be a question of fact for the jury?

A. The same tribunal that passed upon the other.

Mr. BAKER: Suppose the testimony was undisputed that it was in use, and there was no contradictory testimony, would it be possible under our laws for our courts to sustain a verdict in favor of the condemnation?

A. I should suppose not.

By Mr. CHAREST:

Q. By the fact that the Detroit, Lansing & Northern and the Flint & Pere Marquette are leaving the grounds of the Michigan

Central depot, without being sent away by the company, does not that show by that fact that they do not need all that ground?

A. I should not suppose that that inference could be drawn by that fact alone.

Q. Would not that have to go to the jury as a point of law that in case they needed all the room, if they did need it in reality,
1093 they would tell the Detroit & Lansing and the Flint & Pere Marquette to vacate the premises if they wanted, the fact that they do not do that, would not that convey the idea to the jury that there is ample room?

A. That might be a question for the jury to consider with the rest of it.

By Mr. DICKINSON:

Q. The contract which was given to the Detroit, Lansing & Northern provided, did it not, that the Detroit, Lansing & Northern might have the use of these terminal facilities so long as it did not compete with the Michigan Central?

A. There was a provision in the contract by which competition with the Michigan Central at certain points was prohibited, and whether there were terms of forfeiture it would be impossible for me to state certainly.

Q. The Detroit, Lansing & Northern was extended to Grand Rapids, and it did compete with the Michigan Central's Grand River Valley branch?

A. That whole work was done afterwards, and I know nothing about that. I know nothing about that portion of the road.

ABSALOM BACKUS, recalled.

Cross-examination continued; examined by Mr. BAKER:

Q. Do you remember the meeting of the State railroad crossing board at the Russell house?

A. Yes, sir.

Q. Were you there?

A. Yes, sir.

Q. Was Luther Beecher there?

A. I think he was.

1094 Q. You and Luther Beecher were both heard in opposition to the approval of the map and survey of the Fort Street Union Depot Company, were you not?

A. I think I spoke a few minutes.

Q. And so did Mr. Beecher?

A. Yes, sir.

Q. In the remarks that you made to the State railroad crossing board on that occasion, did you not insist that the proper route for the depot company to take was to go through the private property that is situated between River street and Fort street west, and did you not point out a route?

A. Yes, sir; in preference to going up the street,

Q. That went through the Backus property, between your mill and Fort street?

A. Yes, sir.

Q. Condemning a right of way through your lumber yard down there, the old union depot company, and the Detroit Western Transit and Junction Railroad Company condemned a right of way for the passage of trains only, did they not?

A. Yes, sir.

Q. They had 50 feet right through your yard?

A. Yes, sir.

Q. Your yard was substantially as it now is?

A. Yes, sir.

Q. It goes through there on a surface, substantially on the grade of the yard?

A. Yes, sir.

Q. In that proceeding you were awarded in the first place damages to the amount of $35,000, were you not?

A. About that, I think.

1095 Q. And subsequently, after the road was built, the switches were so placed in the union depot yard and close to your property that they violated the limitation in the condemnation and switched across you for a number of years, did they not?

A. Trespassed on me.

Q. They did switching in violation of your rights?

A. Yes, sir.

Q. And you brought an action against the Wabash and the old depot company, and the Detroit & Western Transit, and finally recovered the sum of $27,000?

A. Yes, sir.

Q. You got a verdict of $20,000 that was sustained by the supreme court, which covered a part of the time, and in settling the whole thing you received $27,000?

A. Yes, sir.

Q. In that old condemnation case, where you received $35,000, the only testimony as to the insurance rates was that furnished by Mr. Rothermal, was it not?

A. I cannot remember.

Q. But you remember he was called as a witness in your behalf?

A. You ought to remember.

Q. I am trying to see if you remember. Do you remember that he was at the head of the insurance bureau or the board of underwriters at that time?

A. I think he was.

Q. And fixed the rates for all the companies that were members, which included most all the companies?

A. Yes, sir.

Q. And he testified, did he not, on that trial, that if the road was built through this lumber yard that it would necessitate an increase of the rates?

1096 A. I do not remember.

Q. Is not that in accordance with your recollection?

A. I cannot remember. I know the rate went up on us afterward.

Q. Was not that in accordance with the testimony that had previously been given?

A. I don't remember, really.

Q. Don't you recollect that that was the fact, that he testified that the rates would be increased, and after the road was put through he did increase them?

A. I know that it was divided up instead of being a blanket policy.

Q. Don't you know that the rates were increased?

A. It made the rates more than double what we were paying for it before. I don't remember what testimony was on the subject.

Q. The second case involved the damage that was done to your lumber by soot and cinders?

A. Yes, sir.

Q. Commencing in the fall of 1882 down to 1887 or 1888?

A. Yes, sir.

Q. It covered a period of four or five years?

A. Yes, sir.

Q. You had, on an average, on that yard, during those years about 20,000,000 feet of lumber?

A. No, sir.

Q. How much?

A. I can't tell you.

Q. Did you have 15,000,000 feet?

A. We had more than 15,000,000 a year, taking the whole year around.

1097 Q. How much would be in stock there as an average?

A. Ten or eleven million.

Q. When the jury went down to look at those premises a few days ago, perhaps I might say a week or so ago, didn't you employ a number of men and put on an extra force so as to have the whole mill in operation when the jury were there?

A. No, sir.

Q. Do you mean to say that nothing was done to show the operation of the mill that you took no precautions whatever to put that mill in shape for the jury when they would come there?

A. That is all foreign to my ideas. It is all new to me. I knew nothing of the kind. I knew we were in shape to run any part of the mill if we wanted to.

Q. You had it all in operation when they were there?

A. Not all of it.

Q. Nearly all?

A. Pretty nearly.

Q. Was it all in operation the day before?

A. We are capable of doing it at any time.

Q. Was it in operation the day before the same as it was the day we were there, the same machines and the same men?

A. They might have started up a machine that would have been

standing idle if these people had not been there. We can show off any day just as we did that day.

Q. You did show off that day?

A. I guess we did, the jury will know about that.

Q. On the former trial of this case, the jury went down there to look at the property?

A. Yes, sir.

1098 Q. You took some of the jurymen down there alone afterwards, didn't you?

A. No, sir.

Q. Were not some of them there?

A. Some were there, and I was told by one of them, "When we want any of your assistance, we will call upon you."

Q. Did not Francis H. Carr, one of the jurymen, go down there and go through that mill alone?

A. Not to my knowledge.

Q. Did you see him there?

A. No, sir.

Q. Did you see any of the jurymen there?

A. No, sir.

Q. Do you know anything about any of the jurymen being there after the whole jury had been there?

A. No, I should know better than to do that. That would not be equitable. It would not be in accord with the propriety of the thing. My common sense would tell me not to interfere with any man.

Q. Do you know whether any of them were down there alone?

A. I do not. I never saw them. I never heard of their being there.

Q. Mr. Carr is an old friend of yours, is he not?

Mr. DICKINSON: I submit to the jury whether you will permit us to drag in the names of the jurors on the former trial. I insist upon this objection and I ask the jury to take a vote on it.

Mr. CHAREST: We want to do with this trial and not with the other, for my part, providing none of this jury has been to visit Mr. Backus' mill.

1099 The FOREMAN: The jury seem to agree that the former trial should have nothing to do with this.

Redirect examination:

Q. Will you please state whether, when this jury took a view of your property, you gave any directions to prepare the works to make a good show to the jury?

A. Never, neither this jury nor the other.

Q. I am not going into the other jury at all. Did you direct a thing to be done that would not be done ordinarily as it goes?

A. Nothing whatever.

Q. Will you please state whether the jury saw your works in your ordinary operation on that day, and if there was any exception name what it was?

A. I thought it was as we were doing it all the time, whenever we had business. Sometimes business was slack and we let this machine stand idle, but it was managed so that we could start that machine up. We could always do that.

Q. Was that machine going the next day after the jury were there?

A. Yes, sir.

Q. But you did not give any directions to start up that machine particularly?

A. We did not have any extra men. They were the same men that work it all the time.

Q. How many men do you have on your pay-roll?

A. I think about 130.

Mr. LESHER: I would like to know whether you had any more men on your pay-roll that day than you had the previous day?

1100 A. No, we made no change. The men that were there, if we wanted to take a man and put him over on that machine, it was done. Of course the men always had pride in showing off. I presume likely they might have been running two machines when they could have got along with but one. We showed it off just as we could do it every day.

Q. You were asked by Mr. Baker to bring some letters that you had received in regard to the dust-room and this apparatus?

A. Yes, sir.

Q. Will you produce the letters or some that you have?

A. I can if necessary.

Q. Are they all here?

A. No.

Q. Here are some that you could gather up?

A. Yes, sir.

Mr. Dickinson offered and read in evidence certain letters marked Exhibits 1 X to 9 X, inclusive; also printed pamphlet containing testimonials.

Q. Has the Cyclone and other dust-arresters an opening at the top to the outer air?

A. As a rule, I think that is the way they are arranged, so as to let the air out from the top while the fuel goes to the bottom.

Q. There are none that do not have an opening at the top through which dust may sift?

A. I think not; I never saw them.

Q. On this matter of dust-arresters, you think you have the best; will you tell the jury, in your judgment, whether you think you have the best for your business?

1101 A. Where I draw the line is the absolute perfection of the thing. There is no back pressure in mine; that puts it within the reach of any man. I mean when you are blowing this fan we are carrying the wind through a pipe. If you take a board and hold over the end of the pipe, your machine would go out, would not do any work, so it is found that it requires about 15 horse-

power to run a centrifugal or Cyclone machine. We have a great many instances. I have been told a great many times, in one particular case where a man said he used 60 horse-power more than he did before. The Croghan Street people have two, and they say they use 30 horse-power. Mr. Ferry's people told me it required 15 horse-power for each machine.

Q. Does yours do your work to your entire satisfaction?

A. Yes, sir.

Q. With the other machines it takes 15 horse-power to each fan?

A. Yes, sir.

Q. How many fans do you have?

A. Three.

Q. So that as a matter of economy this is the best?

A. Yes, sir. My fans are unusually large; larger than most fans You noticed one of them is 22 inches across. It would probably take 20 horse-power.

Q. I have not the slightest idea that the union depot company has any right to change your judgment on the dust-arrester?

A. Take that sawdust-room—there is a room 60 feet long, 30 feet wide and 26 feet high; a pipe comes in at one place; it will fill that place full of sawdust, and yet when it comes out at the top, this Cyclone would drop it down in the shape of a cone at the sides, and around it would be empty, so that the shavings would
1102 bank up. The result would be that I would not get over half the capacity in my storage-room that I now have. That is a very important matter, the matter of room. I have a room probably 65 or 70 feet long for my shavings, and one fan takes it in at one side and they take it out the other, and I fill that place full, and when it gets full I draw out a slide, but with the Cyclone we would have to take it up to the top and drop it down, and that is the end of it; there is no power to carry it in.

Q. You would not put in another dust-arrester than your own?

A. I would not if I were building 40.

Q. You think your judgment is just as good as that of the union depot company, as to what you want in your own business?

A. Yes, sir; mine does the work perfectly, and does it without any expense, and I can use all of my room for shavings or for sawdust, and I have got my power for something else, and I have got it all built and I do not propose to rebuild it. It would not be policy for me to go on and build another mill.

Q. Do you at times use your full power in your mill?

A. Most always.

Q. And you have accommodated all your works to the building—you have cut your garment to suit your cloth?

A. Yes, sir.

Q. Does all the lumber that comes to your mill—is it all dressed on the first floor?

A. All that comes into the lower floor is dressed.

Q. Everything comes into the first floor except that which is used for boxes, your local trade?

A. Not all the lumber that comes into the lower floor is made into boxes.

1103 Q. All the lumber that comes into the upper floor is lumber that goes into boxes?

A. Yes, sir.

Q. And that lumber that goes into making box shooks that are shipped away comes into the first floor?

A. A good deal of it, that is resawed.

Q. How much of the lumber that comes in is used on the upper floor, the second story or the third?

A. The second floor, that is for box-work exclusively. I have been looking over and I find that about one-third of our entire business is the box-work and the shook-work.

Q. For the rest of it, the arrangements of your mill and your machine arrangements are such that all other lumber comes in the first floor from the yard, and is dressed before it goes upstairs?

A. Yes, sir.

Q. Don't you think you could bring all that lumber in there on an elevated railroad and get it down to the lower floor, and send it upstairs; does it stand on your trucks as you work it up in the lower floor?

A. No, it is dumped. We bring a particular kind of lumber, and it is put upon this machine that is doing a particular thing, and the other machine something else, and another machine something else, and we bring it usually in lots of about 2,500 or 3,000 feet, sometimes 5,000 feet, and dump it there, each grade and width. This is a peculiar business, and you will see before we get through that my business is not like other people's business, a peculiar business. A man wants a box and he wants it seven and one-fourth high, and we go to a pile of lumber that has been stored previously, of ten inches, or eight inches, or seven and one-fourth inches,

1104 and bring a load of that length to this machine. It would be impossible to take it on a car and mix it in there. You could not do it for 50 cents a thousand. It would not be business. It would make confusion.

Q. Did you hear Mr. Joy's testimony that there was no lumber or coal to go on the elevated road?

A. Yes, sir.

Q. Do you think it possible with these three tracks running by there on the elevated road, that they will give you switching accom-odations, using their track for half a mile?

A. I would not want it if they did.

Q. Did you ever hear of such a thing, doing this to accommodate you, permitting the road to be obstructed with your lumber?

A. No.

Q. What part of the lumber has to be weighed?

A. All of the stock that goes into shooks. We do not weigh the long lumber, because we can always estimate that. A thousand feet of lumber weighs 2,000 pounds; that is near enough for all practical purposes. All the shooks have to be weighed, so that

when we are putting 26,000 pounds in a car, we know just what it is.

Q. Is it necessary to use the yard in front there, where these windows show through in the fence, when you are carrying on your business?

A. I don't know how we could work without it.

Q. Suppose you ever did need a switch from the elevated road—I cannot for the life of me see how you do, having all the accommodations you need from the Michigan Central—suppose they did put a switch in there, it would have to go on your front yard; it would have to stand on stanchions and posts?

1105 A. It would not be a practical thing.

Q. It would cut off some of your light, and keep your room so that you could not use it for any of the purposes for which you are now using it?

A. No, sir.

Q. You said last night your net returns were $27,500; is that net over the $5,000 a year rent?

A. I think it is.

Q. That is, it is net including the rent, $5,000 a year?

A. Yes, sir.

Q. How long have you been receiving this $5,000 a year rent from this business, from the company?

A. I can't tell you.

Q. Five or six years?

A. Yes, sir.

Q. Got it always?

A. Ever since we built that mill.

Q. You built up this business; you carried it through the panic of 1873, and the depreciation following it; you gathered together this large lumber yard, and this mill, and the property on Fort street?

A. Yes, sir.

Q. And after getting the property in shape, so that it would run, you formed the corporation, by which it should pay you $5,000 a year rent, and then put your boys in the corporation with you?

A. Yes, sir.

Q. Did you bring up the boys to this business?

A. Yes, sir.

Q. Educated to this business and no other?

A. Yes, sir.

Q. Always been in it and worked by your side?

1106 A. Yes, sir.

Q. You receive the $5,000 a year rent and your share as a corporator beside?

A. Yes, sir.

Q. Mr. Baker made you say, and I notice he has great success in getting you to say things, when he asks you the questions so loud as he does—Mr. Baker made you say you did not make any money from 1882 down; how much was your loss on the fire in 1882?

A. If I remember, it was about $145,000.

Q. Your total insurance that you carried was how much?
A. $38,000.
Q. So that your total loss by the fire was $105,000?
A. Yes, sir.
Q. During the years following 1882, you told Mr. Baker you had made no money; do you mean by that that you did not divide dividends?
A. That is what I mean.
Q. But you went on and paid this debt right along?
A. Yes, sir; I paid the $105,000 in those years, and a good deal more.
Q. When you told Mr. Baker you made no money for those years after that building was built, you meant you did not declare a dividend, because you were paying the losses?
A. Paying up these debts.
Q. You rebuilt your mill at a cost of how much?
A. $116,000.
Q. You say it cost you to rebuild it $116,000; were your dry kilns burned?
A. No.
Q. What were they worth?
A. $10,000.
1107 Q. Was your office burned?
A. No.
Q. What did that cost?
A. $15,000, office and furniture.
Q. Anything else that you did not have to rebuild?
A. The water pipe to the river.
Q. What did it cost to put that in?
A. $3,000, and I think the boilers were not damaged much.
Q. How about the stone walls?
A. We made no account of that.
Q. You used the old building to build the sewers?
A. No, I used the old building to build the walls.
Q. You used all that was not destroyed, and it cost you $116,000 new money?
A. Yes, sir.
Q. And you used all the old material and brick that you could?
A. Yes, sir, and I worked for nothing.
Q. You haven't charged anything for yourself and boys?
A. No, sir, and it cannot be duplicated for a dollar less than we did it.
Q. Mr. Baker, with marked impropriety, if he will permit me to say so, has asked you about the other suits, the condemnation of the right of way through your lumber yard, for which you got $35,000, and then the suit that you brought for damages for switching around on your yard?
A. Yes, sir.
Q. That looks like a pretty good lot of money. Mr. Baker was your counsel in both of those cases against these people?
A. Yes, sir.

1108 Q. How much did you have left of your $35,000 of the amount realized out of that suit after payment of your extra rates of insurance?

A. I could not tell you.

Q. What is your idea about that?

A. We had to pay equivalent to about three per cent.; it was brought out the other day.

Q. How much did you carry on your lumber yard?

A. If I remember right, we had $250,000.

Q. What was your old rate?

A. One and one-half.

Q. It was increased to three?

A. It was made three.

Q. So that that rate was increased 1½ per cent. per annum?

A. Yes, sir.

Q. On an insurance of $250,000?

A. We did not carry so much all the time.

Q. What was the average amount you carried?

A. I could not tell you. It cost us more than double the insurance we paid before. This $27,000 Mr. Baker has referred to that was collected—that did not go into this account at all. That never had any part or parcel with our business. After we got through paying our counsel, Mr. Baker, what there was left went to the credit of profit and loss. It did not go into the calculation of our business.

Q. You say the money received from the railroads is not included in the statement of the profit of your business?

A. No.

Q. Did not go into the books?

A. It was all kept separate.

1109 Q. You have been asked about your verdict in these cases; did you get full compensation for the damage to that business?

A. They paid us $27,000. If they had paid us $100,000, they could not have made us whole for what we lost. Our business was driven away from us, destroyed. Under our protest, our remonstrance, time after time. I endured it for four years and then I commenced that suit.

Q. You mean by these switches and so forth by your place.

A. Yes, sir, it drove my trade away and destroyed it as a lumber institution.

Q. The business at the lumber yard?

A. Yes, sir.

Q. It detained your teams when they were switching there?

A. To say nothing about that.

Q. In addition to your increased insurance, did the insurance companies or the underwriters require you to keep a watchman in addition?

A. Yes, sir.

Q. Which you did not do before?

A. We have always kept a watchman since the time the road went through.

Q. How much area do your lumber piles occupy on the seven acres?

A. Something over seven acres.

Q. You receive the most of your lumber by boat?

A. Yes, sir.

Q. You do not, like Dwight out here, receive it by rail?

A. No.

Q. You do not need any tramways to run it down to take it off in the piles?

1110 A. No, sir.

Q. He keeps a local lumber yard as well as selling to lumber dealers?

A. He wholesales also. Mr. Dwight I don't think makes a success the way he handles it; I don't think it will be possible.

Q. When he wants to send a load of lumber in the city does he send it out on a tram and ship it onto a railroad, and run it on the railroad in the city?

A. He has to put it on the tram car and shove it out where he can get his team.

Q. What is the object of that?

A. To save him teaming work, I suppose.

Q. He *he* not load it onto a car?

A. No, sir, he loads it on a small car and shoves it out where he can load it on a wagon. There are two tracks that run along where he can load lumber on the car if the car he wants to load it on stands right there, otherwise he would have to move it.

Q. He receives all his lumber by rail?

A. Yes, sir.

Q. What is the difference in the cost, per thousand, receiving by boat and by rail?

A. I could not tell you. I have been advised that he pays two dollars a car to haul the lumber up from the dock to his place.

Recross-examination by Mr. BAKER:

Q. You have two switches that connect with the Michigan Central?

A. Three.

Q. Do you have any difficulty in getting them to do your switching?

1111 A. Not much; they are pretty generally ready and willing to help us; they always cater to us when they can.

Q. And they take it out on their main line?

A. Not on their main line.

Q. On the tracks that go out to West Detroit?

A. Yes, sir.

Q. They take it right out to West Detroit whenever you want it done?

A. They handle them on certain tracks.

Q. They take them out in some way to West Detroit whenever you want it?

A. I think they take our cars whenever we want them to go.

Q. What do they charge you to take it to West Detroit?

A. I can't tell you.

Q. You don't mean to testify in your judgment that the union depot company, if they had a switch connecting your yard with your mill, would not do your switching promptly and efficiently, the same as the Michigan Central does?

A. I want it understood distinctly that it is an utter impossibility.

Q. I am not asking you that question; that is the ground you put it on, and your counsel had you testify that you did not think the union depot company would do your switching even if you had a side track; you do not mean that?

A. No, I think they would do it.

Q. As far as the Wabash is concerned, they do it just as promptly?

A. Undoubtedly.

Q. And if it was put in, as far as they are concerned, they would serve you undoubtedly?

1112 A. I suppose they would.

Q. If it was put in so that it could be operated, you would not have any question about having the service performed?

A. I would not have it up there.

Q. That is another question.

A. If I wanted a car switched by the Wabash, I have no doubt they would do it as promptly as the Michigan Central.

Q. You do not mean to change your testimony, that you did not do a successful business from 1884 to 1888?

A. I did not wish you to take my testimony in that way.

Q. You testified that you did not make any money in those years?

A. I testified in that way, but I wish to correct it so that it will read that we made no dividends.

Q. You did not have anything to divide?

A. No, I kept applying it to pay our debts, paying up the building of the mill that was burned.

Q. Did you get your debts all paid?

A. Yes, sir.

Mr. TRAUB: Was there a decline in lumber in those years?

A. Lumber has held about the same price all along.

Q. Is it not true that lumber is going up a little all the time?

A. We used to sell lumber at $60 that we are now selling at $50.

Q. Certain kinds?

A. The better grades of lumber are lower today than ten years ago.

1113 Q. I suppose there is more of it; when you got $60 it was inflation prices, in 1872 and '73, before the panic?

A. I suppose it was, when everything was booming.

Q. As a matter of fact, lumber is becoming scarcer?

A. We can buy it today cheaper than we could two years ago.

Q. You say that office down there and furniture in it co
$15,000?

A. That is what we expended in putting it in shape.

Q. Where did you put that money in that office; is it in th
furniture, or in the walls, or where is it?

A. It is in the decoration.

Q. And sideboard there?

A. No, there are marble mantels.

Q. Could you not duplicate that office for a good deal less tha
$15,000 today?

A. No.

Q. How much did the walls cost?

A. It was all done on contract.

Q. Who was the contractor?

A. Moross, I think.

Q. Did you let it on advertised bids?

A. I think we did.

Q. What was the contract price?

A. I could not tell you.

Q. Was it $15,000?

A. No.

Q. Who did the decorating?

A. Penfield.

Q. In what year did you build that office?

A. It must have been in 1879 or 1880.

Q. In the period of high prices?

1114 A. I don't know, not so high as they are now.

Q. Is it not your judgment that that office building coul
be duplicated today for less than half of $15,000?

A. You convey the idea that that office cost $15,000; $15,00
covers the whole thing pertaining to the office, decoration, marbl
mantel-pieces and so forth.

Q. How big is that office?

A. 40 by 32.

Q. Where is the principal expense, where is this $15,000 put, th
bulk of it?

A. In the furniture and fixtures.

By Mr. FREUD:

Q. Don't you buy cheaper lumber of mills that are operate
entirely by railroads, the logging done by rail, and also the ship
ping done by rail, don't you buy cheaper lumber of those mills?

A. No, they could not handle it in that way.

Q. There is a mill that Stevens operates?

A. We could not buy lumber of Mr. Stevens; he retails his lum
ber, he sells it the same as we sell it; he is a retailer, and we ar
retailers; we could not trade with him.

By Mr. BAKER:

Q. You could not do business with those people that manufactur
lumber on the railroad?

A. Not so well.

Q. Won't the time come when you will have to use that entirely, when the lumber that can be brought by navigable water will be all used up?

A. It will not be in your day or in mine.

Q. Don't you know that the Alpena people have to go across to Canada now?

A. Certainly.

1115 Q. Don't you know that the money that has been made in pine lands has been made in lands that are in the interior and have been made accessible by railroads?

A. Yes, sir; railroads have developed the country; there is no question about that, but we can buy our lumber better where we can get it from parties that are large manufacturers; we buy a good deal of lumber in Lake Superior and Cheboygan and Alpena and Tawas and Oscoda and Saginaw and Bay City and Marquette; we could not buy it at the country mills because they do not make it in quantities sufficiently large; we want to get a million feet of one kind at a time.

Q. What proportion of your product goes away by water?

A. Not any of it.

Redirect examination by Mr. DICKINSON:

Q. In speaking of the distance you gave yesterday, the nearest distance of the main line of the Michigan Central to your mill, you referred to the nearest distance from your corner of the mill; as the road runs toward the city, it continually runs away from your mill?

A. Yes, sir.

Q. Do you know the distance it is from your mill at this point; how many feet (pointing to map)?

A. No, sir; it must be two or three hundred feet.

Q. And the nearest point it comes is this main track here to the corner of your mill?

A. Yes, sir; the corner here to the main track is about 80 feet; I looked at it last night.

Q. To the main track?

A. Yes, sir.

Q. You are certain that the nearest point, even up on the

1116 corner, is 80 feet away; I want to get at the nearest point by your own map; give us the scale and the distance?

A. That is off on a scoop, getting further over to the main track, 80 feet, right at that point. Then there is a track right around here, there is a branch track that comes off here for holding their cars; that is within about 20 feet.

Q. They run their cars in on that and stand them there?

A. Yes, sir.

Q. But I mean the main track, where the locomotives go up and down?

A. That is 80 feet.

Q. That is your nearest corner?

A. Yes, sir; I looked at that particularly last night, so as to know.

Q. And, of course, it runs away further and further?

A. Yes, sir.

Q. The nearest point of the main track of the Michigan Central is as far away from your corner as the elevated road would be from your premises, if put over here on the Michigan Central?

A. Just about.

Q. I desire to ask you one other question. Do you think that you can maintain and carry on your planing-mill business there; on your judgment and on your oath, as a witness, and on your judgment as a business man, given under your oath, from your knowledge and experience of railroads, and the proximity of railroads and the way they are conducted, and you have seen them go to and fro there for a good many years, do you think you can carry on that planing-mill business, as you conduct it, successfully, with this elevated road there?

A. I don't think it would be possible for me or anybody
1117 else to do it, for the reason that my expenses will be very much larger. The exposure there is what scares me away, the exposure to fire; then the annoyance of that smoke and cinders and smut on my lumber, and the obstruction to my light, makes so large a mountain to be lifted, that I have not the courage.

Q. I suppose competition is pretty sharp in your business in all your trade throughout the Northwest and East?

A. Yes, sir; always.

Q. And your margin is so narrow that you have to do a large amount of business?

A. Yes, sir.

Q. You have to do things right?

A. Yes, sir.

Q. You have to have fine machinery and the work has to be done in a cleanly way, without any embarrassments, to keep you up with competing houses?

A. I cannot make any false motions.

Q. The competition is so great?

A. Yes, sir.

Q. Do you know whether you have in your business—and I suppose you are the one to know—any special machines of your own manufacture that you don't ordinarily show—special machines?

A. I know that we do our work in a superior manner to any of our competitors the land through. I know that people are very anxious to obtain evidence by which they could reach that; we have to keep people away.

Q. You have some special machines by which you think you do your work better than anybody else?

A. We have a great many of them.

Q. You have not done much else for about 30 years than building up this business?

1118 A. We have always devoted ourselves to it.

Q. You have devoted yourself body and soul to that business?

A. Yes, sir.

Q. I don't know whether you go to church on Sundays, but I think I have seen you around your mill on Sunday; and your boys have been brought up to go in with you and to make this business a perfect success?

A. Yes, sir.

Q. You make some money out of it?

A. Yes, sir; it is a success.

Q. You have gathered this property that you have out of your business?

A. Yes, sir.

Q. What do you think all that machinery would be worth, if you were compelled to take down the mill and take it somewheres else?

A. I know you could not say it is half of its value; it wouldn't be possible.

Q. Could you use the brick over again in a building?

A. It would cost as much as new brick would.

Q. Could you get such another location, with switch accommodations there, convenient to the rest of your plant?

A. It would be difficult; we are now located and we are now central; it is a very desirable location.

Q. You do have a large local business that comes down there?

A. Local business all the time; we have a team delivering usually 6 and 7 loads a day in the city.

Q. And do people come down there, drive down and give you orders?

1119 A. Some of our customers come there, on Woodbridge street, to get their lumber.

Q. Do they come anywhere else in your mill than on Woodbridge street to get their lumber?

A. Very seldom; our lumber is on Woodbridge street; they would not come on the Fort Street side because our lumber is not there.

NEWTON D. BACKUS, sworn in behalf of respondents.

Examined by Mr. DICKINSON:

Q. What is your age?

A. Thirty-eight years next Friday.

Q. What has been your business?

A. Lumber business.

Q. You have been with your father all your life?

A. Yes, sir.

Q. Worked up with him?

A. Yes, sir, since I was a boy.

Q. What are your duties?

A. Secretary and treasurer.

Q. Will you tell the jury, in gross, what was the increase of insurance per year which you were required to pay by the running of the road through the lumber yard?

A. The increase the first year after this road went through would

be at least $2,500 for that year; the increase for the next year would be $1,500, and the next year would be $1,000, and since then it has not been less than $1,000 since that road went through there.

Q. Over what it was before?

A. Yes, sir.

Q. Have you also carried an increased amount of insurance; do you include that?

1120 A. That would make the increased rate, I mean.

Q. You are talking about the increased rate?

A. Yes, sir.

Mr. BAKER: He has given the total premiums.

Mr. DICKINSON: At the same amount of insurance carried before?

A. Yes, sir.

Q. You have given it on the same amount as carried before?

A. Yes, sir; it varies different years.

Q. Are you also required to take an increased insurance?

A. Yes, sir, under the general average clause.

Q. I want to know the difference between the amount of insurance before the railroad went through there and what you were required to carry after the railroad went through?

A. Where, for instance, a dollar—we will put it on the basis of a dollar—where we could carry a dollar on the yard before the railroad went through, it is divided into four sections now, and we are obliged to carry $4 now.

Q. So that you carry four times as much?

A. Yes, sir.

Q. And the increased rates were double what they were on the old rate per thousand, or per dollar?

A. Yes, sir.

Q. Now, after this railroad went through in 1882—we will take it from 1882—did it go through in 1882?

A. Yes, sir, the fall.

Q. We will take it from 1882 to 1890, eight years. In round numbers, what has the increased rate been, and including in the total amount that you give the added insurance, the cost of the added insurance that you carried for eight years?

1121 Mr. BAKER: He has given that.

Mr. DICKINSON: No, he has not given that yet.

A. I would have to figure that up.

Mr. BAKER: Give us what it was before and what it is now, what he paid in 1882 and what he paid in 1883, 1884 and 1885.

Mr. DICKINSON: The total cost of your insurance; and I understand your previous testimony when you said the increase was 2,500 and 1,100—I got it from you more in conversation perhaps than in testimony—that that was merely the doubling of the rates at the old amount of insurance.

A. Yes, sir.

Q. Now, add to that the increase of the actual insurance besides, and the cost of the added insurance that you are required to take

under the general-average clause by reason of the railroad going through there?

A. Where $25,000 would do us on the corner, if the railroad had not gone through there, now we are obliged to carry $75,000 on the same insurance.

Q. What is the difference per year you pay?

A. It is three times as great.

Judge CHIPMAN: It would be four times as large?

A. We carry three times the amount of insurance, and the premium is twice as large.

Q. Can you give us, by the railroad going through there, the amount in dollars and cents per year that that railroad going through there increased the cost of your insurance, and include in that, not only the increased rate, but include the cost of the added insurance that the general-average clause requires you to take?

1122 A. Divided into sections, and increasing the rate, it would increase the rate nearly six per cent.

Q. More?

A. Yes, sir.

Q. That is six per cent. per thousand?

A. Six per cent. instead of one per cent.—where we used to pay one per cent., it costs now six per cent.; that is the difference.

Q. And the average amount of insurance carried per year, how much is it now?

A. The last few years we have not had as much stock as we had ten years before. We have had during that time probably close on a million dollars of insurance on the place, during the whole period; that is, the yard alone, each year added together.

Q. Since 1882?

A. Yes, sir.

Q. You have had, as a total, that insurance?

A. Nearly that; maybe I am a little high on it, perhaps it would be between $800,000 and $1,000,000. I could tell exactly by the books.

Q. Could you tell in round numbers the cost of the insurance?

A. I presume that insurance has cost us between $20,000 and $30,000; I cannot tell exactly, because I do not know exactly what I have paid. There has been a little variation in it, according to the variation of some of the companies, some of the companies charging more than others.

Foreman LESHER: How long for this amount?

A. Since the railroad went through there.

By Mr. DICKINSON:

Q. Have you kept a watchman that was not required before?

1123 A. We have kept a watchman in addition to that.

Q. As required by the underwriters?

A. Yes, sir.

Q. What does he cost?

A. $1.50 a night; that would be $450 a year.

By JUROR:

Q. You always had a watchman before that, hadn't you?

A. No, sir; not previous to the railroad coming through there, because we didn't consider it at all necessary. The underwriters require a watchman there now.

By Mr. DICKINSON:

Q. And about eight times $400 would be the cost of the watchman?

A. The watchman would cost about $4,000 in that time; it is nine years this fall since the road went through; eight and a half years now. Our insurance is a very large expense, so much so that father does not always know just what we have on.

Q. You attend to that yourself, in your part of the business?

A. Yes, sir.

Q. You have been the treasurer and secretary; will you please state what the cost of the new mill was, with the machinery, that is, of rebuilding?

A. The new mill cost $115,937.69.

Q. Exclusive of the old dry kilns?

A. Exclusive of the old dry kilns; I kept an accurate account of it, to know specially the amount of insurance to carry when it was rebuilt.

Q. What were the dry kilns valued at?

A. They cost us from $10,000 to $12,000.

Q. What else?

1124 A. The office and the sheds and the water pipe and the stone walls that did not burn at the time of the fire?

Q. How much was all that that was saved and used and still remained as part of the plant; what was the cost of them in addition?

A. Probably between $30,000 and $40,000; when we rebuilt I kept the invoices of everything, brick and mason work and machinery and everything, divided into three columns; here was one for building, another column for machinery, and another column for engine and boiler; as we got bit by fire one time, we didn't want to get bit again; I wanted to know how much insurance to carry on the building, and how much for machinery, and how much for engine and boiler, and for that reason I divided it into three columns, and the total was $115,937.69, and it has cost us more than that, because there was our own time.

Cross-examination by Mr. BAKER:

Q. How much did the firm pay out for insurance in the year 1881, on the lumber yard; what was the aggregate of the amount of premiums paid on the lumber yard?

A. In that year it was between $2,500 and $3,000; I don't know exactly what it was.

Q. Have you not looked at your books to know just what the items are?

A. I have not looked at the books; I know what we carried and know what the rate was.

Q. But cannot you give us accurate information as to what you paid for insurance?

A. In the year 1881 it was probably $2,500.

Q. But cannot you give us it exactly, to a cent, what you paid out for insurance that year?

1125 Mr. DICKINSON: He can in the morning, before we finish the case.

A. $2,500 would be low.

By Mr. BAKER:

Q. But your cash account would show?

A. The insurance account would show.

Q. You have an account there?

A. Yes, sir.

Q. How many thousand dollars of insurance did you have that year?

A. We had $250,000 that year.

Q. How much did you have in 1882?

A. We had $150,000.

Q. Not as much?

A. No, sir.

Q. What was the total premium?

A. The total premium in 1882, I cannot give you exactly, but probably $3,000.

Q. What was the total premium you paid in 1883?

A. I presume $2,000, on the dock for insurance, in 1883.

Q. How much did you pay in 1884?

A. About the same amount.

Q. In 1885?

A. A little less.

Q. 1886?

A. About the same amount as 1885.

Q. There were several years that ran along the same amount?

A. Yes, sir.

Q. Can you, from your books, give us the aggregate amounts of the policies and the total premiums paid from 1882?

1126 A. I cannot give you the aggregate of policies, but I can give you the premiums paid; I kept no record of the policies.

Q. Can you give us the total amount of premiums you paid from 1871 to 1891?

A. Yes, sir.

Q. Will you bring that up?

A. Yes, sir; I can do it.

Q. Have you got that in a ledger account?

A. I have got it in the insurance account.

Q. I would like a copy of your insurance account.

A. All right.

The examination of this witness is discontinued for the present, until he brings in the insurance accounts.

Documentary Proof.

Mr. DICKINSON: I offer in evidence the report of the fire commission of the city of Detroit, the last report issued for the fiscal year ending June 30, 1890; the other is not yet printed. I also offer in evidence the official report of the fire department of New York for the three months and year ending December 31, 1888, at pages 50 and 51. I also offer in evidence the report of the fire commissioners of the city of Jackson for the years 1890 and 1891.

I will read from the report of the fire department of the city of New York, at pages 50 and 51 of the report:

"March 1. Nos. 375 to 393 Lexington avenue, a six-story brick building, 200 by 195 feet, occupied as a furniture manufactory
1127 and for other manufacturing purposes, extending from Forty-first to Forty-second street. The fire originated on the first floor, and extended to all parts of the building, entirely destroying it, and also to the buildings Nos. 148, 150 and 152 East Forty-second street, each four-story brick, 25 x 50 feet, occupied as dwellings, which were all destroyed by falling walls. It also extended to the buildings Nos. 154, 156 and 158 East Forty-second street, each four-story brick, 25 x 50 feet, occupied as dwellings, slightly damaging them; also to Nos. 395 and 397 Lexington avenue, northeast corner of Forty-second street, a five-story brick, brownstone front building, 40 x 75 feet, occupied as a hotel, which was slightly damaged; also to the window frames and cornices of Nos. 139, 141 and 143 East Forty-second street, north side, each five-story brick, brownstone front buildings, 25 x 70 feet, occupied as dwellings, slightly damaging them; also to the window frames and cornices of Nos. 128, 130 and 132 East Forty-first street, south side, each four-story brick buildings, 18 x 50 feet, occupied as dwellings, slightly damaging them. Large cinders from the fire fell on the roof of St. Agnes' Roman Catholic church, a two-story brick structure, 50 x 100 feet, situated on the north side of Forty-third street, near Lexington avenue, and were extinguished by a detail of firemen with slight damage. The intense heat also set fire to the sleepers and ties of that portion of the structure of the elevated railroad running on the south side of Forty-second street, from Third avenue to the Grand Central depot, and a section about 100 feet in length of the structure was destroyed by the falling walls. The first alarm was received at 12.26¼ p. m., from the special building signal box located in the building Nos. 375 to 393 Lexington avenue, and, on the arrival of
1128 the first companies, the fire was burning so fiercely, that at 12.30 p. m. a second alarm was sent out. On the arrival of the first chief officer, at 12.31¼ p. m., he immediately ordered a third alarm, and at 12.42 p. m. the simultaneous call, 6-6-6-12-341-483, was sent, the exceedingly combustible nature of the contents of the building generating an intense heat and endangering the buildings opposite, on both Forty-first and Forty-second streets.

The services of 23 engines and seven hook-and-ladder companies were required to extinguish the fire, which was under control in two hours. The water supply was entirely inadequate. The fire was caused by sparks from a locomotive on the elevated railroad, and the estimated loss was $361,000."

I read also from the 23d annual report of the city of Detroit, the last one printed, at page 45:

"Causes of fires and alarms." I offer in evidence the whole page, but the largest number of fires were caused, outside of locomotives, by "burning chimneys, 29; children playing with matches, 17; defective chimneys, 19; incendiary fires, 22; lamp upset, 13; lamp explosion, 13; overheating, 14; overflowing gasoline stove, 11; smoke from chimney and stove, 13; sparks from stove, 16; sparks from cigar or pipe, 31; sparks from chimney, 22; sparks from locomotive, 63; total fires and alarms, 517." Sixty-three from sparks from locomotives, you will find, is just 12 per cent. of all the fires in the city, and also the alarms, and how could there be an alarm without there was a fire from sparks?

Mr. BAKER: The testimony was that those were mostly from bridges.

Mr. DICKINSON: Here is a memorandum obtained from John Kendall, from the fire office, from July 1st, 1890, to July 1st,
1129 1891, as to fires caused by sparks from locomotives. I suppose it cannot be admitted without Mr. Baker consents.

Mr. BAKER: Bring Mr. Kendall here. Who is he?

Judge CHIPMAN: Mr. John Kendall is one of the assistant chief engineers. I have known him for a great many years.

Mr. BAKER: I have no objection to your reading it.

Mr. DICKINSON: I will read it. "Fires caused by sparks from locomotives from July 1, 1890, to July 1, 1891, 43. John Kendall."

The city of Jackson fire commissioners' report is not given in detail, as ours is. August 3d, Withington & Cooley, lumber yard, at 3.15 p. m., cause of fire, sparks from locomotive; miles traveled to reach it, 2 miles. There are some other details—estimated loss, $1,500. These here don't state the cause of fires, only that lumber yards were on fire—oh, yes: July 31, alarm caused by lumber yards being on fire, owned by C. H. Plummer and J. C. Williamson, corner of Railroad street and Page avenue; put out with water; cause of fire, sparks from engine; $75,000. Also, November 5th, wooden dwelling being on fire on corner of Detroit and Cooper streets; put out with chemicals; fire caused by sparks from engine; $2,000. Also, December 9th, fire caught on roof of wooden building; cause, sparks from engine.

Mr. BAKER: In this connection, I desire to read to the jury from these same books. Mr. Dickinson has introduced page 45 of the report of the fire commissioners of the city of Detroit for the year ending June 30, 1890, and in the total number of fires, 517; total fires and alarms, 63 are given as from sparks from locomotives, and I desire to
1130 read the detailed statement showing what those fires caused by locomotives were. In January there were no fires by sparks from locomotives. This is for the year ending June 30, 1890.

In February there were none. In March there were none. In April, on April 24th, on the Fort Street railroad bridge, sparks from a locomotive; April 27th, there is a fire at Crystal and Trombley street-, by sparks from a locomotive, that is presumably a building of some kind; April 29th, the Michigan Central Railroad junction, fire from locomotive; it does not state that it is sparks. That is all there was in April, and one of them was a railroad bridge, and the other was a fire from a locomotive, and it does not say it was sparks—probably emptying the ash-pan or something of that kind. Then in May: May 8th, Lafayette Avenue railroad bridge, loss, none; sparks from locomotive. The next is a very extraordinary cause for a fire, at 927 Twenty-fourth street, down there in that vicinity; cause of fire, sausages falling in the fire. Then May 11th, Twelfth Street railroad bridge, sparks from locomotive; then May 12th, Fifteenth Street railroad bridge, sparks from locomotive; 12th, D. & M. junction, loss $60, insurance $250, sparks from locomotive; that is the second one that appears to be some sort of building or something. In June there are none. In July: July 10, Lafayette Avenue railroad bridge, loss none, sparks from locomotive. July 30, Twelfth Street railroad bridge, loss none, sparks from locomotive. August: August 2, Twelfth Street railroad bridge, loss none, sparks from locomotive; same day, Baker Street railroad bridge, loss none, sparks from locomotive; same day, Lafayette Avenue railroad bridge, loss none, sparks from locomotive; August 3d, Lafayette Avenue railroad bridge, sparks from locomotive; August 5th, Howard Street railroad bridge; sparks
1131 from locomotive; August 6th, Twelfth Street railroad bridge, sparks from locomotive; August 7th, Baker Street railroad bridge, sparks from locomotive; August 9th, Twelfth Street railroad bridge, sparks from locomotive; August 10th, Baker Street railroad bridge, sparks from locomotive; August 13th, Lafayette Avenue railroad bridge, sparks from locomotive; August 14th, Fifteenth Street railroad bridge, sparks from locomotive; 17th, Lafayette Avenue railroad bridge, sparks from locomotive; 18th, Lafayette Avenue railroad bridge, sparks from locomotive; 20th, Lafayette Avenue railroad bridge, sparks from locomotive; 20th, Howard Street railroad bridge, sparks from locomotive; 21st, Twelfth Street railroad bridge, sparks from locomotive; 21st, Baker Street railroad bridge, sparks from locomotive; 22d, Lafayette Avenue railroad bridge, sparks from locomotive; 23d, Lafayette Avenue railroad bridge, sparks from locomotive; 25th, Lafayette Avenue railroad bridge, sparks from locomotive; 26th, Lafayette Avenue railroad bridge, sparks from locomotive. In all these cases I have given you, the loss is stated as none. Also the following: August 28th, Lafayette Avenue bridge, sparks from locomotive; 28th, Twelfth Street railroad bridge, sparks from locomotive; August 29th, Fifteenth Street railroad bridge, sparks from locomotive; August 29th, Fifteenth Street railroad bridge, sparks from locomotive; 30th, Lafayette Avenue railroad bridge, sparks from locomotive; 31st, Lafayette Avenue railroad bridge, sparks from locomotive; 31st, Fifteenth

Street railroad bridge, sparks from locomotive; 31st, Baker Street railroad bridge, sparks from locomotive.

September: September 2, Howard Street railroad bridge, sparks from locomotive; 3d, Lafayette Avenue railroad bridge, sparks
1132 from locomotive; 3d, Howard Street railroad bridge, sparks from locomotive; 4th, Lafayette Avenue railroad bridge, sparks from locomotive; 4th, Lafayette Avenue railroad bridge, sparks from locomotive; 6th, Fifteenth Street railroad bridge, sparks from locomotive; 9th, Baker Street railroad bridge, sparks from locomotive; 12th, Lafayette Avenue railroad bridge, sparks from locomotive; 12th, Fifteenth Street railroad bridge, sparks from locomotive; 18th, Lafayette Avenue railroad bridge, sparks from locomotive; 19th, Baker Street bridge, sparks from locomotive; 21st, Baker Street bridge, sparks from locomotive; 24th, Lafayette Avenue railroad bridge, sparks from locomotive; 24th, Fifteenth Street railroad bridge, sparks from locomotive; 26th, Howard Street railroad bridge, sparks from locomotive; 27th, Fifteenth Street railroad bridge, sparks from locomotive; 27th, Lafayette Avenue railroad bridge, sparks from locomotive.

October: October 3, Fifteenth Street railroad bridge, sparks from locomotive; 3d, Baker Street railroad bridge, sparks from locomotive; 3d, Fifteenth Street railroad crossing, they have got it—I guess that is the planking—3d, Lafayette Avenue railroad bridge, sparks from locomotive; 4th, Lafayette Avenue railroad bridge, sparks from locomotive; 9th, Lafayette Avenue railroad bridge, sparks from locomotive.

There is none in November, and there is none in December.

Juror TRAUB: Were these bridges built by the city?

Mr. BAKER: They were built in part by the city and in part by the Michigan Central.

Mr. TRAUB: Are they insured?

Mr. BAKER: In all these reports there is no statement that there was any loss in any case.

1133 ANOTHER JUROR: In case they are destroyed by a locomotive, are they replaced by the railroad company?

Mr. BAKER: I do not know how that is. There was some arrangement between the Michigan Central and the city, by which those bridges are built.

Mr. DICKINSON: The city does all the repairing. That is the truth about it.

Mr. BAKER: As I recollect it, there are only three instances in this entire list where there was a fire outside of a railroad bridge or a crossing that was occasioned by a locomotive, and those were at the junction and at out-of-the-way places.

A JUROR: Was there ever a fire that destroyed a bridge?

Mr. BAKER: In this entire list it does not appear that there was a cent of loss.

Judge CHIPMAN: The Fort Street bridge has been so that the engine had to go and put it out.

Mr. BAKER: They ignite and burn, and they ring the alarm, and probably they go out before the engine gets there. It may be so

as to the Fort Street bridge, that the engine had to put it out, but it appears that these wooden structures are not above a foot or two feet above the smokestack, so that the sparks are sent with great force against the bridge.

Mr. DICKINSON: Do you think that within two feet an engine passing rapidly under would set it afire?

Mr. BAKER: In a very dry time it would undoubtedly do so. Of course there is no disputing the facts. Now, as to this case in New York, there appears to have been a large fire on Lexington street, in a six-story building and adjacent property, and the fire was caused by sparks from a locomotive on the elevated road,
1134 and the estimated loss was $361,000. We do not know what the condition of the property was adjoining and what occasioned it.

Mr. DICKINSON: The fire started in a furniture factory, and that was what was destroyed. The other property was saved by the fire department.

Mr. BAKER: That is the only report you give here out of all the fires that occurred in the city of New York. As to the fire in Jackson, at 3.15 p. m., August 3d, Withington & Cooley's lumber yard, by locomotive sparks, that risk was $3,000. It was in Withington & Cooley's lumber yard. There was $3,000 risk, and the estimated loss was $1,500; estimated insurance, $2,000, insurance paid $1,500; estimated number of feet of hose laid, 3,500 feet. That must have been away out, where they lay over half a mile of hose, nearly three-fifths of a mile of hose, and the distance the fire department traveled was two miles; a small lumber yard away out in the country somewheres. At any rate this evidence shows that the fire department traveled two miles, and that they laid 3,500 feet of hose.

Is that all your case, Mr. Dickinson?

Mr. DICKINSON: I would like to know what testimony you will put in. There will be a few questions to Mr. Backus in the morning. What testimony will you put in?

Mr. BAKER: I am going to put in dust-arrester testimony, and I am going to put in testimony from New York, some additional testimony; I cannot tell exactly what I will do.

Juror CHAREST: Suppose the jury deemed it necessary to go and look the ground over, can that be done after we are sent to our room?

Mr. BAKER: Not after you are sent to your room, but be-
1135 fore. If the jury want to take another view of the premises, they can do so before they go to their room. All I object to is men going down there alone. At any time after we get the testimony in or after the argument, before you go to your room, you can go down there, but when you retire to your room there will be no further opportunity for anything of that kind.

Mr. DICKINSON: I give my friend notice now that I shall object to any testimony that was part of his main case. He put in his main case, and we have answered it with our proof, and we do not want a lot more of the same kind of testimony. If we do not have

any order, he would put in more; I could follow with a lot of other testimony, and we never would get through.

Mr. BAKER: I propose to contradict your witness Martine from New York, as to Pearl street and all that property down there, and the change of that rental and that whole subject.

Mr. DICKINSON: That is for the jury to say.

Mr. BAKER: It would be a pretty note if you could put in testimony and we should not be allowed to contradict it.

Mr. DICKINSON: You put in your testimony; there was the testimony of Mackintosh; and then we replied to that testimony; now if after looking the ground all over you put in a little more testimony, if after we put in the testimony of Martine, Mr. Baker seeks to back up Mackintosh's testimony as to the New York elevated system, and he is permitted to put in more testimony, I do not see any end to this.

Mr. BAKER: Gentlemen of the jury, I think I know what rebuttal testimony is, and I propose to put in testimony that is strictly rebuttal. I do not care to open my case in chief. The things
1136 that I will inquire about will be things that go to contradict the testimony on the part of respondents, and if at any time when I am putting that testimony in there is any possible question about it, I have no objection to a circuit judge being brought in here to make a ruling upon it. The question is not up at the present time, at any rate.

Mr. DICKINSON: The trouble is, gentlemen of the jury, about your summoning the judge. The supreme court has said that in ordinary cases a judge of probate may preside, who is not a lawyer, and you are the judges of the law under the constitution, and if you do submit to the direction of a judge, we have no remedy, whereas, if you commit error, we have a remedy; if you submit to the direction of a circuit judge, the supreme court has held that the erroneous direction by the judge, that would affect the verdict, we have no remedy against.

Mr. BAKER: It is right the other way exactly. I have read the case. The statutes of this State provide that a judge can attend this jury for the purpose of instructing them. It has been decided by the supreme court that it is competent to do it. There are disputed questions of law before this jury, and I shall ask Judge Gartner, at the proper time, when we get the testimony in here, to come before this jury and instruct them.

Mr. DICKINSON: Why Judge Gartner?

Mr. BAKER: Simply because he is the judge that has charge of the case by direction of the court.

Mr. DICKINSON: By direction of the court the cases of railroad were referred to Judge Reilly, and I do not know why you should call in Judge Gartner. But, gentlemen of the jury, I shall read the decision of the supreme court to you, that a lawyer or judge is
1137 not required to preside over you, that you are the judges of the law and of the fact, and that erroneous direction by a judge is not error because the jury are not obliged to take it.

A JUROR: I think, at the proper time it would be proper for you

to read it, and have your own argument as to the understanding of it, and I think then we shall be able to judge whether we want a judge or not.

Mr. DICKINSON: Mr. Baker is right when he says that the union depot statute provides that the jury may have a judge or circuit court commissioner, or some one to preside over their deliberations and advise as to questions of law, but the constitution provides, and that is higher than any statute, that you are to be the judges of the law and the fact, and the supreme court say distinctly that, notwithstanding such a statute, the jury are the judges of the law and the fact, and if there was an erroneous direction of a judge, we would have no remedy.

Mr. BAKER: Mr. Dickinson has made that statement repeatedly. I undertake to contradict him. I undertake to say to you, gentlemen of the jury, that when the constitution of this State provides that a jury may be had in these cases, it means no different than a jury in any other case; a jury in deciding a criminal case or a libel case, in deciding many cases, are the ultimate judges of the law and the fact, because they are to dispose of the whole case; but there is no decision yet that excludes from your deliberation the aid and assistance of a judge elected and appointed for that purpose. The statutes of this State provide for it. At the proper time we shall ask the circuit judge to instruct you as to the question of law that has been raised upon the other side, and I call your attention to it, and the attention of my brethren on the other side, at this
1138 time, because we shall ask that it shall be done. We will ask the learned judge to instruct you upon it, simply because we have no doubt that when these statutes are explained to him he will instruct you that we have no right to condemn any right of way along the margin of the Michigan Central Railroad property. My brother seems to realize the fact that if a judge comes in here and instructs you, that that will be the result, and for that reason he tries to keep from you the aid and assistance that a judge can give you. Now, as far as any error is concerned, it has been settled that if a justice of the peace or any judge instructs a jury in a case where they are the ultimate judges of the law and of the fact, if he instructs them correctly it is not error; if he instructs them erroneously it is error. We are endeavoring here to condemn this property for the Fort Street Union Depot Company; we desire to acquire title to the right of way to build that road in front of the property of Mr. Backus. If Judge Gartner or any other circuit judge should erroneously instruct you as to the law of this case, it would undoubtedly defeat our title, and it would be necessary to have another trial of this case; but knowing, as I think I do, what the law is, I desire to have Judge Gartner instruct you, and to have it go to the supreme court of this State to say whether his instructions are wrong or not. I am willing to put it in shape so that the circuit judge, subject to the review of the supreme court, may instruct you upon the question of law that my distinguished friends see fit to raise in this case. I have already presented to you the best possible evidence, the gentleman who was the leader of the

Michigan bar for at least 25 years, and he sustains every proposition that I have made in regard to the law of this case; there is no doubt about it. They have rested their case. Where is
1139 there a member of the bar in this city that has come here to testify that we have any such power? I have proven it by James F. Joy, a man who was in the active practice of law in this city for years, before he went to railroading, who was the legal adviser and the president of the Michigan Central railroad for years. He tells you he never heard of any such power or any such statute, for it does not exist. We do not want anything wrong or unjust here. We do not want to obtain anything of you by any trick. We do not desire to mislead you in any way, shape or manner. We simply say that the depot company could not go upon the property of the Michigan Central. We have proven it upon the stand by the best testimony that is obtainable in this city; it is uncontradicted and beyond question. We have four circuit judges that are here at your beck and call; I am willing to submit it to them; I am willing to submit it to any one learned in the law; and I do not propose to be hoodwinked out of it by any such arguments as are made here, that you should take the law entirely unto yourselves, and not consider any of this testimony or any of this proof. That is the position of this case. At the proper time we will present this whole subject, and hope to be able to present it to the learned judge who impaneled this jury; he can tell you the whys and the wherefores of it; and I have no doubt you will have confidence in his judgment and respect for it. If he makes a mistake, remember that it is an error, and not as Mr. Dickinson says, that he is without remedy. Suppose, gentlemen of the jury, that you make a mistake against us and go out, and, upon this fallacious and erroneous view of the law, render a decision against us upon this question of necessity, how could we review it and cor-
1140 rect the wrong? That is the position he would like to have the case put in, and, if for no other reason, this jury ought to decide in favor of the necessity, so that we can take the judgment of the court and of the high tribunals of this State on this alleged question of law, because when you come right down to it, there is no foundation for his position; there is nothing to support it; it would be utterly impossible for him, or any other lawyer, to obtain a verdict that could be sustained in this or in any other court upon any such theory, and I am willing to submit this to the constituted authorities, to the judge that impaneled this jury; and I have no doubt as to the results, because I know that our position is absolutely impregnable and beyond question.

Mr. DICKINSON: Gentlemen of the jury, for the first time in a somewhat long professional career, although a young man, counsel have seen fit to call upon the witness-stand lawyers to testify what the law is. Nothing was ever heard of it the time before, and for the first time in a long professional career we have been charged, or I have been charged, with not doing my duty, because I would not do such an unprofessional thing as to call a lawyer to testify as to the law. Now, gentlemen of the jury, will sound make you be-

lieve or disbelieve the evidence of your own eyes and the testimony of Mr. Lothrop? Did Mr. Lothrop tell you, or would he tell you, or could he be brought to tell you—counsel of the Detroit, Lansing & Northern, formerly counsel for the Michigan Central, a railroad lawyer from the crown of his head to the sole of his feet, could he be brought to tell you that you could not condemn that margin of the Michigan Central under that statute? Are you to be driven,
not only to consider, but to take the statements of Mr. Baker
1141 as to testimony that occurred when you were all here? Mr. George V. N. Lothrop, who took that witness-stand, would never, I think, have stated, railroad lawyer as he is and counsel of railroad companies' interests as he is, he never would have stated to you that that strip of land could not be condemned for depot purposes and for these terminal facilities, and he did not so state to you, but he did state that that question under that statute that I read to him, and which was called to his attention for the first time, would go to the jury, and you are to be driven and bulldozed by a powerful pair of lungs to disbelieve what Mr. Lothrop told you upon that witness-stand not one hour ago.

Mr. BAKER: Do you claim, Mr. Dickinson——

Mr. DICKINSON: Oh, I know how much you earn; I know all about the treaty between the Michigan Central; I know why the hostility of the Michigan Central is withdrawn; I know you are compelled to go on and condemn the Michigan Central property; I know that hostility has ceased when the Michigan Central wanted Woodbridge street closed.

Mr. BAKER: Have you not been the counsel of the Michigan Central?

Mr. DICKINSON: Never in my life; I never took a railroad attorney fee but once; I never saw the color of the Michigan Central's money in my life, or any other corporation.

Mr. BAKER: At one time before the State railroad crossing board, the attorneys of the Michigan Central asked for an adjournment on account of your absence.

Mr. DICKINSON: They may have wanted me; Mr. Pond told me he wanted me, and I told him I would not take a fee from a railroad corporation.

1142 Mr. BAKER: That is politics, I suppose.

Mr. DICKINSON: That is not politics; that is good American citizenship; because the corporations put their hands upon the people's rights, and when any educated man, any man with knowledge of law, stands in their way, they retain him. You see the learned counsel here, for whose ability and knowledge of the law I entertain the most profound respect—no man shall go before me in respect for the hard-headed intellect of my learned friend here, or for his learning; he it was that fought the battle for Backus, won the battle for Backus when his property was liable to be destroyed, and when they found his mettle and ability they retained him, and Backus had to get somebody else. Now, gentlemen of the jury, I simply ask you, and here is the delicate point, it is the touch of the statute that Joy drew himself for this purpose, unless the Michigan

Central would yield something, it is the sensitive point, and every means has been strained to get you to evade the duty which under your oaths you are to perform; you are to be the judges of that question; I shall read to you the decision of the supreme court of the State, that in these proceedings a lawyer is not required to preside over your deliberations, for the reason that you are the judges of this question as American citizens; I shall read the decision that the direction of a judge, although it should be erroneous in an ordinary civil case, is not error, and they say it is not error, because the jury are the judges of the law and the fact, and the jury are not bound to take the direction of the judge; that is the reason I cannot complain of it or benefit myself from it. I do not dispute the proposition that you may invite in the circuit judge and take his opinion, and do as you like, but I won't ask you; you have had Mr. Joy,
1143 a railroad man from a to izzard, a railroad man who thinks and sleeps on railroads—you have had his oath upon the stand that the law does not permit touching the Michigan Central property. For some reason Mr. Baker is very anxious to get Judge Gartner, to whom the case was not referred at the beginning of the term, but it was referred with miscellaneous business to Judge Reilly; I do not care what judge it is, but I put against the opinion of Mr. Joy, an interested witness, counsel here endeavoring to get this property, endeavoring to get this entrance cheaply, for no more roads than now enter Detroit, to wit, for the Detroit, Lansing & Northern, the Flint & Pere Marquette and the Wabash, the Canadian Pacific being the only new road here—I put against him the sober and mature judgment of that distinguished lawyer who sat in the chair with me as my associate, who gives you as his judgment that there is no question about their right to take that margin of the Michigan Central under the statute. Would you rather have the word of Judge Chipman, disinterested, except for his retainer in the case, with what you know of him, with his record as an upright and pure-minded judge, with his reputation for honesty in this community, with his reputation with wide learning in the law, with such a reputation that his fellow-citizens in Washington have in all great constitutional questions put him in the front as a foremost constitutional lawyer in the counsels of the nation? You are the judges of the law and of the fact; you can take Judge Chipman's opinion, you can take your own, you can take mine, you can read the English language and you can take the statute; take Mr. Lothrop's testimony, that the actual use and need, claiming to want the land when you seek to acquire it; take Mr. Lothrop's
1144 oath, or his statement of honor without oath, that the need and the use must be a need and a use in good faith, and that if the Michigan Central cannot make a showing to the satisfaction of a jury that they need that property and need it in good faith, and not merely to get all they can, a jury will say that they must give us this margin along that River street; save the property along the line of that road, save the business along the line of that road; let Backus go free without paying him a dollar, and go over

there and take this margin, just as they have taken property for th railroad crossing. Now I tell you, gentlemen of the jury, you a the keepers of the conscience in this matter, and you are the kee ers of your own consciences; no judge has power over you; and will be for you to decide, and I caution you that by no power bias, by no desperate effort to carry you away by mere force of wi power or by the efforts of a subsidized intelligence, you be drive from the performance of your duty, from assuming your respons bility as the judges of the law as you are. Take the advice of judge; remember, however, that you are not bound by it, that cannot be imposed upon you unless you want it; you can call i any judge you please of the circuit court, if you want it, but yo are not bound by his advice; if you consider yourselves bound b his advice and take his advice as the reason of your judgment, yo do an injury to your fellow-citizen who is entitled to your hone judgment on the question, because it is not error for the judge give you an erroneous direction, for the reason that the constit tion reposes in you the responsibility, with all it implies, to pa upon this question of law yourselves.

A JUROR: My view is that we ask the judge to decide th
1145 question, whether it would be his duty to give us a bindin direction.

Mr. DICKINSON: I will read you the decision of the suprem court hereafter.

Mr. BAKER: At the proper time we will have the judge come i here and argue the whole thing over again.

Adjourned to Wednesday, July 8, 2 p. m.

WEDNESDAY, *July* 8, 1891—2 p. m.

NEWTON D. BACKUS, recalled.

Cross-examination by Mr. BAKER:

Q. Have you a copy of your insurance account?

A. Yes, sir.

Q. Does that copy show the ledger account just as it is?

A. Yes, sir; that is the total insurance for these years on every thing.

Q. The first paper you show me contains the aggregate amoun of the policies?

A. No, the aggregate amount of the premiums, $53,699.67, fo the eight years.

Q. Does it show the amount of premiums paid each year?

A. Yes, sir.

Q. Commencing with $6,915 in 1883?

A. Yes, sir.

Q. Can you separate that and tell us how much was on the lum ber yard?

A. Yes, sir; I have it right here on this other paper; there is th amount.

Q. That shows that in 1882 and 1883 you paid $4,510?
1146 A. Yes, sir.
Q. From 1883 to 1884 you paid $3,300?
A. Yes, sir.
Q. From 1885 to 1886, $2,840?
A. Yes, sir.
Q. From 1866 to 1887, $910?
A. Yes, sir.
Q. From 1887 to 1888, $900?
A. Yes, sir.
Q. From 1888 to 1889, $500?
A. Yes, sir.
Q. From 1889 to 1890, $900?
A. Yes, sir.
Q. Have you the amounts that you have paid prior to 1882?
A. I have the total insurance.
Q. Haven't you got it by years?
A. Yes, sir.
Q. Is that shown on any other memorandum?
A. Yes, sir; that is from 1874 to 1881. I have not picked out the lumber.
Q. This is the total insurance?
A. Yes, sir.
Q. Can you pick out the lumber?
A. No, that is the total insurance that I took from the ledger for the eight years previous to 1881.
Q. 1874, 1875 and 1876, $2,761 for the three years?
A. Yes, sir.
Q. 1877, $3,399?
A. Yes, sir.
Q. 1878, $1,200?
A. Yes, sir.
1147 Q. 1879, $927?
A. Yes, sir.
Q. 1880, $1,245?
A. Yes, sir.
Q. 1881, $3,320?
A. Yes, sir.
Q. That was on everything?
A. Yes, sir; on the lumber at the dock and factory, and it also included cargo insurance.
Q. The first exhibit you showed me also shows the same kind of insurance on everything?
A. Yes, sir; of course the warehouse does not amount to much.
Q. You can't tell us what you paid each year, prior to 1882, on the lumber yard?
A. It was very little, because we did not carry a great deal of insurance.
Q. There has been a good deal of difference in the amount carried since then?
A. It varies each year.

Q. Some years you have had but little, and other years a larg amount?

A. Yes, sir.

Q. That would depend on the amount of lumber you had in th yard?

A. Yes, sir.

Q. If you had a large supply you insured it, if you hadn't yo would not?

A. Yes, sir; although we always have to carry some ourselve anyway.

Q. You always had some insurance and always had some lum ber there?

1148 A. Yes, sir.

By Mr. DICKINSON:

Q. That is not the blanket policy; that is divided into four sec tions?

A. Yes, sir.

Q. Give us the four sections.

A. A, B, C, and D, divided up on the back of the form. On th face of it it reads, "It is understood that, in case of loss or damag by fire, this policy shall be liable only in proportion that tha amount, hereby insured, bears to the whole value of the entir property covered by this policy."

Q. The mill is insured, at present, for $88,000?

A. Yes, sir; we always have a little more than father know about, but he does not ask us.

Q. The mill and the stock in the yard?

A. Yes, sir.

Q. The moment the stock leaves the yard it ceases to be insured at the yard?

A. Yes, sir.

Q. And you use, per year, about 20 or 30 million feet?

A. Yes, sir.

By Mr. CHAMBERLAIN:

Q. When you insured your mill for $88,000, did that represent the full value, or what surplus would you claim above the $88,000, as the value of the mill?

A. I can tell you. The $88,000 is not on the mill, a certain amount is on the stock. It is divided up as follows: on the machines $29,056; on the building, $33,555.60; on the stock, $18,821.20; on the engines and boilers, $5,250.

Q. How much do you carry yourself on the mill and stock, and so forth, and on the boilers, how much do you expect to carry?

1149 A. We always expect to carry pretty nearly half of it our selves.

By Mr. DICKINSON:

Q. How much would you carry if the elevated road ran by it?

A. We would put on every dollar that the inventory showed.

Q. You would not want to take any chances?
A. No; we would not feel like it; we took those chances once and got left.

PHILLIP C. MILLER, sworn for petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. Chicago.
Q. What is your business?
A. Putting in fanning and blowing pipes and dust-arresters in wood-work factories throughout thecountry.
Q. What firm or company do you work for?
A. The United States Blowpipe Company.
Q. What does their business consist of?
A. Putting in dust-collectors and blowpipe fans, and so forth, for taking care of shavings and dust for furniture factories and all other wood-working establishments where any refuse is made.
Q. How long have you worked for that company?
A. A little over a year.
Q. What company did you work for before that, if any?
A. For the Chicago Exhaust and Blowpipe Company.
Q. In the same business?
A. In the same business.
1150 Q. With the same plant or with another plant?
A. A different company, and they had a little different dust-arrester.
Q. How long did you work for that company?
A. About a year.
Q. What firm did you work for before that?
A. Part of that year I worked for the William & Curtis Manufacturing Company of Saginaw, which this Chicago company was finally consolidated with. Prior to that I worked for W. E. Kuche, of Chicago, formerly of Grand Rapids, in the blowpipe business, now retired.
Q. Did Kuche manufacture dust-arresters?
A. Yes, sir.
Q. What was your business before you worked for him?
A. I worked at my trade.
Q. What was your trade?
A. Tin and sheet-iron work.
Q. How long did you work for Kuche?
A. About three years.
Q. What doing?
A. Putting in blowpiping, and the latter part of the three years canvassed for him, took orders and contracts and planned the work.
Q. What year was that that you were working at that business taking orders, if you can remember?
A. '87 and '88.
Q. Will you state what kind of a dust-arrester Kuche had?

Mr. DICKINSON: To that question we object as immaterial.

Mr. BAKER: This question is simply asked for the purpose of showing his experience and his knowledge of dust-arresters.

1151 Mr. DICKINSON: So far as that is concerned, it is immaterial.

Mr. BAKER: We desire to show that Mr. Backus has not a proper dust-arrester, and we can put in another kind that is fireproof, a great deal better, and do away with his alleged fire risk entirely.

Mr. DICKINSON: To this testimony we object, and I desire to be heard.

Mr. BAKER: They have put in a great deal of testimony that might be objected to, but I have not objected to anything that they have put in on the other side.

Mr. DICKINSON: We have not put in anything that went wide of the case.

Mr. BAKER: You have put in a large amount of testimony that went wide of the case.

Mr. DICKINSON: I suppose, notwithstanding your position in the matter, I apprehend the jury will hear me.

Mr. BAKER: Undoubtedly they will listen to you.

Mr. DICKINSON: The question of what is a better dust-arrester is immaterial in this case, for the following reasons: We submit it to your candid judgment, and I make the objection here, because, whether you have observed it or not, during the putting in of the testimony of the other side, and during the cross-examination, they are going into matters that are taking the time of the jury and the counsel uselessly, and have no bearing whatever on the issue presented. We desire to raise the question upon this kind of testimony, and consider, if it is competent at all, they have not introduced it in their testimony-in-chief, and if it is competent at all, coming in now we shall be entitled to reply, and you will see where we shall end, some time next Christmas, if we keep on doing that sort

1152 of thing. That is the reason why we present to you now the grounds which we, as counsel and as lawyers, deem it our duty to present to you in opposing the introduction of the testimony, upon legal grounds.

The case is brought here, first, to determine the necessity of taking the street in front of Backus' property.

Mr. CHAREST: The right of way.

Mr. DICKINSON: Covering the whole street from curb to curb, which is the property of Backus to the center of the street, subject to public easement. Secondly, if you pass that question that they may come up the center of the street, then to determine the value of the injury to Backus; that is all there is of it. No railroad company can come to your house or over your property and arrange for you a new set of dust-arresters or stove or furniture, or change your conditions. In other words, the constitution of your State, which is the fundamental law, provides that when a railroad company approaches a man's property, whatever it may be, approaches it in the interest of a private corporation, as a railroad company is, but vested, however, with certain rights for the public good, to get a right of way, when the man refuses permission and there is no

other way to go, under the constitution, the railroad company, if it touches you at all, must touch you as it finds you, and if it take your property and injures it must put you in the position of your neighbor in any remote part of the town, uninjured any more than your neighbor in a remote part of the town from the railroad company; in other words, if the railroad company puts the slightest detriment upon you by coming, it must make you whole. Now, the railroad company cannot come and fix up your premises. The premises satisfy you well enough. It cannot come and fix up
1153 your premises with a new kind of safety stove, according to its own claims of what may be safer, or a new kind of safety blind, or a new kind of window, or a new kind of roof, and then ask the jury to assess damages as they would be if you were fixed up according to that style. It must take you as it finds you. Therefore, on that ground, we submit that this testimony is immaterial for you to consider, even if it were not absurd to introduce it. It is immaterial for you to consider, because Backus is to say what suits himself. His premises are to be taken as they are found, in accordance with the arrangements he has made for them, and you cannot take it on any scheme which the railroad company may attempt to have him adopt. He is not bound to do it. He is not bound to change his arrangements. He has, as he has told you, a dust-arrester that is perfectly satisfactory to him. He cannot be scared out as a citizen, even if you disagree with him, if it is satisfactory to him; and it satisfies him for one reason, that it is cheaper than any other one that can be put in.

Now, you are not required to go into the question, are you, as to whether some other arrangement might be fixed by which his appliance would be less dangerous if a railroad ran by him, provided he has not conducted his business so that it constitutes a public nuisance, or so that, by the ordinary uses to which the property is subjected, it would actually be in danger of fire, in the ordinary condition of things. You are to take the condition that he is in, and then taking the condition as it will be if the elevated structure be superadded. Look at the absurdity of it, on no other ground, and I state this briefly, I do not propose to take as much time to argue this as it would take to put in the proof. You have
1154 heard one absurdity, in presenting to this jury immaterial testimony by our friend on the other side, in the matter of a new smoke-consumer, and the position of the counsel to convince you what would be out of 10,000 the best, and the witness swore there were 10,000, what was the best thing to prevent the rolling of cinders and smoke from a locomotive, and you will see what would be the result if you had to listen to testimony as to which was the best. If you take up the question now of what may be the best dust-arrester of all the dust-arresters there are in the country, and when you have decided which is the best dust-arrester, you who are trying the question of the necessity of this route and the damage suffered by Backus, when you have decided to order Backus to put it in and assess his damages on the verdict that this is the best dust-arrester—are you going to have all the dust-arresters of the country

before you? Are you going to give damages by what you think it will be if he will adopt this one, and then decide for him what is the best one, on the testimony of every patentee of dust-arresters on the earth, because you have got to go into that if you are going to pick out a dust-arrester for Backus, if this testimony is admitted. I suppose the witness is the representative of some dust-arrester, and he will testify that it is the best on earth, and we will bring on, if you want to go into the question, we will bring on 24 other patents for dust-arresters—

The FOREMAN: The jury seem to be desirous of deciding this matter without any further argument.

Mr. BAKER: I would like to make a few remarks to the jury upon this question. You have heard an argument from Mr. Dickinson which may sound very plausible to some of you, but if you will recur to what has taken place on this trial, you will
1155 see that we are entirely right in the position that we take in regard to this matter. In the first place, this jury, when they went down to look at these premises, were very carefully shown a dust-arrester made of burlap. Mr. Backus was very careful to testify that that was a dangerous construction, that it was made of burlap, upon which the dust collected on the inside of it, and it was necessary to have openings in the building, through the lattice-work, through which the air could escape. He was very careful to point out to you that the wind, as it came diagonally across these premises, might blow sparks from the engine through this lattice-work, so that they might possibly catch upon the burlap, this inflammable stuff that we saw there. He tried to make out to you, gentlemen of the jury, that this was of such a dangerous character that the presence of an elevated railroad upon that street would cause his property to burn up in a very short time, and it would make it necessary, according to his judgment, for you in this case, in order to do justice to him, to give him the entire value of it before it did burn up, that you award to him $150,000 of $200,000 here because he is going to be burned up with this dust-arrester by the railroad that will be operated in the street. It further appeared, from the testimony of Mr. Backus, that this dust-arrester that he first put up in 1882 and 1883, and that it was put up on a patent of his own. He was very careful to testify to you that that was the best dust-arrester of which he knew anything, that it did the work satisfactorily, and was perfectly safe, and all right as far as his own plant was concerned. But upon cross-examination, it did appear substantially, and he had to admit it, that this dust-arrester, while it did do a successful business for a few years after it was first adopted, was eventually supplanted by something else, which has taken the trade, which has
1156 done the business since then. Would it be right for this jury to consider this case, and finally dispose of it upon his uncontradicted testimony that he has got the best dust-arrester? Will it be right to have this case submitted to the jury upon the theory that he had got a perfect construction, and that it was absolutely necessary to leave that burlap in the exposed condition that it did, with the wind subject to blow through that lattice-work and

blow through between the openings, where a man can step through, to leave it upon his theory of the case, if it is not true, if we can show to you, as we can show to you by this witness, who is an expert in the business, a witness who formerly canvassed for a dust-arrester that is similar to the Backus dust-arrester, the only difference being that the one uses a burlap and the other uses cheese-cloth, but on the same principle, substantially the same construction. We will show you that these two men, Backus and Kouche, were in litigation as to who owned this patent, as to who had a right to the invention. While this litigation was going on and while both of them were doing more or less business, and Mr. Backus said he put in more than 80, other machines were invented, other dust-arresters were patented, and those patents were all of the same general nature, they are all based upon the same principle, the only difference being the mechanical construction of them. What we mean to show to you is that there is an absolute fireproof dust-arrester. We can show to you that there is a metallic dust-arrester, so constructed, that so far as the burlap and the opening on the roof is concerned, it is absolutely fireproof. We will show it to you by this witness that that property down there, without changing his pipes, his flues, his fans or anything of that kind, that you can put this dust-
1157 arrester in there at an expense of about $1,300. We will show that if Mr. Backus insists upon having this obsolete and worthless and played-out dust-arrester, that a device can be put upon that so that it will be absolutely fireproof.

All we want to do is to show the state of the art. We do not desire to have you decide between a large number of dust-arresters, but we would like to submit to you testimony as to the state of the art, to show how easy it is to put a dust-arrester in there that will avoid all this alleged fire risk, show to you that at an expense of $1,300 we can avoid a risk for which they desire to tax us $150,000, which they say that plant is worth down there, and they want us to pay the whole price of it, because it is going to burn up the minute the road is in operation; and, if we are permitted we can show that a metallic dust-arrester can be put upon the same plant. We won't distrurb anything except this construction that he has on top there, and instead of having all that burlap and stuff, they can put a contrivance there that is absolutely fireproof, and will do the same work with the same power; and it would be a little remarkable, if we want to show that, considering the testimony that they have introduced here, that you would not like to know what the state of the art is, what has been done. You have heard the testimony of Mr. Backus that he was in this business a while and then abandoned it. Would you not like to know what has taken the place? Perhaps some of you have had some little experience with this, and you know that there are dust-arresters in use in this city that are fireproof. I examined two of them this morning myself. They are in general use. We will show that this man has taken out a number of the Backus dust-arresters; that every large institution in the country has taken out the dust-arrester and put in metallic ones.

1158 Mr. CHAREST: I move that we go to our room and decide this question.

Mr. CHIPMAN: If the jury wish to hear a reply, I am ready to make it.

Mr. CHAREST: My motion is to adjourn to the jury-room at once.

Mr. CHIPMAN: If what Mr. Baker has said has any effect upon you, and you propose to give it any consideration, the jury should do just as the court does.

The FOREMAN: I know how the jury feel in regard to it.

The jury retire for consultation, and, after a few minutes, return into court.

The FOREMAN: The jury are unanimous in regard to this evidence as to the dust-arresters, that they do not want any more evidence of that kind; they have all agreed upon that point.

Mr. BAKER: What do you mean by that; that you want no other testimony as to other dust-arresters?

The FOREMAN: We consider that we have heard enough evidence in that regard. It is the opinion of the jury that the testimony in regard to the dust-arresters is entirely immaterial.

Mr. BAKER: Do you regard their testimony as immaterial?

The FOREMAN: Altogether.

Mr. BAKER: What we desire to show was that the alleged danger could be avoided at a very trifling expense.

The FOREMAN: The jury have decided.

Mr. BAKER: I desire to note an exception.

Q. Do you know of any instances where the Backus dust-collector has been put in and has been taken out and something else substituted?

1159 Mr. DICKINSON: To that we object as immaterial.

Mr. CHAREST: We don't want any more.

Mr. BAKER: I am going to ask some questions here for the purpose of getting them on the record.

Q. Will you state whether the Backus dust-arrester is in general use at the present time?

Mr. DICKINSON: To that we object.

Q. I suppose you are an expert in this business?

A. Yes, sir.

Q. State whether or not it would be practicable to close up the lattice-work that is on the Backus dust-arrester on the roof and put in other openings so as to avoid the danger from sparks?

Mr. DICKINSON: That we object to as immaterial.

The objection is sustained.

Mr. BAKER: I desire to note an exception. I desire to show how that can be done. It seems to me you ought to listen to that.

Mr. CHIPMAN: It is the same thing.

Mr. BAKER: It is not by the use of screens, but by another device which is very simple, and it will take just a moment to put it in.

The FOREMAN: The jury have decided not to admit this testimony.

Mr. BAKER: I desire to show how easily that can be done.

Mr. JULIEN: Have we any power to make them change it?

Mr. BAKER: There is no doubt about it. It would be ridiculous to say that you could award him very large damages when you could save the damage by a slight expense. I want you to hear the testimony and see whether you think it is reasonable
1160 that he can claim very large damages when, by a few dollars expense, he can save it all, and I want to show by an expert who can fix that with a very few dollars' expense, so that there is no danger from sparks, leave the dust-arrester right there as it is, and put an attachment on there to avoid the sparks.

The FOREMAN: Suppose you introduce the evidence, would not the other side claim the same right?

Mr. BAKER: Certainly, they can put in surrebuttal.

The FOREMAN: Then we extend this case.

Mr. BAKER: No more than any lawsuit is extended. It is the simplest kind of a device that can be put on, if I can be permitted to show it.

Mr. CHAREST: I call upon the foreman to enforce the ruling.

Mr. BAKER: I understood the testimony was ruled out as to other dust-arresters. What I want to show now is with reference to this dust-arrester.

The FOREMAN: It was all dust-arresters, as the jury decided.

Mr. CHAREST: We want that ruling enforced.

Mr. BAKER: If such is the decision of the foreman, and you are unanimous——

The FOREMAN: It is not the decision of the foreman, it is the decision of the whole jury.

Mr. BAKER: I desire to note an exception. I can assure you this is very valuable evidence that would render you great assistance.

Mr. MCINTOSH, recalled for petitioner.

Examined by Mr. BAKER:

Q. Do you know a man by the name of Martine?

A. I don't know him personally, I have heard of him.

1161 Q. He has given some evidence in regard to a street, as damaged by the elevated railroad in New York, called Pearl street; are you familiar with that street?

A. I have been through there.

Q. He has also given some testimony in regard to Greenwich street, and also some testimony in regard to the American Bank Note building, that I desire to ask you about; do you know what the award was for damages to the fee of the American Bank Note building?

Mr. DICKINSON: I desire to object.

Mr. BAKER: You proved that it was $135,000.

Mr. DICKINSON: I will state my objection without argument.

They have insisted before you that they open their proofs first, and they did. They have contended before you that they had a right to open their proofs, and they have. They have gone into the question of the elevated road, have they not, and exhibited the map, have they not, and given you all the testimony they chose to introduce, without objection by us, as to the effect of the elevated road in New York. This witness testified as to the line on Pearl street; he testified as to the line on Greenwich street, where the bank note company is; he testified as to the line on 6th avenue; he testified as to the damage these roads occasioned; he left the stand after cross-examination. He was called all the way from New York. Opportunity was given this union depot company to call any number of witnesses they pleased upon the same point. They chose to rest their case, merely upon the testimony of Mr. McIntosh. We then thought it important enough, inasmuch as the testimony was here as to the elevated-railroad structures and the results, to send to New York, at a large expense, to get the best testimony we
1162 could reach. We are obliged to pay for such testimony, because we cannot subpœna witnesses from New York. The best testimony we could get we produced. We could have produced more, but that testimony we set against the testimony they produced; thought it was sufficient for us to produce this testimony against the testimony of Mr. McIntosh, upon which they chose to rest their New York testimony. We chose to rest our testimony with the testimony of Mr. Martine and the testimony read from the other trial. Now they seek to go into the elevated-road matter again, on the bank note case and on the Pearl Street matter, and go into that part of the case again. If they do it we may do it in reply. They may reply again, they may do it again, if they have any more important testimony than they have when McIntosh was produced, if there is going to be material testimony upon this question, if you permit it to be produced we insist upon our right to supplement our New York testimony with other witnesses.

Mr. BAKER: As far as that is concerned, they have introduced certain testimony that we desire to directly contradict. We desire to contradict the testimony of their New York witness; it is strictly in rebuttal, and this whole argument that we cannot put in any rebuttal testimony, because they would have a chance to come again is ridiculous. It is done in every court. The side that opens has the right to put in its case, they put in the defense and then we put in a rebuttal of their testimony, and if there is anything for them to contradict they can bring in testimony in sur-rebuttal.

The FOREMAN: Did not this witness give evidence in regard to the bank note company case?

Mr. BAKER: No, sir, Mr. Martine gave testimony in regard to that, and he testified that the award was $137,000. I desire to show how that award was made up.

1163 Mr. CHAREST: He has learned that since he was here.

Mr. BAKER: He knew it while he was here. We did not go into it at that time, because there was no testimony to contradict.

The FOREMAN: This is entirely in rebuttal.

Mr. BAKER: Certainly. All the testimony I have offered is entirely rebuttal, but this is peculiarly so.

The FOREMAN: Won't the other side bring in rebuttal evidence?

Mr. BAKER: They have a right to bring it in.

Mr. CHIPMAN: I say to the jury now, we certainly will. We will demand the right to do it. It is our duty to do so. If you go into it with one you must go into it with the other.

Mr. BAKER: The rule in court is that you can introduce testimony as long as it is proper on that side of the case; there is no rule that cuts it off at any proper time.

Mr. DICKINSON: I suppose some of the jurors know that there is an orderly proceeding in court to stop a case at some time.

The FOREMAN: I do not think the jury want to hear any new evidence, but if it is only in rebuttal, we will hear it.

Q. Will you state what the award was in that case, in the two cases, in favor of the American Bank Note Company?

A. $90,000.

Q. What was the value of the property?

A. I do not know myself; but it was testified to in the neighborhood of $900,000.

The FOREMAN: What have we to do with that?

Mr. BAKER: It is merely to assist you.

1164 Mr. CHIPMAN: We renew and insist upon our objection to that particular question. We consider this testimony, without taking up a minute of your time, as utterly illegal. The jurors have stated reasons which I think a court would listen to and give weight to, as showing its illegality, but there are other reasons, and we wish a ruling upon this class of testimony. Of course every time a question is asked, if we get up to object, it is going to take up so much time. We object on this ground that what damages are given in New York, or are given anywhere else, is no guide for you, and can be no guide in law, and we say such testimony should not be received.

The FOREMAN: It does really look immaterial.

Mr. CHAREST: And besides that, what this man has been told he cannot come and swear to.

Mr. CHIPMAN: We would like the jury to pass once for all upon it, because, if this is going on, we have got to take other testimony, and bring witnesses on from New York to meet this young gentleman.

Mr. BAKER: This testimony is already admitted.

Mr. CHIPMAN: We move to strike it out.

Mr. CHAREST: The witness was going to come here and swear to what he knew personally; he cannot come here and swear to what other people told him, and as a juror, I object to it.

Mr. BAKER: I believe Mr. Lesher is foreman of this jury, and when you want to make any argument you ought to go out into the jury-room and discuss it.

The FOREMAN: The jury seem to think that that is entirely immaterial.

Mr. BAKER: If it is stricken out, I take an exception.

Q. Do you know whether it was the elevated road that
1165 caused the rents to depreciate on Pearl street, or other causes?

Mr. DICKINSON: To that we object.

A. I don't know.

Q. Do you know a piece of property that Martine testified about as having been owned by his father?

A. Yes, sir; I have seen the property every day.

Q. He testifies that they bought it for some $60,000; do you know what was paid in settlement with the elevated road?

A. The fee damages were never settled with Martine.

Q. Do you know what was paid and what it was paid for?

A. The Martine estate settled the back damages prior to 1883, together with the damages to two adjacent pieces, one above and one below, on the street, for some $7,000 or $8,000, but the fee damages were settled with the Shasta estate subsequently, and five years' rental damages.

Q. What was settled with the Martine estate?

A. The damages prior to 1883, and the damages to two adjacent pieces of property, one above and one below.

Q. For how much?

A. I think about $7,500; I don't remember the exact amount.

Q. Were the fee damages for this particular property subsequently settled; what was paid?

Mr. CHIPMAN: We object.

The FOREMAN: That is excluded.

Mr. BAKER: Note an exception.

Q. You know what this was settled for?

A. I know what it was settled for.

The FOREMAN: How do you know it?

A. I know it because I have seen the original documents that passed, and the books, and made up the list.

1166 Q. Had you anything to do with the settlement?

A. I did not pay the money.

The FOREMAN: I do not think it is rebuttal evidence.

Mr. BAKER: I will have to take an exception.

JEREMIAH PANGBORN, sworn for petitioner.

Examined by Mr. BAKER:

Q. Where do you live?

A. In the 9th ward of the city of New York, 76 Perry street.

Q. How long have you lived in New York?

A. During my natural life.

Q. What is your business?

A. Real-estate broker and appraiser.

Q. How long have you been in that business?

A. Over 35 years.

Q. Do you own any property on the elevated road?
A. I do.
Q. Do you know what the general height of the elevated road is?

Mr. CHIPMAN: We object.

Mr. BAKER: You tried to make out by Martine that it is some 20 feet; I desire to show that it is less.

A. About 17 feet to the top of the tie that holds the rail; it varies considerable; about 17 feet is the average height; it is 14 in some places.
Q. What effect did the elevated railroad have upon the abutting property?

Mr. DICKINSON: To that we object as not proper rebutting testimony and as immaterial.

1167 Mr. BAKER: We desire to contradict the testimony of Mr. Martine on that subject.

The FOREMAN: The jury object to any more evidence.

Mr. BAKER: Then I except.

Q. Do you know how wide Pearl street is?
A. Yes, sir.
Q. How wide is it?

Mr. DICKINSON: To that we object. McIntosh testified to the width and the line of the road, and pointed it out on the map, and had the figures here, and papers were handed to him by Mr. Baker to testify from.

Mr. BAKER: I take an exception to that statement of counsel. We can prove by this witness the exact width of Pearl street.

Mr. CHAREST: I don't think McIntosh swore to the width of Pearl street. He swore that the railway was passing on Pearl street.

Q. How wide is Pearl street?
A. South of Wall street, it is 40 feet wide from house to house, with sidewalks about ten feet wide; north of Wall street, it is 44 feet wide, with sidewalks ten feet six.

The FOREMAN: Have you measured it?

A. No, sir, I have the measurement directly from the engineer, who did measure it.

The FOREMAN: It is merely hearsay.

A. No, sir, I have it direct from the engineer who measured the street.
Q. Is that what it looks to be?
A. That is what it is, what I measured. I have measured it as nearly as I can by pacing it myself. It is 40 feet south of Hanover square, north of Wall street; it is 44 feet wide, the whole

1168 street. I wanted to be positive, and I did not take my measurement by pacing; I went to the engineer and asked him if he had measured it, and he told me he had, and he gave me his measurement.
Q. Did it agree with your pacing?

A. It did, sir.

Q. Mr. Martine gave considerable testimony here, largely hea say, as to what the rentals were upon Pearl street, both before an after the elevated road was built, in which he stated that the rental upon that street were largely reduced, and in his judgment it wa occasioned by the elevated road; did you live in New York durin the years before the road was built on Pearl street?

A. I did.

Q. Were you familiar with the property upon that street?

A. Yes, sir.

Q. Were you familiar with the property after the road was built

A. Yes, sir.

Q. And the business that was done on the street?

A. Yes, sir.

Q. Will you tell us what affected values, if anything, on Pear street?

Mr. CHIPMAN: We object.

Mr. BAKER: I desire to show it was from other causes, the move ment of population, and not the elevated road.

Mr. CHIPMAN: We object on this ground, that they have gon on and given their testimony, Mr. Joy, Mr. McIntosh and others to the effect that the elevated roads did not interfere with or affec the value of property at all. That was the judgment of those wit nesses. We brought a witness here who gave his judgment, and now they have another witness here to give his judgment, and you will never get done at that rate.

1169 Mr. BAKER: We have only had one witness in this cas who has testified to what caused the depreciation on Pear street, and that was Mr. Martine, and I claim the right to contradic him. McIntosh did not testify as to the rentals upon Pearl stree at all.

The FOREMAN: I think you may answer that.

Exception for respondents.

Q. Will you tell us what caused the depreciation of rentals upon Pearl street?

A. It was caused by the removal of the business from that por tion of the city to another portion.

Q. What business was done upon the street before the elevated road was built?

A. About 40 years ago Pearl street used to be a very large dry goods district, which ran from Wall street down to Hanover square A very large dry-goods trade was done there, and after awhile the wholesale business commenced to go north and west. Years ago 55 years, it used to be a retail trade up to Maiden Lane. The whole sale business was in Hanover square, a very large dry-goods busi ness. It moved from Hanover square into Broad street long before the elevated road came. From Broad street it went into Broad way, from Broadway to Reed street; it kept moving northward and westward from Hanover square. That left the street in what we

call a transition state. The dry-goods trade had gone. From 1870 to about 1877 it was in a transition state. It was so in Front street and also in Water street. That wholesale business went northward and westward, and left the street in that transition state; and after that it got into the cotton business, and the cotton business stayed there until the oilmen got there. The cotton business —

1170 to occupy the whole building, used to store all the cotton in the building, and after that was got through with they sold by samples, and it left all the building upstairs useless, and they had to utilize it in some way. They rented it out for offices. The oilmen got in there then, and after the oilmen commenced to go, the rents began to go down, from the fact that they built a large building on Broadway, more commodious and with better accommodations for their business.

Mr. CHAREST: When did the oilmen go into Pearl street?

A. After 1880.

Q. When did the railroad go into Pearl street?

A. In 1878; business has been continually going northward from the lower part of the city.

Q. Was any of this business driven off that street by the elevated road?

A. All this was done before the elevated road came there; after the elevated road came there, the oilmen got in.

Q. Were they driven away by the elevated road, or for other reasons?

A. For other reasons; the elevated road benefited it; the property, the fee is worth more than it was in 1872, before the transition state; other business came in, and it has been occupied for different purposes.

Q. How is it on the Bowery; that is another street that Mr. Martine referred to?

A. Bowery was the same way; it changed its character. Property on the Bowery today is higher than it ever was, take it from one end to the other, the fee.

Q. Are the rents any higher today on Pearl street since the elevated road was built, than they were previous?

1171 A. Yes, sir; they are higher than they were before the railroad came there; from 1873 to 1877 you could not get any reasonable rent; the panic occurred in 1873, and it lowered the prices.

Q. I mean previous to that time.

A. Previous to 1873 property was pretty high; they occupied it for the dry-goods trade and they paid pretty good prices, because they occupied the whole of the building.

Q. Is it not true that the panic of 1873 caused a very great reduction in real-estate values and rentals in the city of New York, and especially in the streets that were in a transition from 1873 to 1878?

A. It did; the falling off of the fee value of the property was from 30 to 50 per cent. throughout the city, as a general rule.

Mr. JULIEN: You say the dry goods moved from Pearl street to Broad street, and from Broad street to Broadway?

A. Yes, sir.

Q. After it left Broad street, did the property depreciate in rental value as Pearl street did?

A. Not so much, because Broad street was more of a brokers' street; the stock exchange was there, has been there ever since; Broad street did not feel the effect as Pearl, and Front and Water, but it did feel the effect.

Q. Has Front street an elevated road?

A. No, sir; Front street and Water street have no elevated railway.

Q. Are there a number of streets in the same vicinity where there are no elevated roads that the same causes operate?

A. Water street and Front street are the same way.

1172 Q. The same depression?

A. Yes, sir.

Q. Mr. Martine gave some testimony in regard to Greenwich street; are there any other streets near that that are the same kind of streets?

A. There is Washington street, the street next west of it.

Q. Will you state how that street compares with Greenwich street as to depreciation?

A. Greenwich street has not depreciated any more than Washington street. Greenwich property today is worth more than Washington Street property, and is sold for more; the last large sale particularly the property has sold for more than similar property on Washington street; Greenwich street today is worth more money as a rule than Washington street.

Q. Greenwich street has an elevated road and Washington street has none?

A. Yes, sir.

Q. They run parallel to each other?

A. Yes, sir.

The FOREMAN: Has not Greenwich street always been more valuable than Washington street?

A. Generally it bore a somewhat higher price.

Q. Are there any streets in New York where the elevated road has increased the value of property?

A. O, yes.

Q. What streets?

A. You can take any of our wide avenues from above Twenty-third street or Thirty-fourth street; take First avenue and Second avenue, Second avenue is worth one-third more in fee value than First avenue; Third avenue is worth double what it is on

1173 Lexington avenue; Ninth avenue has increased 100 per cent. where Tenth avenue has only increased 40 per cent.; that is because of the elevated road. You can compare Ninth avenue with Eighth avenue, where there is no road; Eighth avenue has not increased more than 30 per cent. while Ninth avenue has improved 100 per cent.; Tenth avenue had improved 40 to 60 per cent. I

have property today that sold in 1868 for $9,000, bought in 1877 for $7,300; that property used to rent for $500, and it now rents for $1,260.

Mr. TRAUB: Is the rise in the rental due to wear and tear; where property remains unimproved, does it rise in value in the same proportion?

A. Yes, more so; the buildings do not increase in value; it is the land that increases.

Q. If property was left unimproved it would still gain in value?

A. You get the same ratio of improvement; the buildings on the property do not improve it; it makes it better for rental purposes, but it is the land that increases.

Cross-examination by Mr. DICKINSON:

Q. Where is your office?

A. 71 Broadway.

Q. Where are the offices of the elevated road?

A. I think they occupy a portion of that building; I have no connection with them.

Q. Next door to them?

A. No, sir, not on the same floor.

Q. How many cases have you testified in for Jay Gould and the elevated roads, condemnation cases?

A. I don't know that I have testified in any cases for Jay Gould; I have testified for the elevated road company.

1174 Q. How many cases?

A. In probably 50 or 75.

Q. What are you paid for so testifying?

A. That is owing to what property it is; from $50 to $75 a case.

Q. You get a commission on the value of the property, is that what you mean? Do you apportion your fees for testifying in New York by the value of the property?

A. No, sir, the size of the property.

Q. You have testified in 50 or 75 cases for the elevated road?

A. I have testified in a number of cases.

Q. How near is your office to the office of the manager of the elevated road?

A. I am in the fifth story and I think the manager is in the second story. The first, second and third stories are occupied by the elevated road company. I never spoke to the president of the elevated road, to my knowledge; I know Mr. Haines, the manager.

Q. How near is his office to yours?

A. He is downstairs, in the first or second story.

Q. You have testified in 50 or 75 cases?

A. Yes, sir.

Q. Have you not testified in 165 cases?

A. Not to my knowledge.

Q. Will you swear you have not testified in more than 50 or 75 cases?

A. I would not swear that I have not testified in more than 200; I do not keep an account.

Q. How much do you get in each case?
A. From $50 to $75; sometimes $30.
Q. No more than $75.
1175 A. If you will allow me to explain, I will do so.
Q. Did you ever get any more than $75?
A. Yes, sir; you take a piece of property like the bank note company, I would get more money.
Q. You testified in the bank-note case?
A. I did not.
Q. Did you testify in the Irving Bank case?
A. I did.
Q. For whom?
A. For the elevated railroad.
Q. Do you remember Hawes testified for the property-owners?
A. Yes, sir.
Q. Hawes is one of your colleagues in testifying for the elevated road?
A. He is a gentleman and a very fine expert, and he has testified in cases.
Q. Did you testify in the bank-note case?
A. I did not, I say.
Q. Did you testify in the bank-note case that the bank-note building was benefited $10,000?
A. No, sir; not to my knowledge.
Q. You would know whether you testified in that case; do you know Joseph H. Choate, of New York?
A. Yes, sir.
Q. Did he ever cross-examine you?
A. I don't remember ever being before Mr. Choate; I don't remember testifying in the bank-note case.
Q. Do you swear that you did not?
A. I won't swear positively.
Q. Didn't you testify in the bank-note case that the bank-note property was benefited $10,000 by the elevated road?
1176 A. I don't remember testifying.
Q. Would you not remember such a thing?
A. I tell you I don't remember.
Q. I want you to go on this record positively whether you testified in the bank-note case?
A. I don't remember testifying.
Q. Will you swear that you did not?
A. I would not like to do so.
Q. Was it so long ago?
A. I have no recollection in testifying in the bank-note case; I suppose he has reference to the Seventh Ward bank.
Q. You say you did not testify in the bank-note case?
A. I did not.
Q. I am talking about the proceedings of the American Bank Note Company on Greenwich street against the elevated road?
A. I never testified in that case, to my knowledge.
Q. I will put to you this question, whether you did not testify in

that case that the American Bank Note building, the real estate, was worth $860,000, and that it was benefited by the elevated road $10,000?

A. I don't remember ever testifying in that case, sir; I don't think I ever testified; if I did my evidence is there.

Q. Is there any other man of your name in the city that testified in that case, that you know of?

A. No, sir.

Q. Jeremiah Pangborn?

A. I don't think there is any other man by that name.

Q. Did you hear the testimony in the case; did you attend the trial?

1177 A. I did not; Mr. Blackwell was one of the witnesses and Mr. Hawes was the other; I was not.

Q. You do not remember to have been cross-examined by Joseph H. Choate?

A. No, sir.

Q. Were you ever cross-examined by Andrew Foster?

A. Yes, sir.

Q. And by W. G. Peckham?

A. Yes, sir; I know him well.

Q. Do you remember testifying in the Irving Bank case?

A. I do.

Q. Did you testify in the Irving Bank case as to what the benefit to the property by the elevated road would be?

A. I may have done so.

Mr. JULIEN: I don't think this will help us any.

Mr. DICKINSON: Don't you want to know whom you have before you?

Q. Did you testify that it was an actual benefit to the Irving bank?

A. I may have done so; I think it was a benefit.

Q. How many tracks are there in Greenwich street, in front of the Irving bank?

A. There are two tracks, and, I think, a turnout.

Q. How many in front of the bank note company, on Greenwich street?

A. There are three or four, with turnout switches.

Q. In front of the Irving bank there are only two tracks?

A. To my knowledge, there may be turnout switches.

Q. You testified in the Irving Bank case that the elevated railroad was a positive benefit to the property?

1178 A. I have always testified that I testified in the Irving Bank case.

Q. Did you so testify, that it was a benefit to the property?

A. I may have, and I say so today, and I will take the corner opposite to the bank.

Q. Did you hear Hawes' testimony on that trial?

A. I don't remember; I think I did.

Q. Did he testify it was an injury of 50 per cent. to the Irving Bank property?

A. I cannot state what Hawes testified; I am not responsible for his testimony; there is not a better expert in the city of New York today.

Q. Did he come out with you?

A. No, sir.

Q. You have testified as to Greenwich street; I will ask you another question before I leave Greenwich street, whether you did not testify in the Irving Bank case, on cross-examination, that the property on Washington street had largely increased in value?

A. I don't remember; I might have testified to that.

Q. Did you not testify that the property on all the side streets had largely increased in value?

A. That may be so.

Q. And did you not testify, on cross-examination, that the property on Greenwich street had decreased in value?

A. It had in some places, and others it had not.

Q. Did you qualify it, and say in some places?

A. I think I did.

Q. On cross-examination, did you not say that the property on Washington street over which the elevated road did
1179 not run had nearly doubled in value, while Greenwich Street property had not increased?

A. In certain locations.

Q. Did you say certain locations?

A. I don't remember saying anything you speak of; I may have said just exactly what you say.

Mr. BAKER: We object to what he testified to in that case.

Mr. CHIPMAN: If this man has sworn to one thing in one place, and comes here and swears to another, it is proper to be shown.

The WITNESS: I have not.

Mr. CHIPMAN: I say if it should turn out that he did, I would accuse him of it, and we have a right to show it. If we have the testimony here that he gave in the cases down there, stenographically taken, we have a right to use it and call his attention to it, and any bluster and any assumption of dignity on the part of this man cannot prevent us from our plain right to contradict him and show what he said elsewhere. This is all fustian.

Mr. BAKER: My objection to this is that they cannot ask him any question of that kind where the testimony itself is not material. It is wholly immaterial what he testified in any case down in New York. It is not a question of whether it is cross-examination or not; it is a question of whether it is material in the case. It does not make any difference what he said down there.

By Mr. DICKINSON:

Q. You say you may have sworn to what I have asked you, and you want to make an explanation to the jury; I have no objection.

1180 A. Will you state what I testified to, and then let me explain?

Q. No; make your explanation now.

A. You asked me if I hadn't testified to so and so; I do not know whether I did or not. Read my testimony, and I will then explain to the jury whether I did so testify; I don't know what I testified; state what I testified and then I will explain.

Q. Would you have testified what was not true at that time?

A. Not at all; anything I testified to I will stand by as being true.

Q. Is that the explanation you desire to make to the jury?

A. State what I stated then, and I will then explain. You went on to say, "Didn't you testify that Washington Street property was so and so, and Greenwich Street property was so and so," and I said that if I did, it was true, and I then went on to explain that certain parts of Washington street were worth more than it was on Greenwich street, because there is a certain kind of business down on a certain block, whereas, on the other side, Greenwich street, it is a poorer class of business; but take one end of Washington, you will find that Greenwich street is worth more than Washington street; there is certain locations on Washington street and certain locations on Greenwich street, where it is worth more than on the other street.

Foreman LESHER: In your previous testimony did you qualify it in that way?

Mr. DICKINSON: Do you swear that you made the same explanation in that case?

1181 A. I don't say I did; I explain it to you that I might have done so; if I did testify as the gentleman says, which I have no doubt I did, if that was so, I don't remember it; but if I did testify so, it was true.

Q. The juror has asked you, and I will repeat the question so that there will be no misunderstanding of it: Did you make that qualification that you have just made to the jury in explanation?

A. I don't remember of doing it; I may have done so; I don't remember.

Q. Did you testify as to the rental value of 93 and 95 Greenwich street in 1877?

A. I testified on a number of cases.

Q. In the Irving Bank case?

A. The Irving Bank case, I testified in.

Q. Did you testify as to the rental value of 93 and 95 Greenwich street?

A. I may have done so; I am not positive.

Q. Did you testify that the rent in 1877 was $4,900?

A. I don't remember.

Q. And in 1889 it was $4,000—on cross-examination?

A. That may be.

Q. In all property in that portion of the city, on Greenwich street, there was a general advance from 1877, was there not?

A. No, sir; not general advance.

Q. From 1877 down to date?

A. From 1877 down to date there has not been a general advance.

Q. In property in that part of New York, will you tell this jury whether you didn't testify in the Irving Bank case that there
1182 had been a general advance in all real estate values in the lower part of New York, on Greenwich street, and Washington street, and adjacent streets, since 1877?

A. There was a general advance.

Q. Did you so testify?

A. I don't remember. There was a general advance, not entirely from 1877. The panic did not spend itself until about 1880, but there was a general rise from 1878 or 1879, after 1879. The lowest point of the panic was between 1876 and 1877.

Q. Never mind the panic; we know all about the panic here. Now, after having testified that there was a general advance throughout the lower part of New York, including Greenwich Street and Washington Street property, did you not testify on cross-examination, that that advance had not been felt on Greenwich street?

A. Not to the extent of some other streets it hadn't, and has not today.

Q. Did you put that word "extent" in your testimony?

A. I don't know what I put in. If you read my evidence, I will tell you.

Q. Did you put in the qualification of "extent"—not to the extent?

A. I don't remember.

Q. Did you qualify it in any way?

A. I don't remember; it is a long while ago since I testified.

Q. How long?

A. I don't remember; the case will tell you there; I cannot carry in my head every case I testified in.

Q. Did you testify as to the rental value of Nos. 93 and 95 Greenwich street, No. 44 Greenwich street, No. 88 Greenwich street,
1183 No. 40 Greenwich street, No. 25 Greenwich street, No. 523 Greenwich street, No. 501 Greenwich street, No. 458 Greenwich street, did you testify as to those?

A. I don't remember about testifying as to No. 458 Greenwich street.

Q. You are right as to that, but as to the others you did testify to them?

A. I don't remember all the numbers.

Q. Did you, after testifying that there had been a general advance in New York, on cross-examination testify that 93 and 95 Greenwich street, which is a five-story brick, double tenement, rented in 1877 for $4,900, and in 1889 for $4,000?

A. I don't remember.

Q. Did you or did you not?

A. I don't remember whether I did or not. I cannot remember my testimony in every case.

Q. Did you testify as to 44 Greenwich street, that the brick store

and tenement No. 44 Greenwich street rented for $3,200 in 1877 and for $2,200 in 1889?

A. I don't remember testifying to it. It may be so. If I testified to it it is so.

Q. Did you testify as to No. 88 Greenwich street, that the five-story brick tenemant-house, 88 Greenwich street, rented in 1875 and 1877, for $4,200, and in 1889 for $2,650?

A. I don't remember.

Q. Did you testify as to 40 Greenwich street, that it rented in 1875 and 1877 for $2,750, and in 1890 for $2,200?

A. I may have done so; I don't remember what I testified. Whatever was testified was true.

Q. Did you testify as to 525 Greenwich street, that the total
1184 value on sale—this was a sale of 525 Greenwich street—was, in 1877, $18,000, and that it sold on August 30, 1890, for $15,000?

A. I guess you are wrong.

Q. $18,000 in 1877, No. 525 Greenwich street?

A. I don't remember testifying in that case.

Q. Do you say you didn't?

A. I don't remember.

Q. Do you own any property on Pearl street?

A. No, sir, not now.

Q. Did you ever?

A. I think I did some 25 or 30 years ago; I am not positive, but I think I owned some then.

Q. You do own some property, I think, on West End avenue?

A. No.

Q. Don't you own some property on West End avenue; didn't you testify in the Charles Buck case that you did?

A. Where is that property?

Q. In New York.

A. What street is it on?

Q. Do you know of any *streets* on West End avenue that you owned?

A. I don't remember; I might have done so.

Q. Do you know where West End avenue is?

A. Yes, sir.

Q. Where is it?

A. It is in Harlem.

Q. You asked me where it was; you know where it is.

A. Yes, sir.

Q. Did you own some lots there?

A. I don't remember; I may have owned some there. I
1185 buy and sell a great deal of property today, and then sell to-morrow; I don't remember where I owned it. I buy at auction and sometimes sell before I leave the exchange.

Q. You cannot remember whether you owned lots there?

A. I may have done so.

Q. You don't know whether you owned lots on West End avenue?

A. I think I did; I don't remember whether I did or not. I own property today on Greenwich street and on Third avenue.

Q. Do you remember that you sold lots for $18,000 on West End avenue, your own lots?

A. That may be so.

Q. But you could not remember the little matter of $18,000?

A. No, sir; I don't remember. I sell a great deal of property; I cannot tell where it is or how it is. I buy at auction and sell it right over.

Mr. BAKER: Gentlemen of the jury—under the rulings you have made, the important testimony that I desired to introduce is probably excluded; but I offer to prove, by Col. Frank J. Hecker, that at the Peninsular car works, in this city, they took out the Backus dust-arrester and put in the Cyclone dust-arrester, which is fireproof, and operates at the car works better than the Backus dust-arrester. I desire, also, to show, by Mr. William F. Dwight, that they use a metallic dust-arrester in their planing mill, at the junction of the Michigan Central and the Bay City roads, out towards West Detroit. I would also desire to show by him that he handles his lumber from the cars and in his yard without teams, but with tramways, two and a half feet tramways, and without horses, with small hand trucks, and does it economically. And that is
1186 about all the testimony I desire to introduce, but, under the rulings that have been made here, as I understand it, you have excluded that testimony.

Judge CHIPMAN: Yes; the rulings cover every bit of that testimony.

Mr. BAKER: I can show by a large number of people in this town that are using these metallic dust-arresters, that they are better and safer.

Foreman LESHER: The jury seem to think that they do not care about reconsidering their action about what they have said already.

Mr. BAKER: I don't know but what, in cases at home here, they might go and look at it.

A JUROR: My impression is, that if the dust-arrester is so much better—I don't know whether it is or not, and I don't want to look into it—I don't think we have any business to look into it; my way of looking at it is, that we could not make Mr. Backus change his, even if we thought he had a poor one.

Mr. BAKER: That is right enough in one sense. You cannot make him change it, but you certainly can do this: If he persists in using an imperfect and dangerous dust-arrester, when there is a good one that is fireproof and is without danger, you certainly can refuse to give him damages, because he insists upon using an imperfect one. Of course, I do not claim you can make him change that, but if there is a good one that is fireproof, and he can avoid the damages that he asks for here, for $1,300, why, that is all we ought to pay.

JUROR: I think we all see into that pretty well.

Mr. BAKER: Of course, under those circumstances, I do not desire to delay the jury any further.

1187 Foreman LESHER: I think the jury understand it.

Juror TRAUB: That does not cover this entire condemnation case.

Mr. BAKER: I do not claim it does, but I can show that that dust-arrester is absolutely worthless; but I am not permitted to do it, and under such circumstances, I will simply rest this case and take an exception to the rulings that are made, and I will now proceed with the argument.

Mr. Baker then commenced his argument by saying:

Gentlemen of the jury, but was interrupted by Mr. Dickinson.

Mr. DICKINSON: Now, gentlemen of the jury, there is a question still remaining, as to how you will arrange for his argument, and I have nothing more to say than what I have said heretofore. I will not take time in arguing upon who shall commence the argument. The situation is that without our desire at all, we are brought into court to show cause, and here we are; we are not here by our own volition. Whether you will let us reply finally to the argument made by the railroad company, under the circumstances, is within your disposition beyond any question.

Mr. BAKER: I have the opening and closing of this case beyond any possible question.

Juror CHAREST: What about viewing the premises there?

Mr. BAKER: You can after the argument go and look at the premises if you want to, at any time before you go out, after you have listened to the argument.

Mr. DICKINSON: I ask the jury to make an order; we will be satisfied with your decision, but I ask you to decide upon the order in the argument. I shall be satisfied with whatever you do, but I want you to decide.

1188 Mr. BAKER: I think you understand very plainly that we have the burden of proof and have the right to the opening and to the closing.

Mr. DICKINSON: Upon the question of necessity that is possible, but not on the question of damages.

Mr. BAKER: We have on both.

Mr. DICKINSON: On the question of damages we are in the position of plaintiff. They are not asking money from us.

Mr. BAKER: We are asking to condemn it and to have the damages fixed, and we are entitled to the opening and closing.

The jury then retire to their room to consider the question, and remain out twenty minutes and then return.

Foreman LESHER: We have decided to go according to the rules that Judge Gartner laid down to the jury.

Mr. DICKINSON: Did he give you any rule as to the question of damages?

Foreman LESHER: No, but merely as to the opening and closing.

Mr. DICKINSON: But on that question of damages.

Mr. BAKER: You could not have two arguments.

A JUROR: The jury did not understand whether it could be made into two cases.

Mr. DICKINSON (to Judge Gartner): Judge Gartner, in your letter to the jury, which I did not read fully, I would like to ask whether you told the jury that Mr. Baker had the affirmative of the issue on the question of damages.

Judge GARTNER: The way I look at it is this, that you cannot subdivide the question. The petitioner has got the affirmative, in view of the fact that the question of necessity is contested; that being so, and having the affirmative, it strikes me that there
1189 can be no possible question but what under the law, the petitioner would have the opening and closing.

Mr. DICKINSON: How about the question of damages; who has the affirmative of that?

Judge GARTNER: The question of damages is an incidental question. If it only resolved itself into the question of damages, the rule might be at variance.

Foreman LESHER: That is what the jury thought. They were not satisfied exactly in regard to the rule as to damages.

Judge GARTNER: I have stated the rule, as far as my opinion is concerned, and in view of the fact that the question of necessity is contested, and the petitioner is obliged to satisfy the jury in the first place, on the question of neces-ity, and the question of damages being merely an incidental question, that the petitioner has the opening and closing.

Mr. DICKINSON: But if the question of damages were the principal question, who would have the affirmative of the issue?

Judge GARTNER: I do not understand that that is the case.

Mr. DICKINSON: May I ask you who would have the affirmative upon the question of damages?

Judge GARTNER: If the question of damages was the only question involved in this case, if the affirmative of the showing of damages would be upon the respondents, why, I suppose in that case they would have the opening and closing.

Mr. BAKER: But that is not the case.

Judge CHIPMAN: Yes; the question of damages is involved here.

1190 Mr. BAKER: But you cannot separate them; do you hold that they can be separated?

Judge GARTNER: I say that I do not think, in any case, you can subdivide those questions.

Mr. DICKINSON: Which would your honor consider the important question, if we have the affirmative of the issue on the question of damages, and they have the affirmative on the question of necessity?

Judge GARTNER: The question of public necessity is the first question involved, and the first question that the jury will have to pass upon.

Mr. DICKINSON: We submit that the jury have the right to decide which is the important question.

Mr. BAKER: Does the jury decide that the petitioner has the opening and closing?

Foreman LESHER: Unless you can make two cases of it.

Mr. BAKER: Is it proper to make two cases of it, Judge Gartner?

Judge GARTNER: I should say it is not proper.

Mr. DICKINSON: Then I will say to the jury that they are not bound to take the direction of the judge.

Judge GARTNER: My opinion was asked by counsel in this case, and the jury are supposed to follow what the law is.

Mr. DICKINSON: We take an exception to the direction of the judge. If you desire to consider any statement of the judge upon this question, gentlemen of the jury, you may retire and consider the matter.

Mr. BAKER: The circuit judge has made a ruling here and has told you what the law is and what your ruling should be, and they have appealed from the circuit judge.

Mr. DICKINSON: Gentlemen of the jury, you have 20 minutes yet before it is 5 o'clock; will you listen to the ruling of the supreme court.

1191 Foreman LESHER: Yes, sir.

Mr. DICKINSON: I will read it to you.

Mr. BAKER: If your honor please (to Judge Gartner), I desire the court to listen to an argument in this case as to the power and jurisdiction of the court and the jury in the case. The court has decided it for you, gentlemen of the jury, and Mr. Dickinson desires to appeal to you from his decision.

Mr. Dickinson procures a volume of reports, and then says:

Mr. DICKINSON: Gentlemen of the jury, there is also a case in the 83d Michigan, which is not in the judge's library, but which I will call your attention to tomorrow, but here is a decision in the case of The Toledo, Ann Arbor & Grand Trunk Railway *vs.* Dunlap, in 47 Mich., 456, a decision by Chief Justice Campbell. I will read from it to you:

"This is an appeal from proceedings to condemn lands"—precisely like this case in every particular. "It appears that immediately after the confirmation of the proceedings which were afterwards set aside by this court, the company took possession of Dunlap's land and built its road across the part sought to be condemned. This was done in December, 1880, and led to a series of controversies not yet determined. The present proceedings were begun on the 18th day of June, 1881, by the presentation of a petition to the circuit court for the county of Oakland, where a jury was drawn and subsequently rendered the verdict complained of. During the pendency of the proceedings, and subsequently, certain orders were made by the circuit court, to which reference will be made hereafter.

"Some important questions arose which require a brief
1192 preliminary reference to the nature of these proceedings. The statute is evidently framed in accordance with the laws of some other States where the judicial power is not parceled out as it is here, and some complications have been caused by this prac-

tice, which introduce difficulties. We had occasion in the case of Michigan Air Line Railway *vs.* Barnes, 44 Mich., 222, to point out some of these difficulties. It is greatly to be regretted that this species of legislation has been so carelessly framed.

"In the present case some steps appear which could only have been taken by a court in the regular exercise of judicial power, while others belong to a different class of functions entirely, and are governed by different consideration.

"Under our constitution such powers as are strictly judicial in their character can only be vested in certain courts which are named in the constitution itself. The circuit courts, as courts, have such powers. The judges, as judges, out of court, do not possess them and cannot be vested with them.

"The proceedings to condemn lands, although made under the railroad laws, subject to judicial review and supervision for certain purposes, are not in themselves, and never have been, regarded as judicial proceedings. Our constitution allows them to be conducted by highway commissioners in some cases, and by specially appointed commissioners or juries of freeholders. The inquiry in this State, as elsewhere, is an appraisal or estimate of values, and not a contest on litigious rights, and includes what is not elsewhere included, an inquiry into the necessity of the proposed taking for public purposes, which was never made by courts, but always heretofore by the legislature or some unjudicial body of its creation. Had it not been for the specific provisions in our constitution, the State could have provided for these inquiries to be made by any medium it might select. Our present system is better calculated than the old one, if fairly applied, to secure the rights of land-owners. But the nature of the proceeding remains as before, a special proceeding by a temporary tribunal, selected for the occasion, and not a judicial proceeding in the ordinary sense.

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"As provided for under the railroad laws, there are certain proceedings in court to select a jury, and subsequent proceedings to determine whether the action of the jury should be sustained. Beyond this, the courts have no part in the matter, and, with the exception of some special matters to be referred to hereafter, no difficulties should have arisen to confound these functions. But it is manifest they have been confounded to some extent here, and the question may arise how far such confusion may have caused mischief which we can redress."

I said to you yesterday, gentlemen of the jury, that if the judge came here and made an error, we had no remedy, because we had to take your judgment of the law.

The court continues: "It may be said in brief that if a jury has been summoned under proper circumstances, has conducted its inquiries legally, and with due regard to private rights, and has reached a legitimate conclusion as to the necessity of the condemnation and the compensation, the appropriation of the land, upon payment of that compensation, will be lawful, and will not be affected by collateral action by the judge or court, which may be

unlawful. The distinction between the different tribunals is essential. The objections taken may be divided into classes, the one relating to the sufficiency of the condemnation, and the second
1194 to the action of the court or judge, independent of the inquest. Reference will first be made to the latter. These are, first, action taken by the circuit court to restrain legal proceedings, second, action concerning certain moneys, and third, action requiring the land-owner to pay costs."

Now, upon the question of legal proceedings and the influence of the judge. Here in this case it was complained by the appellants that the judge had made an error in his ruling. The supreme court hold that it was no cause for setting aside the proceedings that the judge made the ruling, for the simple reason that the judge had no business there; it is not for the jury to abdicate its duty for any man. I read from the decision:

"The remaining errors assigned refer to various rulings and testimony bearing upon the question of public necessity. Some of them have been raised on what is a mistaken notion of the character of these proceedings. The circuit judge attended the sittings of the jury and admitted or excluded testimony and charged the jury precisely as on a trial.

"The judge formed no part of this special tribunal. The statute indeed allows the judge to attend said jury, to decide questions of law and administer oaths to witnesses. But the same statute which allows this allows him to designate a circuit court commissioner for the same purpose, and also allows the jury to proceed without either. Whatever the language of this statute literally construed may mean, it is very clear that any such functions must at most be advisory," the distinction between advisory and directory I think any intelligent man can understand. You can ask the opinion of any judge, but you can determine whether you follow it or not. Mr. Baker has asserted that you have got to take the direction of the judge; I say you have not.

"The jury will undoubtedly be regarded as accepting and
1195 doing what they permit to be done. But in all such cases the constitution as well as the principles of the common law make them judges of law and fact."

We cannot assign error, because the supreme court holds that whatever is done, whether you do it by the advice of the circuit judge or by your own consciences, it is your own act, and we are concluded and barred by your act. So you must beware about putting any other judgment in this case upon any question except your own.

"Their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, quite as much as the testimony of witnesses to matters of opinion. And while an appellate court is bound in such cases to set aside proceedings which appear to be based on false principles, it cannot properly deal with rulings as if they were expected to on a common-law trial or dispose of the controversy on merely technical notions.

"In the case before us the jury have in proper form decided the improvement to be one of public necessity. They had a considerable amount of testimony before them bearing on that question, and it was strongly contested. While the language of the charge of the judge is certainly ambiguous and open to criticism, yet it appears distinctly that the jury regarded not merely the necessity of the land if the road should be laid out, but also the importance of the road itself. We cannot say from an inspection of the record that there is any prevailing reason for holding that the jury were misled in their conclusions."

Gentlemen of the jury, I will read from the 83d Mich., when I can put my hand on it and bring it before you, from the opinion of
1196 Judge Campbell. And I will put a mark in this book, from which I have just read, so that any of the jury may read the decision of the court of last resort in this State upon such question.

Mr. BAKER: Mr. Foreman and gentlemen of the jury: Having been one of the counsel in the case that my brother cites, I am entirely familiar with this decision, and I desire briefly to call your attention to exactly what was decided. The statute under which you are acting in this case contains this provision: "Said judge or a circuit court commissioner to be designated by him, may attend said jury to decide questions of law and administer oaths to witnesses, and he may appoint the sheriff, or other proper officer, to attend and take charge of said jury, while engaged in said proceedings."

Now, that is what the legislature of this State has enacted, and while it is undoubtedly true that it is not a judicial proceeding in the sense that it is a trial between parties in ordinary litigation, at the same time it partakes largely of a judicial character in its nature, inasmuch as it is an inquiry to be determined partly upon testimony and partly upon a view of the premises by the jury. Of course the constitution contemplates that the question of necessity and of damages shall be ultimately decided by the jury, and what Judge Campbell says in this opinion is that it is competent for the jury to take the advice of the circuit judge. Now in this Dunlap case, we tried it at South Lyons in this State; the jury was impaneled at Pontiac; we went to South Lyons, where the property was situated, and where it was sought to acquire a right of way through Mr. Dunlap's farm. Judge Turner, one of the oldest circuit judges of this State, for years he was circuit judge in the Genesee, Shiawasee and Tuscola
1197 circuit, now a very old man—he attended that jury; it involved him in some expense, and the parties, between them, paid his traveling expenses; he went and conducted that trial, ruled upon the questions of evidence as they arose, and as a matter of course we had an orderly proceeding. He made his rulings, and in the end he charged the jury, gave them certain instructions. We complained of those instructions as being too favorable to the railroad company, and we assigned error. We took the case to the supreme court and alleged that the judge was wrong in his instruc-

tions, and the court held that he was not; among other things, that they were sufficiently fair, and that it appeared that the jury had decided the question of necessity correctly, namely, in favor of the company.

In this case, you are assembled, as that jury were. We did not have a judge in this case, because we could not get one; we have not had a judge in any of these cases, because we could not have one; they were engaged in other cases. During the progress of this case a question arose as to the burden of proof, and the foreman, under your direction, asked the circuit judge his opinion and advice in regard to it, and he has given it. It seems to me that ordinary courtesy, ordinary respect for a judicial officer, would lead this jury to follow that advice. I have not asserted that you cannot go out and disregard that ruling, if you see fit. You can do anything you have a mind to; you can shut out any testimony, and you can shut me out entirely so that I cannot be heard. But you have asked the advice of a judge; he has given it; he has told you that the affirmative is upon the petitioner; he has told you that it is not proper to subdivide the case and make two arguments; and still Mr. Dickinson turns round and consumes half an
1198 hour here, and asks you to disregard the advice that you have solicited, the advice that has been given disinterestedly, and the advice that seems to accord with your own judgment as to what should be done, and it is a struggle on the part of my learned friends here to see whether they should have the last say in this case. We are the petitioners in the case; we desire to have a decision upon the right of way, and to have a right of way upon the question of necessity, and to have an award in this case; but that Mr. Backus and his sons shall not be paid any more money than they are justly and fairly entitled to. The orderly way to conduct this case is for me to open the argument, then for my learned friends to make their argument, and for me to reply, and then it will be in your hands for decision. I do not think I could change your opinion by having the closing argument. My brothers seem to think that they can carry you off your feet and get anything they ask. I merely insist upon it because my client is entitled to it, because my client has the affirmative of the case, and I desire to satisfy you, if I can, from the evidence in the case and your own knowledge of the case, that the necessity should be decided in our favor, and that the damages in this case should not be any considerable sum of money; and, if you will permit us, at 2 o'clock tomorrow afternoon we will go on with the argument.

Mr. DICKINSON: Gentlemen of the jury, you can take this case in the 47th Mich., and look at it if you wish.

Mr. BAKER: I am perfectly willing that they should refer to this case, and read it and study it.

Mr. DICKINSON: The matter of closing the argument has nothing to do with the question of courtesy to the judge. We do not want any rights that our clients have given away on the ground
1199 of courtesy. All I want to show is what your duty is, gentlemen of the jury. Your are the keepers of your own con-

sciences. I am not the keeper of your consciences. My opinion is that we ought to reply, and I think you have seen that there may be a necessity to reply.

Mr. BAKER: There must be something about your argument that is weak if you think it is necessary for you to have the closing.

Mr. DICKINSON: I have borne those insinuations all through the case, and I can bear them now. Gentlemen of the jury, I said that whatever you did I would be satisfied; but, after all, you are the keepers of your own consciences and are to decide the matter. I shall be satisfied with what you do, only exercise your own judgment, and that is all I require. The ruling of the supreme court is doubtless based on section 2 of article 18 of the constitution of this State, which I will read to you:

"When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by a court of law."

You see that the question of necessity, by the constitution itself, and the question of the value of the property, if you decide upon the necessity, is left to no court, but to a jury of twelve freeholders.

Mr. BAKER: There is no doubt about that.

Mr. DICKINSON: And there is no court and no judge, and no question of courtesy. You can get all the help you like of the circuit judges, but remember that you are masters of the situation.

Adjourned to Thursday, July 9, 2 p. m.

1200 THURSDAY, *July* 9, 1891—2 p. m.

Opening Argument of Mr. Baker.

MR. FOREMAN AND GENTLEMEN OF THE JURY: We have spent a large amount of time in this cause in the introduction of testimony, and I have no doubt that the matter has become somewhat wearisome to you. As far as the testimony is concerned, it is evident that a great deal of the cross-examination of the witnesses for the respondents was made necessary by the very extravagant and extraordinary claim made in this case by them for damages, and while we would have liked very much to have spent a day or a day and a half more in the introduction of testimony bearing upon some of the aspects of the case, it is perhaps well enough that the jury saw fit to bring the testimony to a close and to render a verdict in this case upon the testimony that is already in, with the assistance that the view you have already had of the premises can give you, and with the further assistance of another view of the premises, if it is desired.

I desire briefly this afternoon to discuss the first question that you will be called upon to decide when you retire to consider of your verdict. That question is the question of public necessity, as it is understood, as it is defined by the constitution and the laws of this

State. The only evidence in which the necessity of this enterprise and of this route is attacked is by a claim on the part of the respondents, originally made by them before the State railroad crossing board, that this route should go on their property, along the line of Fort street. But subsequently they changed that to a claim
1201 before this jury that the route should be along the margin of the property of the Michigan Central.

Upon the general question as to what constitutes a public necessity, there ought not to be any controversy among lawyers, or among jurymen, at the present day. We all know that railroads have been in operation in this State since about 1834. In that year, or about that time, a railroad was built from this city to the city of Pontiac, the old Detroit & Pontiac railway. That was chartered in that year, and for years maintained a railroad running out of this city to Pontiac, using the ordinary wooden rail with an iron strip upon it. I believe that the beginning of railroad enterprises in this country commenced about the same time. A very few years previous to that, railroads to some extent were started in New England and in New York, and in the eastern part of this country, and the entire railroad system of this continent, one of the greatest achievements accomplished by man, has been the growth of the last 60 years, and the largest part of it the last 40 years.

The railroad is a development. It was not all conceived and all brought out at once. As I remember the history of it, it started with the original tramway in some of the coal mines in England or in Scotland. They used wagons or carts with which they hauled the coal out of the hillside down to the water's edge, or to the roadside. They hauled these vehicles loaded with coal along an ordinary road, and it was found that in the constant use of the road it would become defective. If there was a rain, holes would form, ruts would form in the road, and in their desire to get the coal out it occurred to somebody where there was a hole to lay a board or a strip of lumber to go over the rut that had formed in the
1202 road, and whenever a hole broke out in some other place, they laid another strip down there, and gradually it dawned upon them that they could lay strips of timber along like that and have a tramway. They did not even think of the tramway in the first instance, in its entirety, but in that way they found out they could draw a bigger load with less power in the use of a vehicle and rails. After the discovery of steam, its application as a motive power was applied, and they built railroads, and it gradually developed into the great system that it now is. It became evident, in the very inception of the business, in the very commencement of railroad construction in England and in this country, it became evident that railroads could not be built unless some power was exercised on the part of the government to compel property-owners to relinquish a right of way for a reasonable price. It was found out that if you laid out a roadway any considerable distance through private property, that while you might buy the first man and the second man, and a third man and a fourth man, and gradually acquire a greater portion of it, in the end you would find some ob-

stinate property-owner, some man who thought he had something that was better than anybody else had on earth, and either from motives of pride or avarice, or something of that kind, would not sell a right of way under any circumstances, so that the enterprise would have to stop right there, unless the government exercised a power of this kind. It has been illustrated time and time again. There is hardly a great street that has been laid out in the city of Detroit but what some property-owner has objected to it, and would have fought it to the bitter end, if there was no power in the city government to compel him to take a reasonable price for the right of way, where a public highway crosses his property. Some of you
1203 may remember cases of that kind in the eastern end of the city.

My attention has been called by an old resident to a controversy of that kind between this city and Governor Woodbridge, who owned a farm just this side of the Backus property. He had a farm extending from the river back to the line of the private claims, and it was desired to open Fort street west of Lafayette avenue, through his property, and he contested it bitterly, insisting that he had a right to enjoy his farm-house and his orchard, and they should not be taken by the people of this city who desired to make a highway of it. But he was compelled to give way, and upon that farm, at the present time, there are thousands upon thousands of people. This is something that is necessary, from the nature of man, from the natural condition of the human mind. A man has a piece of property. He desires to realize as much as possible from it. If a right of way is put through it, and if he has it at his mercy, he will charge just what he sees fit; he will insist upon having an exorbitant and an extravagant price. It occurs every day, so that if it is necessary, in order to build highways, in order to build canals, in order to build railways, in order to build works of public convenience that require continuous strips of land, it is necessary to exercise this right of eminent domain.

Under the laws of this State, railroad corporations, from the very commencement, have been vested with the power to condemn land for the public use, the theory of the law being that a railroad is simply a highway formed by a private corporation, partly at any rate operated in the public interest, and that it is perfectly competent, right and proper to exercise the power of eminent domain.

When the Fort Street Union Depot Company first started
1204 out to acquire its depot grounds, and its right of way, our distinguished friend, Mr. Don M. Dickinson, insisted before Judge Reilly, and before the jury in the Morton case, that it was not a public use, that we could not condemn property at all, that we could not take union depot grounds and we could not take rights of way, that the statute which undertook to confer this power upon union depot companies was unconstitutional and void. But, gentlemen of the jury, Judge Reilly held that he was wrong. The jury before whom we tried that case held that he was wrong. He took an appeal to the supreme court of Michigan, and the supreme court of Michigan, in a very concise and well-considered opinion, held that he was wrong, and that there was no question, as Judge Morse

put it in deciding that case, there was no question but what the Fort Street union depot enterprise was a public work that would be of very great public benefit, and in behalf of which it was competent to exercise the power of eminent domain, and the court said, in so many words, that they approved of the decision of the jury that it was a public necessity.

In that case this whole plan, this whole scheme, was laid before the jury and the court. Not only was the plan of the depot grounds, where we sought to acquire 5½ acres of land, but the map and the survey by which we were to reach those grounds, was before the court. The case itself was a case that involved land for the depot ground, but of course these depot grounds are of no use unless you can reach them. They are of no earthly use unless they can be reached by connecting tracks. I do not think anybody would question the good sense of the company in locating those
1205 depot grounds where they are. It is certainly self-evident, it seems to me, that with the construction of the new post-office, the location of the large and expensive hotel (the Cadillac) that has recently been built in this city, the court-house, the city hall, where we now are, and eventually some sort of a county building, that it is perfectly evident that this depot is advantageously and properly located for the purpose of doing the public business, for the purpose of accommodating the people who live in this city, who desire to go out of the city, who desire to send freight out of the city, and to accommodate people who live in the country, who live in other States, who live elsewhere in Michigan and Canada, who desire to do business with the city. I do not think that any argument can be made that would show that this is an improper location.

But my brethren upon the other side say that we ought to go along River street. That did not occur to Mr. Backus when he and Luther Beecher were up before the State railroad crossing board. He had no idea of that at that time. He insisted that we ought to go through his property, and why? Why did he want us to go through his office, to go through his dry kilns, through between his mill and Fort street, and not on River street? Gentlemen, it is simply because he desired to dispose of that property, and he knew if the railroad went through it he would be in a position, practically, to sell that entire property to the company; that it would have such an effect upon the property that he could claim, at any rate, very much more extravagant damages than he can claim with the present location. He urged that route because he wanted to sell. He still wants to sell that property.

But what did the State railroad crossing board say about
1206 it? The statute under which that board is created (I think I read it in the opening of this case to this jury) provides, in so many words, that that board shall determine the place where and the manner in which we should cross the Michigan Central tracks. It is a board that is composed of the State railroad commissioner, the secretary of state and the attorney general of the State. We were required, in the first instance, to make a map and

a survey of the route. We could not take a step until we did that. The statute provides that our map and survey shall be made and approved by the directors, and certified by the directors, and when that is made, if we cross another railroad, it must be submitted to this State railroad crossing board. When we submitted that to them, the whole subject was before them for decision and determination, whether they would approve of it or not, and if it was not satisfactory to that board, they had the power then to refuse to approve of our map and survey. The controversy was pending in the common council of this city, and the board adjourned to meet here the same night that the common council was to consider it, and the common council also having approved of this location, the State railroad crossing board approved of it, so that we had not only the State authority, but the local authority approving of this route, and that is something that we had to do in order to go on with this enterprise. That is something that we could not avoid. There was no way in which we could file a petition, or take a single step, until we filed a map and survey that had been approved by our own board of directors, that had been approved by the State railroad crossing board, and if we went along a street, it was also approved by the local authorities of this city.

1207 Now, it has been suggested why didn't we stop right there and get an act through the legislature? In the first place, gentlemen, when this company was organized, the legislature was not in session, and they would not meet again for two years, and this whole enterprise would have to be delayed for that length of time, if any such legislation was sought. It was utterly impractical. It was utterly beyond the power of the promoters of this company to accomplish any such thing if they desired to go along with it, but there are other reasons that equally answer that proposition. Those reasons are that it would involve a contest before the legislature of this State, in which every railroad corporation in this State would combine against the Fort Street Union Depot Company to prevent any such legislation, and we have found, gentlemen, in this enterprise, that these corporations have some influence, especially the greatest one in the State, the Michigan Central. Suppose we had gone to Lansing. Brother Dickinson has pointed out that we could not get a bill through just for this case. He is undoubtedly correct in that. We could not have a bill passed authorizing the Fort Street Union Depot Company to condemn a portion of the property of the Michigan Central. It would have to be a general law, authorizing the Fort Street Union Depot Company and other railroad corporations to condemn depot grounds over the rights of way of other railroad companies, under certain circumstances, which would have to be defined in the statute, and that statute would have to have general application all over the State. So that you could not pass such a bill if you tried to, in face of the opposition that would spring up against it, not even if we had a Democratic legislature and Mr. Don M. Dickinson was employed to get the bill through, because it would antagonize all the railroads in the State if we should

1208 undertake to pass a law, by which, under some local excite-

ment in favor of a new enterprise, the rights of one road could be taken away and given to another. We would introduce an element which would be a dangerous piece of legislation and would produce controversies that would not be wholesome, and would accomplish no good for the people of this State.

But, as I say, the legislature was two years off. Brother Dickinson may say, Have the governor call a special session. A special session would cost from $50,000 to $100,000. It would be unheard of. I merely refer to this to show the practical situation of this enterprise, when it was started, when the men who are interested in it conceived the idea of raising the necessary amount of money and going on with this enterprise in this city. They had to take the laws as they were. They filed their articles of association, in which they designated the places which they were to run to, in which they designated the depot grounds on the corner of Fort and Third, and designated the western terminus of the line of the Backus lumber yard, at the west end of the old union depot grounds. They then made their map and survey, and upon the approval of the State railroad crossing board, and the common council, they proceeded to acquire the land that was located upon the depot grounds and also to acquire the right of way.

Of course they did not make it known in the first instance, in buying property down there, what it was to be used for, and they succeeded in buying some property for what it was worth, getting it at a fair price; other property they were compelled to condemn. In some cases, the verdicts were perfectly just and proper; in other cases, they were somewhat extravagant, but on the whole, were not
1209 substantially out of the way. They have proceeded with it at any rate. The have proceeded with it in cases in which the learned counsel in this case, Don M. Dickinson, appeared for the respondents, and they acquired, in face of his opposition upon this question of necessity, both upon the union depot grounds and upon the right of way upon River street, they obtained favorable verdicts through juries, fellow-citizens of yours, who have heard the same testimony and passed upon the same controversy.

They have succeeded in acquiring all of this right of way except two or three parcels, that is the right of way in front of two or three pieces of land, on the north side of River street. They have acquired the entire union depot grounds at the corner of Third street and extending down to Sixth street. They have acquired the entire right of way from there to River street. They have acquired the entire right of way upon the south side, where the property is owned by the Michigan Central. They have acquired the property on the north side, with but few exceptions. They have acquired the property that is beyond Mr. Backus, every foot of it, that is the right of way in front of it, from Twelfth street to the Backus line, in which there were four or five different trials where jurors were impaneled to pass upon the question. We have not acquired the Backus right of way. The next piece of property this way is a small brick house that joins the Backus side track. Mr. Conely is the counsel for Mrs. Specht, who owns it, and he has gone to Europe

with the understanding that the work shall be put up and the damages assessed afterwards. The next property this side is the property of the Michigan Central, where the flour shed is. We have acquired the right of way in front of that. We have ac-
1210 quired the right of way across the street from that, all of it. The only cases that are undisposed of is the case of the Peninsular Stove Company, where they have consented that the work be put up, that elevated road be built there before the case shall be tried, so that they will have an actual demonstration of the amount of injury that it will produce upon their property.

But that is a practical concession on their part that they make no contest about the necessity, but merely desire, at the proper time, to have their damages determined by a jury under the constitution and the laws. The only other piece of property that is not condemned is the property of the Diamond Match Company, a great corporation that exists in the State of Illinois and owns this property, which was formerly the property of the Richardson Match Company, but is now the property of the great trust, and that is in process of adjustment, and I apprehend in the end it will not be necessary to try the case, although we cannot tell until we finally reach a settlement of it.

That is the situation of this enterprise. That is what we have done. That is what has been accomplished by the company. There have been all sorts of delays. If anybody had told me when we started out with this enterprise two years ago that I would not be through condemning property by July, 1891, I would have laughed at him; that such a thing was possible to delay it that long I would not have believed. But we had a long controversy with the Michigan Central Railroad Company, which delayed us the principal part of last summer, where they insisted upon very extravagant damages for the privilege of going along the street in front of their property, and we consumed a larger part of last summer, and all in trying that case before three commissioners
1211 in this city. But finally an award was made that was satisfactory to the Fort Street Union Depot Company, and the money was paid. All this money has been paid from time to time as it accrued to the parties. I don't know just what it all has cost, but I know that it has cost a large amount of money, and that money is to be raised by the stockholders in this corporation in some way, and I know that the expense of the enterprise has been way beyond anything that it was estimated at the time, and I doubt very much whether, if they had had any idea as to what it was going to cost, they would have gone into the enterprise at all.

But, gentlemen, it is natural that any great public improvement should meet with opposition. It is natural that men who think, and honestly think that they are going to be seriously damaged, should fight such an enterprise as bitterly and as tenaciously as within their power. They are not to blame for that. Most every one is made up in the same way, and they simply desire to get every dollar they can out of it, and of course they take advantage of every opportunity that they can to get an advantage in favor of their posi-

tion, and they would like nothing better than to have a decision of freeholders in this county that the public necessity does not justify the building of a road along River street. And why? Not that they care specially about it; not that it would make very much difference with their property; not that it would not be a great deal better for them to have it there than to have it anywhere else. That is not the reason. The reason is, that if they obtain such a position, they would be in a position to sell that entire plant to the Fort Street Union Depot Company in order that that company could get by there, at the price that they saw fit to fix upon
1212 it, the extravagant one of $300,000. That is why they are contesting this question of necessity; that is why they appeal to you to render a decision that would conflict with every decision that has already been made in this matter, that would conflict with the decision of the supreme court upon a similar case, involving the same enterprise and the same improvement, and that would conflict with the judgment of every disinterested citizen in the city of Detroit. And, gentlemen, it is a little remarkable, as I have already stated to you during the trial of this case, it is a little remarkable that my distinguished friends here should make the arguments that they do in regard to this question of necessity. It is a little remarkable that men as learned in the law, men of the reputation of our friends, should come before a jury of their fellow-citizens and undertake to make them believe that it is perfectly easy and proper to condemn a right of way along the margin of the Michigan Central railroad, when every particle of testimony, when everything in the case that is entitled to any weight shows that it is an absolute legal impossibility, under existing laws.

My brother Dickinson yesterday said it was an unheard-of thing to have a lawyer testify before a jury as to what the law is. He saw fit to criticise my conduct of this case, because I had called Mr. Lothrop and had him testify upon that subject; but it is not an uncommon thing, in the administration of the law, to put a lawyer upon the stand to prove what the law is. I remember one time being in court when the late Theodore Romeyn, who had practiced law in the city of New York at one time, and it was necessary to prove what the law in New York was upon a given subject, and as
Mr. Romeyn was then a member of this bar, and had pre-
1213 viously practiced in the city of New York—had practiced there some ten or twelve years—he was put upon the stand, and testified as to what the state of the law was in the city o New York, because it became material to know it in a controversy that was in this court.

But, gentlemen of the jury, did it occur to you, did it occur to our distinguished friend here, when he was criticising me he was criticising himself? Did he remember, in his zeal, and in his desire to make a point in favor of his client, did he remember that he was the first man in the case that proved the opinion of members of the bar? I think my brother's recollection is a little short. I think the case had progressed so long that he hardly remembered what he had done himself, because you will remember this, that I

called Mr. Mulliken to testify about the right of way down there, as a railroad man, and as the former manager of the Detroit, Lansing & Northern, and upon cross-examination Brother Dickinson asked him what advice G. V. N. Lothrop had given him upon the subject of condemning the property of the Michigan Central Railroad Company, and got Mr. Mulliken to testify that Mr. Lothrop had advised him that there was no legal objection to it. Don M. Dickinson did that in this case, and he holds up his hands in holy horror later on, and says the attorney for the company in this case has done an unheard-of thing in calling Mr. Lothrop for the purpose of showing just what advice he did give.

Now that there may be no misunderstanding about that, I desire to refer to this testimony, because I think perhaps all of us to some extent have forgotten what took place right here in this court-room.

I read from page 497, the cross-examination of Mr. Mulliken:

1214 "Q. Mr. Baker has asked you about legal difficulties; do you know of any legal difficulties in the way? A. I do not; I am not an attorney. Q. Who is the general counsel of the Detroit, Lansing & Northern? A. Charles B. Lothrop. Q. G. V. N. Lothrop before that? A. He was formerly. Q. That being the best route, was there ever any talk about the power of the railroad company wanting terminal facilities to condemn the Michigan Central's grounds? A. Mr. Lothrop told me at one time there was no difficulty in doing that. Q. Which Lothrop? A. G. V. N. Lothrop."

What did he ask that question for? What did he ask that question for unless he wanted to make you believe that G. V. N. Lothrop advised in accordance with his theory of the law, had given advice that this could be legally done, a man who is well known to all of you, a man who is of the highest reputation in this community, a man who, for the last 25 years, was the recognized leader of the Michigan bar, as long as he was in the practice of his profession, recognized by the bar and the people of the State as at the head of his profession.

Upon redirect examination, as I was somewhat astonished at this testimony, I put some questions:

"Q. You say G. V. N. Lothrop was counsel for the Detroit, Lansing & Northern; did you get his opinion on the right to condemn a line of road across the Michigan Central? A. He gave me his opinion once. Q. In writing? A. No, sir. Q. How long ago is that? A. I think it was the year before he went to Europe."

He went to Europe in 1885, about the time Mr. Dickinson went to Washington.

"Q. Where did you see him? A. In his office. Q. Did

1215 you go there and ask him for a formal opinion? A. No, sir; we were talking over the general situation of our company with the Michigan Central. Q. Did he make any examination of the subject while you were there? A. No, sir. Q. Did he answer you immediately? A. Yes, sir; that he did not think there would be any reason why the Lansing Company could not condemn the line down the Michigan Central if they wished. Q. Down from where? A. From the junction to Detroit; the right of way over

the Michigan Central, over the Michigan Central grounds. Q. He expressed that opinion to you? A. Yes, sir. Q. Was it without any examination? A. It was without any examination. Mr. DICKINSON: That you saw? Q. He answered immediately? A. Yes, sir. Q. Was not that opinion right the other way? A. No, sir. Q. Have you talked with Mr. Lothrop about it recently? A. No. Q. Never talked about it since? A. No, sir. Q. Don't you think that opinion was right the other way? A. No, sir. Q. Don't you think that opinion was right the other way?"

That is the way Mr. Mulliken left it at that stage.

Upon cross-examination he testified:

"Q. You became the manager of the Detroit, Lansing & Northern how many years ago? A. Fifteen. Q. When you became manager, Mr. Lothrop was counsel? A. Yes, sir. Q. And continued so until he went to Europe in 1885? A. Yes, sir. Q. Mr. Baker has asked you whether he gave it without any examination; was Mr. Lothrop accustomed to give you superficial opinions, in your experience? A. I don't think so. Q. You usually could rely upon his opinion? A. I always found his opinions good."

1216 Mr. Dickinson was throwing that out because he supposed the opinion was in his favor.

"Q. You found him pretty level-headed ordinarily? A. Yes, sir. Q. When you say he gave it in conversation with you without examination, you mean he did not examine it there and then? A. He did not examine it there and then; he did not examine it, he simply said he did not think there would be any reason why we could not go over the Michigan Central grounds."

And now he lets the cat out of the bag:

"We were talking in regard to legislation necessary to get into Detroit. Q. Did he refer to a piece of legislation? A. No; upon getting legislation, he did not think there would be anything to prevent it. Q. Did he say anything about a piece of legislation passed in 1881? A. I don't think so; that was the Saginaw matter, was it? Q. He thought there would be no difficulty in getting an act under which you could condemn a right of way from the junction? A. That was his opinion. Q. You were not talking about getting depot grounds in the city? A. No, only the right of way. Mr. BAKER: Mr. Lothrop didn't tell you you could do that without additional legislation? A. No, sir. Q. Did he tell you if you got a bill passed authorizing it it could be done? A. Yes, sir. Q. You would have to get a bill passed first? A. Yes, sir."

That is the testimony of Mr. Mulliken on the cross-examination of Mr. Dickinson and redirect examination by me in your presence, and it shows that the advice that was given was not in the broad sense in which it was stated by Mr. Mulliken in the first instance, that Mr. Lothrop told him in substance that he thought a bill could be passed, and that it was necessary to get a bill passed in

1217 order to do it, and that they were talking about the legislation that would be necessary in order to condemn the right of way over the Michigan Central tracks and grounds into this city. And that was all brought out because Mr. Dickinson undertook to

prove in this case that Mr. Lothrop, one of the oldest railroad attorneys in the State, had given advice to sustain his theory. As it appeared under such circumstances, inasmuch as Mr. Lothrop was within easy call, it was proper to bring him before this jury and find out whether he gave any such advice, and what the advice was. We called him, and it being some years ago, he did not remember the particular conversation; he did not remember the year in which it took place, but he goes on and testifies that that was not his opinion of the law at that time, and it was competent to prove that to this jury for the purpose of showing that he gave no such advice, that it could be legally done without additional legislation.

Now my brother I do not think is always entirely frank, not that he intends to mislead the jury with malice aforethought, but that in his zeal he will claim things as having appeared in the testimony, as having been testified to, that he cannot substantiate, and if I understood him correctly yesterday, he claimed that Mr. Lothrop had not testified that it was his opinion that we could not condemn a right of way along the margin of the Michigan Central. That there may be no question about that, I desire to call the attention of the jury to just what Mr. Lothrop did testify to. After testifying to his connection with the profession and his long residence here, I put this question to him:

"Q. Will you state whether, under the statutes as they existed at that time, the Detroit, Lansing & Northern, which was a road
1218 organized under the general railroad law, had any power to condemn the tracks and depot grounds of the Michigan Central? Mr. DICKINSON: To this we object as incompetent. I desire an exception. A. The Detroit, Lansing & Northern was organized under the general railroad law, and I never supposed that they had any legal authority to condemn the depot grounds of any other railroad company whatever. Q. If there had been any such statute in Michigan, you would undoubtedly have been familiar with it? A. I could hardly answer that."

It is modesty, but we all know if there had been any such statute, G. V. N. Lothrop would have been just the man who would have known all about it.

"A. I could hardly answer that; that would go to the extent of my diligence and knowledge, and I would not wish to affirm that I did know it. I ought to have known it."

If he ought to have known it, he did know it.

"Q. Did you ever learn of the existence of any such statute or any such authority in the law? A. I knew that under special circumstances public franchises for one use could be condemned, under the authority of the legislature, for another use that was paramount. I knew that, and I have no doubt about it, but I did not know or believe that any authority had been given by the legislature to condemn the Michigan Central property, the depot grounds here. Q. That was your understanding of the law? A. Yes, sir; I supposed it did not exist." That is, the power to condemn.

Upon cross-examination he says:

"Q. Your impressions of the law, which you have stated they were and must have been, prior to the passage of the union depot act, was that the franchise of one corporation could not be
1219 taken without statutory authority by another? A. Yes, sir. Q. There is no doubt about that at all, but you have no doubt that by express statutory authority, property of one corporation may be taken by another? A. I think I stated before that I always understood that all property was subject to the power of eminent domain, but that there must be, for the particular purpose of taking one piece that had already been appropriated for that use, to take it for another use, there must be express statutory authority."

Upon redirect examination I put this question:

"Q. Suppose it appeared in a condemnation case that was instituted under this statute, that the property was in use and was needed, and there was no contradictory testimony, could a verdict in favor of the necessity and assessing damages be sustained in this case? A. All these questions of law I shall have to answer with modesty, because I have been long out of practice, but so far as I remember, I never supposed that property that was in actual use and was needed for the use of one railroad corporation could be condemned and taken by another. I should perhaps make one exception, and that is the crossing of railroads, for which special provision was made by statute. I never supposed it was possible to take land already owned by a railroad company as its depot, and used for that purpose."

Upon recross-examination Mr. Dickinson is trying to get at the question of the tribunal that was to decide it.

"Q. Of course the question of the actual use and the need, under the question asked you by Mr. Baker, that there was evidence of the use and need by the railroad company whose property was sought to be acquired, that would be a need in good faith; there would not be any pretense about it? A. Certainly not. Q. For the jury? A. The same tribunal that passed upon the other.
1220 Mr. BAKER: Suppose the testimony was undisputed that it was in use and that there was no contradictory testimony, would it be possible, under our laws, for our courts to sustain a verdict in favor of the condemnation? Mr. CHAREST: By the fact that the Detroit, Lansing & Northern and the Flint & Pere Marquette are leaving the grounds of the Michigan Central without being sent away by the company, does not that show that they do not need all that? A. I should not suppose that that inference could be drawn from that fact alone.

Now, gentlemen of the jury, there can be no question as to what the oldest and most respected member of the profession in this State has said upon that subject. As I understand, one of the last questions that Mr. Dickinson put, he referred to the question of good faith, as to the possession and the need of using a certain piece of property for depot purposes. But that is merely stating it in another way. Of course, if the Michigan Central Railroad Company should acquire a large amount of property that was way beyond

anything that was reasonable for them to own, and acquire it simply for the purpose of keeping it away from other companies, you might conceive of a case where a jury could say that it was not occupied and held in good faith. But, gentlemen, if there was any such evidence to be had, if there was any such evidence that could be used, would we not hear testimony of that kind here? Would we not have some testimony going to show that Mr. Sutherland, whom we called, who is connected with the Michigan Central Railroad Company, was entirely mistaken when he testified that the property was in actual daily use for the Michigan Central road, and the yard was simply overflowing,
1221 and all we would have to do to make that apparent to any man, would be to go down and look at the property, to go down and look at the immense business that railroad company is doing. According to the testimony of Mr. Joy, years ago they took their engines and machine shops out of that yard to get more room. They have been enlarging their yard from time to time; not only that, but they have encroached upon River street, and have got 13 or 14 tracks that they use for yard purposes in River street, switching backward and forward daily and nightly, with practically a railroad yard from River street to West Detroit, with four or five or six or eight tracks the whole length, and more business done upon those tracks and upon that yard, I should judge under the testimony in this case, than all the railroad business in the city of Detroit. And still we have a lawyer, learned and distinguished counsel, coming in here and arguing to a jury of his fellow-citizens that they would have a right to decide that we could take that property from the Michigan Central and build an elevated road upon it in spite of them, under an existing statute, which is very carefully drawn and is very explicit, that it cannot be done unless the property is not in actual use and is not needed. That statute does not say or is not needed, and you should remember the full significance of that. Perhaps some of you have got an idea that all that it would be necessary to do would be to show that they could get along without it in some way; but the first condition of the statute is, if it is in actual use, there is no power to condemn it. If it is not in actual use, you cannot even then condemn it, if it is vacant property there, with not a rail upon it or a building or anything upon it; if it was not in actual use in any sense what-
1222 ever, you could not even then condemn it unless you could show that it was not needed in the immediate future for the transaction of the business of that company. And it does not make any difference with us in that form whether you would have framed a law, if you had been the legislature, that would have been more liberal. It does not make any difference what you would like to make the law, if you had the power to make; the law is as it stands upon the statute book, and we and you are powerless to remedy it. The law-making power is vested in the legislature. It is not vested in union depot companies; it is not vested in jurors who are trying union depot or other condemnation cases.

I think the suggestion of good faith is the suggestion of Judge

Chipman. Realizing, I think, a little more fully than Brother Dickinson, the difficulties attending that, he suggests that you might properly raise an issue in the Michigan Central case as to the good faith of their occupying that land. But I have already pointed out to you that in order to go on with this enterprise at all, we had to take the statute as it is. We had to take the opinion of the State railroad crossing board, and we had to go on under the conditions that existed, and we had no reason to believe, this company had no reason to believe that it was possible for them to acquire a right of way along the property of the Michigan Central railroad, because that company was necessarily antagonistic to this enterprise.

Brother Dickinson undertook to assert the other day that there was some sort of a contract or agreement between these companies, by which they were acting in concert, and he disclaimed any connection with the Michigan Central. But, gentlemen, can't you see; can't anybody see that the Fort Street Union Depot Com-
1223 pany, on the corner of Third street, is going to have a better location for passenger business in this city than the Michigan Central? Can't you see that when you leave the Russell house or the city hall or the Cadillac or the business portion of this city, that this depot is going to be a better location than the Michigan Central; more convenient and more accessible? and do you suppose there has been a time, from the inception of the enterprise down to the present time, that they would not take the enterprise by the throat and throttle it if they could; and were they not, according to Mr. Dickinson's own story, trying to engage him in that work? But instead of working for them, he has taken up the case of Mr. Backus and some other property-owners, and he says that he did that and refused to take a retainer from the railroad because he did not want to be a railroad attorney; and he undertook yesterday, I think, to reflect upon the testimony or impugn the motives of Mr. Lothrop, because he asserted that he was a railroad attorney from the ground up. Now, Mr. Lothrop has lived here a long time; he has always had the confidence of this community; I think he has had the confidence of his clients generally. He probably has no aspirations to be President of the United States. He has simply practiced his profession to earn what he could in the profession, for the benefit of himself and family. If Mr. Dickinson, as a politician, desires not to act for railroad corporations, it is his right, and it is his privilege; but anybody could see that it would be from prudential, political grounds. As far as I am concerned, I am in the practice of the profession for the purpose of getting a living. I have no other way of getting a living. Mr. Backus at one time saw fit to employ me in litigations with the union depot
1224 company. I was very glad to work for him. I found him to be a good client. We got along first-rate together. We tried two cases for what they were worth. I endeavored to try them upon their merits. We succeeded reasonably well in that litigation, and our relations have always been friendly. He certainly could not expect me, not having a general retainer from him, to

decline employment that would extend over a period of two or three years to defend one of these cases for him. It is a mere matter of business so far as I am concerned, and while I have the utmost respect for Mr. Backus, and would be glad to serve him in a professional capacity at any time, I was under no legal or moral obligation to refuse the retainers I received from the union depot company because I had been at one time his attorney.

It will be well enough to understand that there is a great deal of cry about railroads, that there is a good deal of claptrap to it, that there is a good deal of humbuggery about it. One of the things that is done more frequently than perhaps anything else in political conventions or in gatherings of politicians, is to pass a resolution condemning land grants that were made to the Union Pacific and the Northern Pacific Railway Company. It is locking the door after the horse has been stolen. It does not cost anything to pass resolutions of that kind at the present time. It does not oppose any enterprise, and it is awfully cheap. It is easy enough to make a declaration of that kind; but in my judgment, and I am somewhat familiar with the country along the line of the Northern Pacific railroad, it is one of the biggest things that the Government of the United States ever did, to open that whole country up to settlement in some way or other, and it is a fact that you
1225 can buy land today of the Northern Pacific Railway Company, on their grant, at a less expense than you can buy it of Uncle Sam. There are two sides to every controversy. There are two sides to all these questions, and it must be apparent to any man who has a head on his shoulders, that the railroad system of the United States has made this country. What would the United States have amounted to if we had not gone forward in enterprises of this kind? How could the Michigan Central have ever been built and successfully operated, after the State had undertaken to build and run that railroad, and had become utterly bankrupt, if the legislature of this State had not seen fit to pass the charter of 1846, and Mr. Brooks and Mr. Joy had not gone East, and upon their knees implored men to raise the necessary amount of money to consummate the purchase and go on with it, and succeeded the last day of the six months that they were given; an improvement, gentlemen, that marked a new era in the history of Michigan, that built our southern tier of counties, and made the State of Michigan the great, growing and beautiful and wealthy Commonwealth that it is.

But one railroad does not make a town. It is a mere start. One railroad does not make a great State. We find that Mr. Joy and Mr. Brooks succeeded in organizing the Michigan Central Company, that they built that road, fought through all difficulties, and they conducted it successfully and satisfactorily for a number of years. But having some foresight as to what can be accomplished in the future, he saw fit, in his management of the road, to encourage collateral lines. We find that he aided in the development of the Detroit, Lansing & Northern, that it was under his manage-

1226 ment that the line from here to Bay City was built. We find that he encouraged these enterprises and aided them, and assisted them, until the stockholders of the Michigan Central became disgusted with him because he was spending too much in railroad improvements and railroad development. They wanted more dividends and less improvements, and finally Mr. Vanderbilt bought the road, and Mr. Joy ceased to be connected with it; but he tells you how along in the early 50's he went over to the city of Chicago, and Chicago was then a smaller place than Detroit then was; he shows you how he aided in the construction of the Chicago, Burlington & Quincy, one of the greatest railroads in the whole Northwest, and how he has been familiar with the railroad business, and has aided and assisted in the development of the railroad business in Chicago, and in this State and in this city, and has ever, gentlemen of the jury, has ever been true to the interests of the city of Detroit.

Some years ago it was thought advisable to bring the Wabash road in here. It was apparently a successful road at that time. It had a terminus at Toledo, and it was proposed to buy the Lake Shore of Mr. Vanderbilt and come up to this city upon that line, but Mr. Vanderbilt would not sell it. He owned two lines down there and would not sell to the Wabash, so it was finally decided to build a branch line in from Butler. They located depot grounds at the foot of Twelfth street, and it was thought that other companies, the Detroit, Lansing & Northern, the Flint & Pere Marquette and the Grand Trunk would come in there, but the Grand Trunk made another deal by which they acquired the D. & M. property, and it was thought impossible on the part of these companies to go on with it, until the Canadian Pacific came along and was
1227 willing to take a quarter interest. Detroit has grown during all these years, and if we are to continue on the road to prosperity, we ought to be willing to aid somewhat in the establishment of proper railroad facilities within the city limits. When you come down to the exact situation, it would appear to be quite clear that the proposition to build a railroad along River street to connect with these depot grounds is a sensible, intelligent and proper proposition. If it came through one of our principal streets and would destroy a large amount of residence or business property, there might be some objection, but it goes along a half mile of street, one side of which and a part of the other side is devoted to railroad purposes.

Outside of a few large institutions, the property is in a dilapidated and in a transition state; the property is not property that will be seriously affected in its market value, in its real value, by the construction of this road, and the route that has been selected is simply the most practical, the most sensible and the most proper route that can be picked out between the Twelfth Street yard and the union depot grounds. And I desire, in this connection, before I forget it, to call your attention to this matter of a viaduct for teams, because there is a difficulty in connection with that, that my learned friends do not seem to comprehend entirely, and, perhaps, some of the jury-

men do not see fully the significance of it. The statutes of this State provide, that when, in the judgment of the railroad commissioner the public safety or the public interest requires it, he may order any railroad company, whose track crosses a public highway, to put in a gate and maintain a flagman there, or to put in some sort of an overhead or underneath crossing. It is done in the exercise
1228 of what lawyers call the police power, that is, the governmental power, the power of the legislature to compel the company to do something in the interest of the public safety. That power is carefully limited to the street. The railroad commissioner is authorized to compel the company to put in a crossing, which, of course, must be connected at one side of the crossing with some sort of a superstructure to the other side of the crossing. When we apply to the State railroad crossing board, of which the commissioner of railroads is one, he directed that in building this elevated road along this highway a viaduct be put in there for teams. We contested that, we objected to that, because if the viaduct for teams was put in right in the highway, where it ordinarily would be put in, where it is put in on Jefferson avenue and on Fort street, it would occupy the very space where we desired to build the elevated road. If you made an approach as you approach the Michigan Central crossing and then have a bridge and went down on the other side, which is as you do on Fort street, and occupied the width of the pavement, you would have your highway and your bridge right exactly where we want to put the elevated road; so we contested that. The Michigan Central urged this, because they thought, perhaps, they could drive us out of the street entirely, that they could get the commissioner to approve of it; but finally the commissioner approved of the map, but ordered that such a viaduct should be put in by the two companies, reserving the right to approve of the plan that they should adopt. So that we were compelled, when we came to build that crossing, to submit the plan to the railroad commissioner, and he approved of the plan, by which we are authorized to build the elevated road along that highway, just as we contemplated, but requiring the two com-
1229 panies to build a viaduct on the south side of it for teams, about from 13 to 15 feet being in the highway on the sidewalk part on the south side, and the other 9 or 10 feet that are necessary, being upon the property of the Michigan Central; the commissioner being authorized to make such an order because the Michigan Central wanted it built, and was more interested in having it built there than they were in the union depot project. It is sensible, then, is it not? Here is your elevated road that will run along there. We had a controversy with the Michigan Central as to whether that would be left open; they wanted to put abutments there. But the commissioner decided that it should be left open, but he also held that the two companies should put in this viaduct on the south side. Now, what sort of condition would that part of the enterprise be in if we went along the margin of this property with the elevated road? Let us see where Mr. Backus would be if we put the elevated road along the margin, taking up 25 or 30 or

40 feet, whatever would be necessary to build the elevated road along the margin, and we put the elevated road where it would have to go, where the commissioner has power to compel them to put it—where he said he would eventually compel the Michigan Central to put it anyhow—put the viaduct for teams in the highway, where it would be necessary, and it would be necessary to make an approach alongside the Michigan Central crossing, and you cannot do that without raising the grade in front of the property of A. Backus, Jr., & Sons the entire distance, and cutting him off entirely, giving substantially the same kind of a structure in front of him there as he has now got on this Fort Street front, where he testified they have raised it one time and another five or
1230 six feet. And still, when we make a fight with the Michigan Central and insist upon having that highway open, so that he can go across there just the same as he could before, so that the crossing is open for his teams if he desires to go that way, and also affords him another crossing o that if the railroad engines and trains are standing upon the ssing, he can go slightly to the west and go up overhead without struction and without difficulty—when we make such a fight, a d obtain such facilities for him, he insists that we shall construct this work in such a way as to block him up there absolutely; and all you have to do is to look at that approach and the situation of that property, to see that what I state to you is absolutely true, as you will find here by this model; that the approach is in front of his property, and if you draw this up further towards the Michigan Central crossing, it would be necessary to have this approach running down on the highway there, so as to cut off his premises entirely. Is it better to elevate the grade there? Is it better to commence on the hill and come up there with this viaduct for teams, or is it better to leave it open so that he can drive in there just as he sees fit, and unload his lumber just as he now unloads it, and go on with his traffic without the least obstruction to his ingress or egress? And the only answer that was heard on the other trial and on this trial to that proposition was to put the viaduct away over beyond, to still go south, if you went along the margin and put the viaduct away over beyond, make a road away over on the Michigan Central property, at right angles, and go over the Michigan Central property in that way. What sort of an interference would that be with the Michigan Central yard? How long do you suppose the Michigan Central people would fight that? How long do you sup-
1231 pose the merchants and people of this city, who desire to do business with the Michigan Central Company, would consent to such an interference to one of their principal means of communication and of business and of traffic? Because there can be no question about the utility of the Michigan Central property and its facilities to the business men and people of this city, and no one who has any regard for his own interest or for the interests of this city would undertake to curtail those facilities. So that when you come to look at this question just as it is, when you come to look at this controversy in all aspects, from every possible standpoint,

there can be but one intelligent answer to the proposition or to the question that is to be submitted to you, as to whether the public necessity justifies the taking of this right of way. We have had jury after jury that have so decided, both in taking the union depot grounds themselves, and in going along the highway, and it is only a matter of time when we will have another jury render a similar verdict, because it is absolutely ridiculous to believe that Mr. Backus and his lawyers have power or influence enough to stop this enterprise. Some one or more of you may think that you are wiser than the legislature, that you would like to change all this, that you would like to take the Michigan Central by the throat and compel them to give up a portion of this property; but it is a herculean task for one or two men to say or to undertake, it is a bigger task than the Fort Street Union Depot Company desires to undertake, it is something beyond any probable or reasonable reach of any man. The company has gone along too far, the enterprise has gone along too far, and necessarily they have not gone along with this enterprise in a blind sort of way, in an ignorant, stupid sort of a way. Union depots and railroad tracks and
1232 terminal facilities cannot be built without money; the capital has to be raised, the money has to be paid in by the stockholders or borrowed, and this whole enterprise is as sensible and business-like a proposition as has been made in the city of Detroit since I have had the pleasure of residing in this beautiful city.

We ask nothing unreasonable, we ask nothing unjust. We simply say that this is a practical route, that it is a feasible route, that it does not interfere with the facilities or the ability of the Michigan Central to do a railroad business in this city, and, in addition to that, it does not seriously interfere with Mr. A. Backus, Jr., or any other property-holder on the north side of this street. It is just simply an exaggeration, it is just simply an attempt to get a large sum of money where they are only entitled to a very small sum, where they do not show any desire to accommodate themselves to the existing situation, and to adjust their premises and their business to what is to come. Can you stop this improvement in any such interest?

(Mr. Dickinson here excused himself, explaining that there was a meeting of the citizens' committee at 4 p. m., and he left the court-room.)

We must all remember that we cannot live in seclusion, we cannot live out on the open plain with nobody around us, unless we want to be a hermit, we cannot live in a great city in that way, and if you live in a great city you will have a neighbor right close to you, his back yard right alongside of yours, and he will have a chimney alongside of yours, and if he burns soft coal at certain seasons of the year you will be annoyed by it; you cannot go anywhere in a thriving, industrious and go-ahead population but what you have got to respect the rights and the situation of
1233 others. There is no one who can monopolize the whole thing and say, "My precincts and my property are so sacred

that I shall not submit to any inconvenience and any annoyance in the common good." And I noticed that in these fire returns that Brother Dickinson brought in here, when we came to examine them there were only three or four fires out in the outskirts of the city that had been fired by locomotive engines, and that there was a large number of fires that had been occasioned in this city by smokestacks and chimneys; and if there is any sense in their argument at all, why you should not have a chimney in the city, it might set the adjoining property afire; you should not have any manufacturing institutions, you should not have anything because you might set A. Backus, Jr., afire. I wonder if he thought that when he built that factory down there and put up that smokestack and made himself a nuisance to Mrs. Barbara Steadley, who owned the adjoining property—residence property there, where the old lady lived for years and insists on living just as long as she has life in her body, because she is attached to the place, where undoubtedly years ago it was a beautiful place to live. We must remember that if this city is to grow and develop, new conditions will arise, and that everybody should go upon the principle that they should live and let live, and when an enterprise of this kind comes along, they ought to be willing to adjust themselves to it and take a reasonable compensation for their real or imaginary wrongs.

What is this elevated road that is to be built there? It does not take an inch of their property. It is to be built so the entire paved portion of the street is to be spanned by this superstructure, with 14 feet in the clear, and it is to run along the highway there, 1234 and run along the highway where it would be necessary if the union depot company had never been dreamed or thought of, where it would be necessary in the course of time to put in a viaduct for teams, a bridge just as there is over Fort streets and all the other streets, almost away out to West Detroit; it is a mere matter of time when the public interest would require that such a viaduct should be put in for the safety not only of people that travel in the Michigan Central cars, but for the safety of people who travel along that highway. We are endeavoring to get those put in all around the city, and strong effort is now being made to have a crossing put in on Woodward avenue, and it is expected that it will be accomplished in the near future, and ultimately there will not be a street crossing going out on any street in the city of Detroit, a grade-surface crossing. It is a mere matter of the growth and development of this city, when the public interest and good will require it. Mr. Backus' property is situated so that if this viaduct was ordered in there, it would be necessary to injure his property to some extent by making an approach. That is the difficulty with putting in these crossings. You go out Woodward avenue, and if you put in an overhead crossing for teams, you have to go up there and elevate the grade of the property on each side, and it will do thousands on thousands of dollars' worth of damage, and if you raise the railroad some feet, as it is proposed, and you go under with your passageway for teams, then you will have to make a cutting so that you could not get up to the adjoining

property with a vehicle; you would have to start back and make a cutting so that you could come down and get underneath there, and that would damage the adjacent property, but not so much. So that this is the kind of property, and this is the kind of superstructure that we propose to put up
1235 there. We propose to put up an elevated road that will not stop their egress and ingress to their premises, where they can carry every load of lumber, where they can take away every load of shavings, every load of sawdust, every load of any sort of product they see fit to make there, with just the same facility after the road is built as before; and, in addition to that, we will furnish them at the side of the present crossing additional facilities in the shape of an overhead crossing, where they can go when the railroad blocks the street up, as it frequently does. And because we want to do that, Mr. Backus comes in here and claims that you should allow him the entire value of his property, the sum of $360,000, when he cannot show, and no man can show, that it will have any appreciable effect upon his property. And in aid of such a demand, in settling such a cause, learned lawyers come before you and ask you to find that there is no public necessity for the improvement, and claim that you can make such a decision under a statute, which is explicit that it shall not be done where the property is in actual use and is needed for the purposes of the corporation; and in this connection, in order to give Brother Chipman and Brother Dickinson an opportunity to reply to these cases, and as it will be a matter of some interest to you in your deliberations, I desire to call your attention for a few moments to some of the cases that have been decided, because there is nothing difficult about this question of law, and if there is any confusion about it, I would be very glad to have you request the opinion of the circuit judge, if you desire; yet, if you will take the pains to think about this and reason about it, there is no question about where you will come out about it; it is too plain and too simple; the most learned and brilliant lawyers on God's earth could not convince you that black was white.

1236 They have had a controversy of this kind down in Pittsburgh, and I refer to the case of the Pittsburgh Junction Railway Company's appeal, 122 Penn. State, 511, and I desire to read briefly from this opinion. A railroad company down in Pittsburgh made a map and survey and laid out a railroad through the yard of another company; this company desired to go through the yard of another company; I suppose it was under some such advice as my brother Dickinson has concocted for this case. "In pursuance of this object it surveyed and located a route through the plaintiff's yard, cutting through the coal yard, repair yard, and about 24 feet of the coal chute. Not being able to agree with the plaintiff, the defendant filed its bond in the court below in accordance with the act of assembly. Whereupon the plaintiff filed this bill to restrain defendant from further proceeding to lay its track upon the location in question. The court below granted a preliminary injunction, and upon final hearing made the injunction perpetual."

That is, if we had laid out our road across the Michigan Central track and undertaken to go ahead there, the Michigan Central could file a bill for injunction, just as this company did, and in that case it would be litigated and settled.

Upon the hearing before the court, it was pointed out that the location did more damage than if they changed it, and the court refers to that: "The master held that such action" (the change in the location) "was justified by a certain statute," that was referred to. "Upon exceptions to the master's report, the court below held that the act of 1871 had no application, for the reason that it referred to railroad crossings alone, while this was not a case of crossing at all in the proper sense of the term." That is, going
1237 through the yard longitudinally was not the case of one railroad crossing another in the sense in which it is ordinarily understood. "In this we think the learned judge was clearly right."

Judge CHIPMAN: We make no claim of that kind, under the crossing provision.

Mr. BAKER: That is, you do not claim that this is a crossing.

Judge CHIPMAN: Of course we do not. We never have claimed it.

Mr. BAKER: That is undoubtedly true. But I will come to something else in this opinion soon.

"The act of 1871 relates to crossings of lines of railroads by other railroads. There was no attempt here to cross the line of plaintiff's road. It was an attempt to run through the plaintiff's yard, and the crossing of some of its yard tracks and switches which were merely incident to the use of its main line. As was well observed by the court below: 'The attempt is not simply to cross the yard and tracks with a common use, but absolutely to take from plaintiff a portion of their yard for the sole use of defendant.'" And they hold that they would not permit it upon that ground, that it would not be sustained as a crossing, and therefore was defective.

Judge CHIPMAN: We accede to that entirely. There is no such statute as we have here.

Mr. BAKER: Now I come to the statute part of it.

"We might well stop here and affirm this decree. We are in no doubt, however, as to the main question. While the franchises of a corporation are property, and may be taken under the power of eminent domain, yet when property has been already taken
1238 for one public use by a corporation, it cannot be taken by another corporation for another use, except by express grant or by necessary implication."

Judge CHIPMAN: Yes, sir; that is our doctrine.

Mr. BAKER: "The principle is well settled that the lands or right of way occupied by one railroad company for its corporate purposes, cannot be taken as right of way by another railroad company, except for mere crossings, and then only for crossing purposes, and not for exclusive occupancy."

Judge CHIPMAN: That is our doctrine exactly.

Mr. BAKER: Yes, of course. I will come to you step by step.

"It was urged, however, on the part of the defendant that the

yard of the plaintiff is larger than is necessary." That is what they claim here, trying to have you believe that the Michigan Central yard is larger than necessary, "and that it could be so rearranged as to accommodate defendant's tracks, and without serious detriment to the plaintiff, either in the present or in the future. The evidence upon this point is conflicting, and we will not discuss it." * * * "We are not embarrassed with the question that would arise if the defendant company could not build its road without laying its track through the plaintiff's yard. The location claimed for defendant is a matter of economy, not of necessity."

In other words, gentlemen of the jury, the only circumstances under which, in any of the cases we find in the books, one company will be justified in taking the property of another company is where it is absolutely physically impossible to build the road as authorized by the legislature, but if there is any other route between the two termini that the legislature authorizes the road to be
1239 constructed upon, in States where they have a special act fixing the termini, the only case where there would be a necessary implication that you could take the property of another company would be where, in order to build the road at all, you would have to go right through the property—no way of going round it or at the side of it, or anything of that kind. They say you cannot do it unless there is an express grant or necessary implication.

Judge CHIPMAN: Is there any such statute in Pennsylvania as there is here?

Mr. BAKER: No, there is no such statute. I will come to that statute. You know that statute has been read here time and time again. That statute I pointed out to this jury this afternoon, and it has been argued here from the commencement of this case down to the present time, does not authorize the taking of a right of way over the property of the Michigan Central Company, where, as appears in this case, that property is in use by that company.

Judge CHIPMAN: On that point we contest; but fairness requires you to state to this jury in connection with these cases that there is no such statute in Pennsylvania.

Mr. BAKER: Certainly.

Judge CHIPMAN: There was no such statute in this case; there is a statute involved there in Pennsylvania about crossings. We have already said that the effect of that statute is exactly as laid down in this law, but they have no such statute in Pennsylvania, and consequently when the Pennsylvania court decide that they could not take this depot, it is because there was no law; that is the reason—there was no statute for it. I notice my friend, Mr. Freud (a juror), shaking his head very approvingly. I wish the jury would put that question, because it is their duty.

1240 Mr. BAKER: There is no doubt about that position, Judge Chipman, and I have driven you right where I wanted to drive you, right where the authorities drive you, and where you have got to stand—where Mr. Dickinson has not stood—that you

cannot condemn this land unless you can show a statute, and you cannot show any such a statute authorizing it.

Judge CHIPMAN: That is the very point in issue here.

Mr. BAKER: That is the point in issue; but I want the premises that lead up to that point established beyond question. You make a concession here, but Mr. Dickinson has not made it.

Judge CHIPMAN: That is the point in issue here, whether there is such a statute, and these cases that are being read now have no application to it; they do not touch upon any such state of facts or law as to whether that statute permits us to do that or not. We think that if you are intelligent men, gentlemen of the jury, we can convince you of that beyond any peradventure.

Mr. BAKER: You may try to do that, but unless the jury are color-blind, as suggested, you will not succeed. I have the utmost respect for Judge Chipman, and I desire to pay the utmost respect to him on the trial of this case, but I have argued somewhat from this statute this afternoon, and I desire to establish the proposition beyond any possible question or controversy with every one of the jurymen here, that this property cannot be taken unless there is a statute that authorizes it.

Judge CHIPMAN: That I will agree with you upon, and that case does not touch the statute at all.

Mr. BAKER: I agree with you upon that.

Now, here is another case I will call your attention to,
1241 gentlemen of the jury, Housatonic Railroad Company *vs.* The Lee & Hudson Railroad Company, 118 Mass., p. 391, where it was claimed that because the legislature authorized by a special act, which is permissible in that State, that a railroad should be built between two towns, and it was practicable to go upon the same route, upon the location of another railroad company, and it was claimed that this implied a right because this other railroad was between these two towns, where they could do it; and this is what the court says about it:

"No express authority is given in the charter to locate its road within the location of the Stockbridge & Pittsfield Railroad Company, except so far as the third section permits it to enter upon, unite with and use the road of the Stockbridge & Pittsfield Railroad Company at West Stockbridge; nor has any authority been given by the plaintiff, as lessee of the Stockbridge & Pittsfield Railroad Company, to enter upon such location, except as appears by several agreements made between the plaintiff and the defendant, permitting the defendant to do so at certain points on the line of the Stockbridge & Pittsfield Railroad Company. The encroachments complained of are at other points than those authorized by the charter and the agreements. A charter to build and maintain a railroad between certain points, without describing its course and direction, but leaving that to be determined and established by the corporation, as provided by the general laws, does not *prima facie* give any power to lay out the road over land already devoted to and within the recorded location of another railroad. It is not to be presumed that the legislature intended to allow land thus de-

voted to one public use to be subjected to another, unless the
1242 authority is given in express words or by necessary implication; and such implication can only be found in the language of the act or from the application of the act to the subject-matter, so that the railroad could not be laid, in whole or in part, by reasonable intendment, on any other line. In the defendant's act of incorporation there are no such words, except those already referred to in the third section, and it does not appear that there was any physical necessity that the defendant's location should be made within the location of the Stockbridge & Pittsfield Railroad Company, as appears to have been done in many instances recited in the master's report."

Judge CHIPMAN: There is no such act in controversy there in Massachusetts as we have here.

Mr. BAKER: There is no question about that, and there is no such act in Michigan as will authorize it.

Judge CHIPMAN: That we will contest to this jury.

Here is a decision by Chief Justice Gray, now one of the justices of the Supreme Court of the United States, in 124 Mass., p. 370 (Boston & Maine R. R. *vs.* Lowell & Lawrence R. R. Co.):

"The general principle is well settled, and has been applied in a great variety of cases, that land already legally appropriated to a public use is not to be afterwards taken for a like use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication."

That is, there must be a plain and unequivocal act of the legislature showing that they intended that one railroad company might take the property of another.

And then he cites other railroad cases: "For instance, a highway cannot be laid out across a navigable river without the au-
1243 thority of the legislature, and such authority is not to be implied from a general statute empowering courts of sessions of county commissioners to lay out highways."

A JUROR: That is, you have to show the authority?

Mr. BAKER: Yes, you have to show the authority.

Judge CHIPMAN: That is what we are doing here.

Mr. BAKER: Here is another case in 91 N. Y., p. 552 (The Prospect Park & Coney Island R. R. Co., appellant, *vs.* S. Stryker Williamson *et al.*, respondents).

The railroad had terminal facilities down on Coney island, and the township authorities down there undertook to lay a highway right through the depot grounds. This is what the court of appeals say:

"We do not think it is now open to the officials of the town to question, collaterally, in this action, the propriety of the condemnation, on the ground that the land taken was not necessary for railroad purposes, and to appropriate it without any special legislative authority to the purposes of a public highway."

That is, they make the same decision, that there must be special legislative authority in order to interfere with property that is acquired and used for depot purposes.

"The general principle, that land once taken and appropriated to a public use pursuant to law, under the right of eminent domain, cannot, under general laws and without special authority from the legislature, be appropriated to a different public use, is well established," citing Mills on Eminent Domain.

Here is another case, 30 Minn., 359, The St. Paul Union Depot Company *vs.* City of St. Paul. The St. Paul Depot Company had a tract of land in St. Paul on which they had a union depot, and the city of St. Paul, for some reason, thought it would be a good
1244 thing to lay out a highway right through it, just the same as if this city would go down to the Michigan Central yard, say at the foot of Eighth street, and lay out a highway right through the heart of River, it would be the same kind of a case; that is what they tried to do in St. Paul. This is what the court says about it:

"The fact conclusively appears that the land in question is needed and is actually used for a public purpose, authorized by plaintiff's charter. This places plaintiff's rights upon the same footing as if the necessity and propriety of its appropriation had been preliminarily determined by the court or legislature. Plaintiff's beneficial use is practically exclusive, and cannot be appropriated or taken away except by express authority of the legislature or by necessary implication." And they hold that the city of St. Paul had no power to open the highway through the union depot grounds.

I will read to you from another case, in 122 Ill., p. 473 (The Illinois Central R. R. Co. *vs.* The Chicago, Burlington & Northern R. R. Co.) The court say:

"The only question which we shall consider is whether the property sought to be condemned is subject to be taken by appellee for the purposes specified in the petition. That the legislature of the State might, subject to the conditions imposed by the constitution, take the property for the purposes in question, we have no doubt. And we think it equally clear that the legislature might, by a general law manifesting such intention, authorize one railroad company to condemn a part of the right of way of another, to the extent and for the uses proposed in this case; but without such legislative authority or enabling act, it is manifest the taking
1245 of it would be unauthorized. This is conceded. Such being the case, the question resolves itself into this: Is there any existing legislative authority for taking property, circumstanced as this is, for the purposes and in the manner proposed."

And then he reviews the provisions of the general railroad law in Illinois, and they are substantially like the provisions of the railroad law in Michigan, that there is no general legislative authority in that State.

Judge CHIPMAN: Does he quote any such statute as we have here?

Mr. BAKER: No, sir; they never passed any such statute in that State, and, according to the contention of my brother Chipman, the only question in this case, that he makes continually, is whether this statute authorizes it, and it is too plain for an argument, even with

all my distinguished brother's ingenuity, he cannot show that it can be done under this statute. As a matter of fact, the language of the act is so carefully drawn that the wonder in the case is that Judge Chipman and Mr. Dickinson would ever think of making any such argument before this jury. Does it not say, gentlemen of the jury, in so many words, that the property must not be in use? Let us look at that a minute. We cannot read that too often.

Juror CHAREST: I took notes of that when you read the law, and after what Mr. Lothrop had said, that one railroad could not take the ground of another railroad for the use of a depot, all for the same purpose. I took notes of the law that you read, that a railroad company could not take the grounds of another railroad company for the same purpose, for depot purposes.

Mr. BAKER: Or any other purpose. It does not make any
1246 difference what other purpose it is for. It does not make any difference whether they want to use it for a railroad track or depot purposes. All we want up and down there is a right of way to run a railroad, but the question is whether they are using the property, not what use we want to make of it. We might want to put a depot there. Mr. Lothrop did not testify that we could put a railroad there, and could not put a depot there. I will read the statute to you again—sec. 3357. Now, I suppose that the gentlemen upon this jury have the ordinary knowledge that people usually possess of the English language. Here is the statute. Now, remember the position of it. Brother Chipman concedes, and he has to concede, when I cite the decisions of New York, Massachusetts, Pennsylvania, Illinois and Minnesota, three of them are among the best law States in the Union, that is, we get our law from Massachusetts, Pennsylvania and New York, because there has been more litigation in those States than all the other States put together, I guess, so that they are the authority that this State holds to; when I cite all these authorities to them, to avoid the effect of them, Judge Chipman concedes it; so that we start out with the proposition that we have got to go by the statutes, the authority to do this thing, and the only thing they have pointed out is this statute; and assuming that you have the ordinary knowledge of the English language, I would like to read this statute to you. Remember it is a grant. They undertake to give authority, that it cannot be extended by implication, that it must express the authority; it is like a power of attorney that you give a man to sell a horse; it would not authorize him to buy one for you; or a power of attorney to deed one piece of property; it would not authorize him to deed another piece of property or do something else; it is a grant of authority, and it gives just as much
1247 authority as it confers, and nothing else. Now, what is there here? "When any part of the land of any railroad company in this State, in and adjacent to its depot ground,"—well, this property down here is in and adjacent to the grounds of the Michigan Central,—"is not in actual use for depot or other purpose pertaining to the operation of a railroad,"—it cannot be expressed in plainer language; I defy any man to use language that

expresses it plainer than that does,—"is not in actual use for depot or other purpose,"—it does not have to be used for depot necessarily, but if it is in use for any purpose pertaining to the operation of a railroad, a side track, an engine-house, a baggage-house, an elevator, or any other thing that pertains to the operation of a railroad; if it is not in actual use for any such purpose, and if — is not in use, there must be something else; if it is vacant, unoccupied property, then there is another condition; "and such land is not needed by said railroad company for the purposes of a depot or other terminal facilities." If it is not in actual use and is not needed for a depot or other terminal facilities, what can be done? "It shall be lawful for any other railroad company organized as aforesaid, needing such land for the purposes of a depot or terminal facilities,"—it is not limited to a depot—any terminal facilities, a side track, connecting track, or anything of that kind,—"to acquire the same in the same manner as may be now done for such purpose from individuals. The question of actual use and of necessity for the aforesaid purposes by said railroad company owning and not using the land,"—reiterating that—owning and not using it—"shall be determined, in addition to the other questions, as provided by law in cases of condemnation of lands for the purposes aforesaid, and the same proceedings in all respects, as near as may be, shall
1248 be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals." And Brother Dickinson will read that last clause to you and ask why, if there is a question of necessity and not using the land, why it provides that there is a jury to decide it. It does not say a jury, but commissioners decide the question.

Judge CHIPMAN: And that needs a jury as well.

Mr. BAKER: Undoubtedly; it applies to commissioners if commissioners are appointed; and it applies to a jury, but that is merely providing for a tribunal to decide it, when there is something to be decided, and there can be nothing of that kind, there can be no question of that kind to be decided until you have a case where it is not occupied, and the question comes up whether it is needed or not. I can conceive of a case where there would be a question of whether it was actually occupied, that is, suppose they had a piece of land, they did not have any railroad track upon it, and occasionally they piled freight or something of that kind on it, only used it occasionally, and the petitioning company would come up and say, That is not occupied, you do not use it, and they would come in and say, We do use it; and, of course, that would be a case that would have to be passed upon and decided. But is there any fact or circumstance in this case that would lead you to believe that any jury that could be impaneled in the State of Michigan would decide that the Michigan Central is not using that property down there; and if you did render any such decision, do you believe that there is a court in Christendom that would allow it to stand? Our courts set aside verdicts every day; the supreme court set aside verdicts and judgments of the courts below constantly, because there is a
1249 lack of evidence upon certain points; and here is the Mich-

igan Central using this property every day; that is the testimony. You might go down there and say, Well, these cars have been standing there a long time. Of course, they may stand there a day or two, but the testimony is that they are changed every 24 hours, ordinarily. Of course, a car might stand there longer if there was some freight undisposed of, but, every 24 hours, according to the undisputed testimony in this case, those cars are handled along down there along this margin. So that it is in use, and it is in use in good faith. Brother Chipman says he could get up some controversy before some jury about that. Of course, you can claim anything. That thing has been going on ever since Adam, I suppose, that people are claiming something unaccountable and wonderful and mysterious. And there is no accounting for the ability of them to create a controversy; but in the practical affairs of life, in the practical administration of this statute, is it not perfectly plain, is it not just as plain as anything can be, so almighty plain that you cannot argue about it, it is self-evident, it is an axiom, it is so plain that you cannot bring any reason to support it that is so strong as to state it; here is this corporation owning this property down here, the Michigan Central, acquired under their special charter, in daily use, and doing more railroad business than all the other railroads in this city together, and stretching out to West Detroit; and then my friends learned in the law, men supposed to have respect for the intelligence of their fellow-citizens, stand up here and argue and contend and insist that this means something else, and that there is some legerdemain or some hocus-pocus in some way, by which they could get a decision that we could condemn that property. Suppose there was a question as to whether the Michigan Central really needed that, as to whether they could raise a question of good faith, where would you get your testimony, where could a man come and testify that the Michigan Central did not need it? That is what I would like to know.

Juror TRAUB: They need it for an elevated road.

Mr. BAKER: They do not need it for an elevated road, but they need the ground there; our elevated road has got to be put upon posts, and if that interferes with their tracks, and their right of way is not limited to the surface, they have got a right to put up buildings there; we have no more right to obstruct them there in the air than we have to obstruct them on the ground, and counsel concede that they have got to show some legislative authority for it. Where is the language of this statute which says that we can put an elevated road there, if we cannot put a surface. There is no such distinction.

Judge CHIPMAN: The juror asked you if the Michigan Central would not need it for that purpose; he attempted to aid you.

Mr. BAKER: I did not understand him that way. They might want to build a depot there; but at any rate, Brother Chipman and I agree that they have got to find their authority in this statute, and he claims that in some way he has found that authority, and at the proper time we will listen, and I will listen with a great deal of in-

terest to him, because Judge Chipman can think and reason and approach a subject logically, and I would like to see how a man of his calibre and brains can get at this subject and make it intelligible. All I can say is that so far as we have had an argument, Mr. Dickinson just asserts the proposition and does not argue it, he
1251 just holds up his hand and says, "We have got a jury, we have got a jury to determine this question," and assumes that because he has got a jury he can get an erroneous decision from them. He does not argue it, but makes a broad assertion of that kind and leaves it there, on the assumption that an assertion of that kind is just as good as so much argument, and that he can lead you to believe that there is something in it; and he appealed to you to disregard the testimony of Mr. Lothrop because he is a railroad lawyer, to disregard anything that I might say in the case, and in the same breath turns around and asks you to believe him, because he appears for the property-owner, and to believe John Logan Chipman because of his services in Congress, because he has made some reputation down there as a statesman and a constitutional lawyer. What they won't resort to in order to bolster up this argument is difficult to divine, and I suppose that tomorrow and the next day we will have to listen to a contention all about the language, all about the legal meaning of those words, when there is not a school-boy in the United States but what could tell you what they mean, when it is so plain that I defy any man to express it in plainer language, to express my construction of that statute in plainer language; I defy any man to express it in plainer words than it is in that very act.

I did not expect that I would talk as long as this in opening this case, but I think that I have sufficiently opened the case, and we will, tomorrow and next day, hear from our learned friends, and with your permission, at the proper time, I will make an effort to reply to such suggestions as they can make; but of course you can realize the importance of this case to my clients, the importance of this case to this enterprise, and will pardon me if I trespass upon your time more than you think I ought.

Adjourned to Friday, July 10, 2 p. m.

1252 JULY 10, 1891—2 p. m.

Argument of Judge Chipman.

GENTLEMEN OF THE JURY: We have been some time upon this case, and I congratulate you heartily upon the prospect of its conclusion. The positions taken here have been held with great tenacity, and so far, the arguments have been made with a great deal of zeal, and perhaps I am not without that zeal and the attendant excitement myself, but I shall endeavor, as far as possible, to discuss this whole matter calmly, and as nearly as I can with a view of what I believe the law and the facts are. Of course, ultimately, both of these questions must be decided by you, and the most that I can expect to do will be to aid you in coming to a decision. You

have been very patient, and I trust that your patience and good nature will continue until we have got through laying before you our views in the case. So far as my friend Mr. Baker is concerned, I thank him most cordially for the kind and respectful things which he said of me yesterday. We all like to be thought well of, and to be spoken well of. There is a great deal of human nature in that, and I assure him that I value his good opinion very highly. Of course the views which he takes upon this case are diametrically opposed to the views which we take, and in all respect to him, in my judgment, he approaches the case from a wrong standpoint, and in a wrong spirit, in the very inception of his argument and his position here. He seems to think that the controlling right, or a controlling right in matters of this kind rests with the party seeking to procure the condemnation. All his argument has been tinctured with that spirit, and indeed substantially composed of that
1253 view. Under our law, that is radically a wrong view. There is no such presumption, there is no such advantage given to either the State or to a corporation or a municipal authority or other authority when it essays to condemn the land of the citizen. The necessity is never taken for granted. That is always an open question, a question to be determined as well as the question of damages by a tribunal selected by the parties.

My brother Baker said, with a great deal of emphasis and with a good deal of triumph, that Mr. Dickinson came here and simply says in fact, we have a jury, and that a little eloquence, and substantially, a little fustian will do the whole matter. Now, my friends, that is hardly a proper remark to make. It hardly becomes the exigencies of an action of this kind. I have no doubt that Mr. Dickinson prizes highly the office of the jury in a case of this kind. I know that he is tinctured, saturated with old-fashioned ideas of liberty and of the rights of the citizen, and that he never has been educated into the modern heresy, for it is a heresy if ever heresy existed, that juries are an obsolete institution, and are to be feared instead of being prized and cherished by the community. Of course he says, we have a jury. He demanded a jury, he demanded it because he thought that justice lies in that direction, because he felt sure that you, being men, like the respondents in this case, with similar interests, with the same rights to be guarded, that you would see that justice is done to these respondents, and that the land is not taken without just compensation, that no injury shall be done to any one. And why should we not feel in this way? What is there wrong in demanding a jury here? If it is wrong, the constitution is wrong, because your constitution provides that we may
1254 have a jury. If it is wrong the statute is wrong. If it is wrong, this whole proceeding here is iniquitous. You know better than that, my friends. The law says we may have a jury, and therefore we have one. We have a jury, because we believe we are safe in the hands of a jury, not that we believe we can dictate to that jury, not that we expect any favors. No, sir, but because we believe there will be a calm, a fair, a jury consideration of this case,

and that the verdict will be honest, unswayed by prejudice or fear in behalf of either party.

It is wrong in us to demand a jury, is it? And that is made by eminent counsel here as an argument, an argument because he professes to be arguing the case, that is made as an argument here in your ears why Mr. Backus should not stand well before you. My friends, what sort of logic is this? Is there any harm in us having you here? Are we wrong in selecting you men, or is the jury system generally an abomination which ought to be abolished? You know it is neither. But why such an argument was made, I cannot conceive, and if it had not been made by counsel so eminent, I should not have mentioned it here. But there was some purpose in the making of it, and whether it will have any effect, I cannot say, but I have confidence in you that an argument which would stultify yourselves, which would degrade you in your office here, which assumes it is wrong in us to appeal to you, that such an argument as that can have no force or effect with so intelligent a body of men. But perhaps he means something more. Perhaps my friend, as the representative of this mighty railroad company, holds it wrong in Mr. Backus to dare to come here and ask you to protect his rights My friend's general argument seems to convey the impression, I do not believe he feels so himself, but he conveys the idea that a citizen
1255 has no rights which a railroad company is bound to respect; that it is a sort of crime to resist one of these companies when it makes any demand upon the citizens; and yet, my friends, the law says that we may resist them. The law says that we may resist them with reason or without reason; that it may be all fancy that we do not wish to give up our property; that it may be for any cause, and we are not bound to tell you or to tell anybody what our cause is. Under the law all we have to do is to stand upon our land and say, this belongs to us; this is our property; our money has paid for it; the law protects us in it; and if a railroad company wants it they must prove, step by step and inch by inch, the very smallest particle of an inch, that it is necessary that they should have it; and when they have proved that necessity, that they shall pay us the full damage which it is to us. Wrong for Mr. Backus to stand upon the law? What do you stand upon? How do you protect your property? How do you protect your property against depredation, whether from railroad companies or from others? What authorizes you to shut your front door against any intruder? What makes your house your castle, the inviolable abode of yourself and your family? What gives you the right to the clothes you have on, to the food you eat, to any and everything which makes up what we call an estimate as property? It is law. And when one comes to you to take any of these things from you, whether it be a railroad company, or whether it be an individual, you fall back upon the law and you say that this is mine; the law throws its shield around me and says, you cannot have this property unless you get it by due process of law. So it is wrong in Mr. Backus to come here and insist upon his legal rights. It is wrong in
1256 you by the same theory, if a man sues you for a debt that

you do not owe, to say you do not owe it, and to call upon a jury of your countrymen to protect you against his unjust demands. It would be wrong in you, according to that same theory, to protect your store here on Woodward avenue, or your house here on one of the residence streets, if some man claimed title to it, and went into the courts and demanded that title and possession of it from you. A new kind of logic, a new argument in the courts that there is something wrong in a man insisting upon his legal rights; insisting upon his legal rights in this community of law and order, where law is the buttress and defense of all that you have; where there can be no safety, no decency, unless the law subserve, and unless every man is permitted to enjoy that, and that only, which the law gives to him.

I can hardly think, my friends, that it is right when a citizen comes here in pursuance of the law of the land, and in answer to the demand of a railroad company, or any other company, that he shall be reviled, his motives questioned, his conduct assailed, and he held up as a wrong-doer because he throws himself upon a jury of his countrymen and asks them to protect him in his rights. But, forsooth, my friend depicts Mr. Backus in two attitudes, one standing in the way of public improvement, and the other trying to drive an unconscionable and hard bargain with this railroad company. Mr. Backus is not opposed to public improvements. He is no more opposed to public improvements than you are. No one has put himself in the path of this improvement, if improvement it is. Neither counsel nor client, from the beginning to the end of this proceeding, has uttered one single word against this improvement.

On the contrary, we welcome it. We welcome the union
1257 depot. We welcome any and every enterprise that will add to the wealth of this great and this beautiful city. We are no laggards in this race of improvement. We keep step with the front man in the front rank with everything which will benefit this city. Her interests are our interests, your interests are our interests. I say we stand shoulder to shoulder in this great march of progress, and welcome everything which brings blessing, brings wealth, brings strength to us, as a community, a people. But Mr. Backus says, Do not make me pay for all of it; do not make me pay the whole bill. If you must have railroads, and they are coming here to benefit everybody in the whole city except him, of what good are those railroads? If this progress is simply a march in which each step treads upon him and crushes him out, and crushed out his business, how can he shout hosannahs to this improvement? How can he spread out both arms and clasp it to his breast and bid it welcome among us. Have it, he says, by all means. Let the good work go on; but, gentlemen, do not make me pay for it; do not let me be the only man in the whole city of Detroit, the only one whom it literally crushes out and ruins in its progress. Backus is reasonable in that. That is the position you would take. My friend talks a great deal about the advance of civilization, and about its being our duty to give and take, as residents of a great community. Unquestionably he is right in that; but, my friends, it must not be all

give and no take. It cannot be possible. It is not just, nay, it would be wicked, iniquitous beyond conception, that any one man should bear the whole burden. If one citizen must bear the burden of introducing this company into the city of Detroit, let all citizens join with him. If it is proper that Backus should give away
1258 his property and his rights in order to secure this improvement for the benefit of the city, then my friend Baker should head this jury, head ten or fifteen or twenty thousand of our citizens, and every one of you put your hands in your pockets and say we will not be liberal at the expense of Mr. Backus, we will pay in our share and let the company come in. It is wicked, it is unjust, it is illegal to make any one man a sacrifice. There is no law of the land, there is no law of conscience which calls upon Mr. Backus to make one single sacrifice in this matter. He can cling honestly to the last penny of his rights here. That, my friends, cannot be gainsaid, and that is the feeling you would have, and it is the feeling which the law permits you to have.

We are not without decisions, for the decisions of our courts, the very gospel of this thing, is that when a company undertakes to condemn a citizen's property, that they shall prove, first, that it is necessary, and, secondly, pay to him every cent that that condemnation costs him.

Now, my friend eulogizes railroads. What has that to do with Mr. Backus' case. I compliment him by saying he did it very nicely. He gave us the history of railroads, their inception and their growth in the world. All that is very pleasant information, perhaps a trifle common; all of that passes as an interesting rhetorical exercise to my friend. But, after all, what has that got to do with this case? Railroads are a benefit. Neither my friend Baker nor myself need say that to you. You are men of the 19th century. You live during the wonderful period when railroads and telegraph and the electric motor have been developed, to the astonishment of the world. You have lived in a period when you are prepared for everything, when nothing which will come will cause an exclamation of
1259 surprise to you. We know that railroads are a benefit; but, my friends, railroads are not so superior a benefit, not so dominant, paramount a benefit that they can be allowed to crush down the citizen and take his property from him without a proper compensation. Railroads are for the people, not the people for the railroads, and when my friend talks about land grants to the Pacific railroads, and about it being mere claptrap for political purposes, I think he has either not studied the question well, or he is mistaken. Take the Pacific railroads, for instance, owing this nation over $100,000,000, and besieging us at every session of Congress to give them that $100,000,000. And why do they owe that money to us for the road built upon the lands the Government gave them? My friend says they can sell the land at a less price than the Government can. If I come to your store and steal a watch from you, I can sell that watch cheaper than you can, for you paid for it in your hard-earned money. One hundred million dollars, besides the land grant they owe us, and they won't pay us that, and the

land we gave them to build the road with, my friend says, they are selling for less than $1 an acre! You get goods in your store and do business on the same basis, and you will be in the position Uncle Sam is in—you will be out so much money and so much land. Why this was brought in here, I do not know, but I suppose it was for some purpose, and therefore I must reply to it.

Now, my friend says that these party platforms are full of fustian on this subject. Was it fustian when under the leadership, or under a bill drawn by my friend who sits there, the [illegible]h Congress forfeited every acre of unearned land grant in this fair State of Michigan because these railroad companies got these lands and they did not want to pay the price for them; they did not want to do the work, and under that bill, the land grants which were unearned in the upper peninsula were forfeited by Congress, and only the other day, right in the heart of those forfeited lands, forfeited under that very bill, my brother Dickinson and I stood at the county-seat of a new county, found cities all around us. We found a town of six or seven thousand inhabitants; we found the people coming there and making homes, making fortunes, making strength for their country, and making happiness for themselves and their children. Now, the political platforms that my friend ridicules so much had something to do with that. The political platforms demand that justice shall be done, and that is all that they demand. They demand that where these grants have been made, where the homes of the people have been taken from them and monopolized in this way, that if the railroads do not keep their bargain, do not do what the law requires they should do to earn the land, that the land shall be taken from them and shall be returned to the people. Anything wrong about that? I don't know what Mr. Backus has got to do with all this. I don't know what it has got to do with Mr. Backus' planing mill. But somehow or other, my friend seems to think that Mr. Backus is passing all these platforms, that he is pressing this great demand of the people, because political conventions do not put things that people do not demand into their platforms. On the other hand, they put most everything in the platforms that they think the people want. So that my friend, if he means to arraign Mr. Backus for the conduct of the political conventions and the political platforms, he pays him the highest compliment one man can pay another. I hope Mr. Backus feels that way. I hope he will vote that way. I hope his boys will vote that way. I hope you will vote that way. I hope you will always vote and feel that there should be free land for free men, and that no corporation, no foreign syndicate or domestic corporation shall be allowed to withhold from the people such land, waiting for the rise of prices in the future, barring citizens from having homes in the immense tracts of lands on this continent. But what has all that got to do with this case? What has all this got to do with the necessity of stopping up the streets of the city of Detroit, and how much Mr. Backus should be paid if you find it is necessary? And yet that is a sample of the argument. My friend may have strong arguments

in reserve, but that is the staple of the argument made here yesterday to this jury, the benefits of railroads, the virtues of land grants to railroads, and the sins and iniquities of political conventions.

There is another class of arguments used by my friend, and if that sort of argument finds any lodgment in your minds, we might as well leave the court-room. We might as well have gone in the first place to the company and said, Give us what you please, tear down our building if you want to, banish us from the city of Detroit if you choose, strip us naked and turn us out to the world beggars, if that sort of argument can find any respect at the hands of a jury of our countrymen. But there is another class of argument, and it is this, this work so far has cost the gentlemen that went into it more than they expected, and it is difficult to raise the money, my friend says. What has that to do with Mr. Backus? What has that to do with the necessity of this improvement? Can you explain? Can you show it to me? If this body of men, instead of being a jury were a charitable establishment, if you were a
1262 sort of an alms-house, a poor-house, for Mr. Joy and Mr. Alger and these other gentlemen whose names have been mentioned here, to take refuge in, that would be a very good argument. But you are not here to financier for them. You are not here to tell them how to get their money. You are not here to help them out if they have undertaken too big a job, are you? You are here to find out whether it is necessary to take River street, and if they do take it, how much damage it is to Mr. Backus. That is the question the law has given you. That is the question you have solemnly sworn before God to discharge, not whether Mr. Joy has got money enough to pay for what he has undertaken, not whether they have gone to a great deal of expense already. The fact is, my friends, if this matter of expense is of serious consideration with them, they should have waited and condemned all the property and known what it was going to cost before they commenced the work. Difficult to raise money, is it? One of you goes into business, buys a lot of goods in New York. Trade is not so big as you expected it to be. The New York man comes around with your notes. You say to him, I made a mistake. The expenses of my business are much greater than I thought they would be. Trade is not so big, rents are high, clerks' wages are high, and therefore, my friends, you must take off something. You must take off ten or fifteen, or twenty or thirty per cent. from this note. If you were the New York man you would pay no attention to it a minute, you would say, you made the bargain, you got my goods. And whether it has cost this company much or little, if they take Mr. Backus' goods, if they take his property, not a right of way only, but his property, up to the middle of the street, as the courts have decided, if
1263 they take that from him, it won't do for them to say the other property cost us too much, they must pay him for what they take from him.

My friend says they have commenced to work already, they are coming up that street already. They have dug some holes there. You have seen the holes. Take notice, they have done nothing

serious yet; take notice, they have done nothing in the way of a structure that would prevent them going right straight across onto the line of the Michigan Central railroad, but they have dug these holes up and down the street, and he says if you do not find it necessary to use that street, then this enterprise must stop. Is that so? But suppose it must stop. It could not stop. You know it would not stop. We all know it would not stop. But suppose the worst comes to the worst, is that any reason why Mr. Backus should be injured and plundered? Will their carrying on their project make him whole? Would your sympathy for them, because they have got themselves into a bad scrape, would your sympathy for them be justice to him? Now, my friends, that is not a proper argument to address to a jury. I repeat, and I cannot repeat it too often, we are not here to determine whether the railroad company are making a good or a bad bargain, whether they can go ahead with their project or not go ahead with their project, but we are here to determine whether it is necessary to use that street, and whether if it is necessary it injures Mr. Backus, and if so, how much? There is the question for this jury, and everything else, every consideration which does not touch those two questions has no earthly place in this case. Suppose, my friends, that they have commenced their work. Does that make Mr. Backus' property any less valuable? The property is there, the work is going — in front of it. Does
1264 that change the question as to the necessity of using this street? Does it bear upon it at all, and can my friend expect it to have any place here, except as a mere appeal, a mere begging to help them out of the scrape in which, according to his story, they have brought themselves, but which I do not believe they have got themselves into at all? Do you believe that Mr. Joy, with all his experience in railroad-building, did not know that every man whose property he injured would make him pay for it? Do you believe that Mr. Joy does not understand the arts and the measures by which rights of way are fought through? Does he not know that the weak fall by the wayside, and those who cannot come into a court and before a jury, and have not the means to face these companies, give way, and take a paltry ten dollars here and five dollars there, and do almost anything to avoid trouble? It is not surprising that they give you the list of the widows and the orphans who took what they chose to give them, this widow, and this estate, the guardian may have bargained with him. The widow and the orphan could not come here. They have not got the power and the strength to stand up and fight Mr. Joy and the union depot company. We are told that because all this has happened, Backus is a bad citizen because he dares to fight and because he dares to ask at the hands of this jury that which belongs to him.

Now, my friend calls upon the council. The common council have indorsed the work of my friend. In view of recent events in this city, I hardly expected my friend to invoke the name of the common council in connection with this corporation. I hardly expected that argument to be made here. It seems the common council have let this company do about as they pleased, let them

take a street down there. And it is a very serious thing to
1265 take a public street. They give them authority to close street after street, or are about to give it. Are you in a frame of mind to allow the action of the common council to be cited here as a reason why Mr. Backus should not be paid for his property, or as a reason why the railroads should go up that street at all? Do you feel as if my friend were appealing to highest authority when he bid you turn your eyes to the other end of this building and behold all the virtues assembled there? Now, my friends, that is fustian. The council had nothing to do with this question of necessity; they had nothing to do with the question of damages. If they had to do with those questions, why are you here? What are you brought here for? First, my friend says, the railroad crossing board has settled this matter. Then he says the common council have settled it. Then he says the company have settled it themselves by digging some holes in the street. What are you here for?

Mr. DICKINSON: They filed plans.

Mr. CHIPMAN: I am coming to that. What are you here for? What office are you to perform here? What does the law say? The common council, railroad commissioners, railroad companies cannot touch an inch of the property until you find this necessity and until you have awarded damages.

Mr. DICKINSON: Neither can the legislature of the State.

Mr. CHIPMAN: No, sir; on that I shall speak to you in a few minutes. Now, my friends, what sort of an argument is this? Does it affect you? As sensible men, does any such argument force you to believe that you are here for nothing, except to look as pretty as you can and sit in your chairs and go to sleep while we are
1266 making the speeches, because that is all there would be in it if the common council and the railroad commission and the company have decided it? That is all there is left in it, and there is nothing left for you but to drone and to drowse away your time and get through with it as quickly and as safely as you can. You know better than that. You are here to perform a high and an important function, a duty cast upon you by the law, a duty formerly performed by the legislature, the highest body in our State; but when the people framed a constitution, in that organic law, they took the power from the legislature, they would not trust the legislature, and they said the citizens must decide all these matters. Although they would not trust the legislature, the counsel tries in some way to make you believe they trust the common council of the city of Detroit, and that the action of that body is final in the premises.

Now, my friends, it has pleased Mr. Baker to couple this statement, about the omnipotence of the common council and the power of the common council, with the assertion that this railroad does not take an inch of the property belonging to Mr. Backus. Why does it not take an inch? Mr. Backus is the owner of that property to the middle of the street. The public have a right of way over it, but Mr. Backus is the owner of that property from the middle of the street clear up to the heavens. That is the law. You cannot

build a house in front of it. You cannot shut out his light. You cannot put any permanent structure in front of it without being guilty of a nuisance, without being guilty of a trespass upon it. There is no doubt about that. Every man understands that. No man is fit to be a citizen who does not understand it. Let some man come and put a structure in front of your house, how
1267 quickly you would drive him away. The city might drive him away as obstructing the right of way of the people, but if the city did not act you could act. Suppose a man should erect a low building four feet high, for some purpose or other, between you and the middle of the street, you could drive him away.

Mr. DICKINSON: Or put it upon stilts so that he could drive under.

Mr. CHIPMAN: Or put it on stilts so that he could drive under, exactly as they propose to do with this elevated road. You could defend your rights there. The city, generally, or the county, generally, might prosecute for a nuisance, but you, specially and particularly, you of all men alone, would have an individual right of action as against the person who committed this trespass. Why? Because, up to the center of the street, subject to the easement and right of way of the public, that property is yours. No man can take it or appropriate it unless in accordance with the law of the land.

In the case of Lahr *vs.* The Metropolitan Railroad Company, 104 New York, the court, in giving their opinion, review some decisions which had been previously made. Before I read that, however, I will read what our own supreme court says in the case of The Detroit City Railway against Mills, Northwestern Reporter of June 21. This case, in brief, is this: Here is a land-owner upon a lot abutting upon a street. Mr. Backus abuts upon this street. The soil he owns, that is the soil in the street, not a right of way, but he owns the fee, subject only to a public easement, which he, by dedication or otherwise, has granted to the ordinary and proper uses of the street or highway. Backus abuts on the street. Justice
1268 McGrath, in the same case, in giving his opinion, quoting from that great jurist, so many years on the bench of this State, Judge Christiancy, indorses the doctrine laid down by Judge Christiancy in Booming Company *vs.* Jarvis, 30th Mich., 319, as follows:

"It is a transparent fallacy to say that this is not a taking of his property because the land itself is not taken and he utterly excluded from it, and because the title nominally still remains in him and he is merely deprived of its beneficial use, which is not the property but simply an incident of property. Such a proposition, though in some instances something very like it has been sanctioned by courts, cannot be rendered sound, nor even respectful, by the authority of great names."

That is, that the word and authority of great men cannot make any such doctrine respectable, that when you take this right of way in front of Backus, you do not take his property. Here our judges say, three at least of our judges say it here, of your own court, and

the judges of other courts say it. What is Mr. Backus here for at all? Why is he here if they are not taking something from him which belongs to him? They are not paying for bubbles in the air. They are not paying for his whims and caprices, but this is property; and being property, the law says you cannot have it unless you show a public necessity, and then you must pay for it to the value of it.

My friend will have to change his position. He says not an inch of his property is taken. What is it? What are you doing with the man here? What is he here for? Why are you here? Why all this expense, all this testimony, all this loss of time, if nothing is to be taken from Backus? The courts say that under
1269 these very circumstances, where you take to the center of the street, taking what is called the right of way, that you do take the man's property. It is his property, you are taking it from him, and you must do it only under a public necessity, and then you must pay him all that it is worth.

There is some very good doctrine in this case of Lahr. In the State of New York formerly, when these elevated roads were put there, they held that they were to be treated, as it were, as a sort of nuisance, and that the only remedy against them was to sue for the rent or the diminution which was caused by the occupation of the premises. That doctrine prevailed until finally, in this case of Lahr, they held that the taking of a street in front of a man's premises in that way was really an injury to the fee, and that consequently he was entitled to damages, and could recover damages for that injury. In that case the courts say:

"We hold that the Story case has definitely determined, first, that an elevated railroad, in the streets of the city, operated by steam power, and constructed as to form, equipments and dimensions like that described in the Story case, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize nor sanction, without providing compensation for the injury inflicted upon the property of abutting owners."

What becomes of your common council under that decision? According to my friend's argument, they have settled the whole question. But this court says, that even so great a body as that, and that even the greater body of the State itself cannot do this thing.

"Second, that abutters upon a public street, claiming title
1270 to their premises by grant from the municipal authorities, which contains a covenant that a street to be laid out in front of said property shall forever thereafter continue for the free and common passage of and as public streets and ways for the inhabitants *for* said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now or lawfully ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and

air through and over such street for the benefit of property situated thereon.

"Third, that the ownership of such easement is an interest in real estate, constituting property within the meaning of that term as used in the constitution of the State, and requires compensation to be made therefor before it can be lawfully taken from its owner for public use.

"Fourth, that the erection of an elevated railroad, the use of which is intended to be permanent, in a street, and upon which cars are propelled by steam-engines, generating gas, steam and smoke, and distributing in the air cinders, dust and ashes, and other noxious and deleterious substances, and interrupting the free passage of light and of air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damage occasioned by said taking."

Now, Mr. Backus is an abutter there. His premises run up to the street. That street is one of the oldest streets in the city of Detroit, laid out years and years ago, laid out in the early days of the Territory. It has been a road from time immemorial. Down that street marched the troops who went to the Raisin. Up that street
1271 marched the British at the time of Hull's surrender. My friend Rivard's ancestors were there. He probably knows something about the history of that street. There that street has been from time immemorial. Every man bought his property subject to that right, and every man who buys there, just as any of you who have bought on Woodward avenue or Jefferson avenue, has that right, and railroad companies, city councils nor no one else can take the right from you.

Now it is idle to say that Mr. Backus is not to be injured here. It is idle to say that he has no substantial claim here. The law says he has a claim. The railroad company itself says he has a claim, because it comes in here and makes him a party and wishes to acquire the rights which he possesses there, for the purpose of building this road.

Now, among the arguments which my friend has made here, and it is a sort of kaleidoscope, and they are different every time he turns his machine around and it takes a new shape. He says that by and by Backus will be blockaded anyway. There is a good old saying, "Sufficient unto the day is the evil thereof." You are not here to decide what the railroad commissioners or the city of Detroit or somebody else will do to Backus 20 or 30 years from now. You are not here to imagine what will happen. You are here simply to do what is patent to your eyes and your ears, to apply your understanding to today and not to tomorrow. What does Backus care what takes place when he is dead and gone? What difference does it make to him what becomes of that property when he is in his grave, and when all the property he possesses will be his chance of a happy hereafter? You see, my friends, you are dealing with today. You are not seers, you are not proph-

ets, you are not speculators, you are plain, every-day matter-
1272 of-fact jurymen, dealing with the present, with now, dealing with Backus' mill, as it is situated, dealing with Backus under the rights he possesses now—dealing with this question of necessity and this question of damage, with this question of what is sought to be taken by this railroad company. How my friend makes out that it is possible in any way to crowd Backus out by anything that should be done with regard to conditions which are not there now, I cannot conceive. The railroad commissioners apparently have acted. They have established gates here. They have established watchmen there at the central crossing. And besides, my friends, the crossing and the opening which Mr. Backus relies on principally is by way of Twelfth street. That is the crossing they are trying to cut him off from. Do you think that is a fair thing for you to do, when you are here to take things as they exist now, to get some imagination into your heads that something else will happen by and by? Is that honest? Can you, as honest men, doing your duty, can you, under the oath to do justice in this case, take any such view as that, and say to a man, They have injured you, but they are not going to give you anything, we will decide against you, because in ten or fifteen or twenty years from now, somebody will come along and close you up? It is a shame to make such an argument. It is not just, and if you are influenced by any such consideration, you certainly will fail in the performance of the high duty you have undertaken to perform in this matter.

I dwell on these things because my brother has deemed it proper to introduce them to the jury. Ordinarily I would not dream for an instant, that any such considerations could enter the heads of honest and sensible men.

Another argument that is made against Mr. Backus is
1273 that he wants his pay. Backus wants pay. Now, Mr. Backus has always said, Go ahead with your railroad; take it away from me, take it across the street; I do not want to be paid; let me alone. Go across the street with your road, then you will have no controversy with Backus whatever. But he certainly does say that if the jury finds it necessary that this railroad should plant itself right in front of his doors, that he wants pay, and therefore Mr. Backus is a very wicked man. How, wanting pay for his property, wanting damages, he can sit there, apparently sleeping the sleep of the just, his conscience apparently not affecting him, under the scoriation my friend Baker has given him, I cannot imagine. You would think his guilty conscience would keep him awake nights, if there is anything so awfully wrong in wanting pay for the injury done to him. He does not look like a very bad man. He does not look like a man who has got any guilty secret upon his mind. I think on the witness-stand he looked my friend Baker in the face calmly, and he talked low and talked quietly in response to my friend's somewhat loud and violent tones. He does not seem to feel that he is doing anything wicked here, and do you think he is, my friends; is he doing anything wicked? The law says he may do it.

What makes it wicked? Is he driving an unconscionable bargain? What makes him wicked? Is it because a railroad company wants this property? Why, I tell you, my friends, it is wrong, it is a shame that when a man comes in to assert his constitutional rights, when he simply asks of the jury that which the law says is his own, when he does it decently, without chicanery, without attempt at corruption, without attempt at perjury or any form of untruthfulness, I say it is a shame that he should be villified and
1274 abused as if he were a common malefactor and ought to be put in yonder dock and bid to stand up and answer guilty or not guilty to some charge of crime. Is that the way to treat a man who asks only for his right under the law? Is that the way to characterize his actions when he says to you, All I want is what is fair and right here, and I will leave it to you to determine. Gentlemen, this sort of ground and lofty tumbling won't do. Even railroad companies must abstain from that sort of abuse of people who choose to come here and insist upon their rights.

Mr. DICKINSON: Brought here in spite of themselves.

Mr. CHIPMAN: Backus did not come here and ask anything from the company. He has not brought the company here. The company has brought him here, brought him here and made him plunge into the law, just as you do a boy and plunge him into the river and teach him how to swim and say, Strike out and save yourself. Their summons brought him here, and yet he is wrong because he came; he is wrong, because when he does come, he stands upon his rights; he is wrong to leave his business here and ask you to accord his rights to him. I say that is not the spirit in which to try a matter of this kind. It is too high-handed. Even a great corporation is not justified in treating a decent citizen and property-holder of this city in any such way as that. Is there anything wrong about Backus? Decide that now. You have heard this harangue about him. Is there anything wrong about Backus? Do you think he is a guilty man? Do you think he is a wicked man? Do you think he is a bad citizen? If you do not, discard all this abuse and simply come back to the question in the case, whether this is a public necessity which justifies this company in using that street, and whether if that necessity exist, it affects Backus, and how much the damages are.

1275 Now, gentlemen, we have had a great deal of talk in this case about what is called the right of eminent domain. There has been a great deal of talk here as to what that right is, what it applies to. Intrinsically it is a very simple matter. You see an illustration of it here. It is under the right of what is called eminent domain that this railroad company comes into this court, and seeks to condemn the property of your fellow-citizens. It is simply the right which resides in all governments to appropriate private property for paramount public uses, public uses which are paramount to the private use, which are of a stronger and more general necessity than any private use to which the property is devoted. In other words, the interest must be of so general and public a nature as to justify the taking of the property. That

is what is called the right of eminent domain, and that right and the power which we may exercise under it extends to every species of property. There is not one law upon that subject for you and another for a corporation. There is not one law upon that subject for the small and another for the great. The law is universal, that where a public necessity requires a use of private property, that that public necessity is of such a character that the private use of the property must give way, and whether it is over the tracks of the Michigan Central railroad, whether it is through your door yard, whether it is in front of Mr. Backus' mill, wherever this public necessity comes in, the right of eminent domain which resides in the State will come in and take possession of the subject and dispose of it. Now, there are some things in this world I observe that mysteries are made of, and you hardly ever find a man for in-
1276 stance who will tell you he is a banker, or a broker; he will tell you he is a financier. He is not telling you the truth, because probably, out of a million bankers, there are not half a dozen financiers, because the real financiers have generally been poor men who have never handled much money, men like John Stuart Mill, and Adam Smith, men who make little money, and the men who are always looking out to make the next dollar, their vision is always too limited, their necessities, their desires always prevent them from taking a great, broad view, who can lay down a general law. And so it is in some respects in regard to these corporations—railroad corporations. They assume a great deal of dignity and a great deal of mystery, and a great deal of sanctity, giving a sort of idea that they are not made of the same clay that you and I are made of; but when you come to think of it—now here is Mr. Joy, a gentleman I respect very highly, a man who, intellectually and physically is in some respects very remarkable. You have all heard of Mr. Joy. He is a great railroad man. He is the incarnation, so to speak, of the railroad idea. You saw him sitting there, you observed that he is a man like other men, that in the progress of years his hair has turned gray, his face is wrinkled, he begins to shrink just as other men do, from his stature, though his vigor is remarkable for his years. You have learned that he wears the same clothes, probably a little nicer than some, not as nice as others. He feels the heat and cold just as you and I do. I have no doubt he has the same necessity to eat a square meal three times a day that you and I have, and to go through the other functions of the body which you and I are obliged to go through with.

Why do I say this? Simply to let you understand that
1277 he is like yourself and myself trying to take care of yourself and myself; and when he comes here with an enterprise that his money is in, that his fortune is in, that all he has made money largely out of, as you can see, when he comes here and talks in the name of the public, appearing as a disinterested benefactor of the city of Detroit, you want to say, Mr. Joy, you are a man, your hair has turned gray and you eat and you get cold and warm, and you are a man in all respects like the rest of us, you have to take care of Mr. Joy, you do take care of Mr. Joy, you are not a god, you are

not so high up that your desires to make money out of this road, this project, will not color your testimony and color your feelings upon this subject. Why, my friends, there are men, and you know it and I know it, and we see it, who will give their hearts and homes and carry ruin and misery with them in all directions to carry out a project of this kind. Take that elevated road in New York. See what ruin that has created to that city, and thatched today with judgments which it does not pay, on account of the immense mortgage which lies over it, preventing anybody from buying it on a sale. I am told that one of the greatest stockholders in the company, the immaculate Russell Sage, is buying up all the judgments, on a great discount on the dollar, and undoubtedly he and Mr. Gould will soon freeze their brother stockholders out, and somehow or other get the whole thing in their hands. Now, my friends, Russell Sage teaches a class in Sunday school. He is one of the pillars in a great church. He is a teacher of little boys, and he is very careful not to give them any pointers on stock, and he is very careful not to pay the fathers and mothers of those boys the money he owes them for damaging their property. Russell Sage, and these other
1278 gentlemen engaged in the Wabash road down here, undoubtedly would go into this witness-box and look as saintly and as good as good could be, and tell you that you should give them this property for the sake of the public improvement and for the sake of the best interests of the city of Detroit.

Now, I repeat to you that I have nothing but respectful words to say of Mr. Joy personally. I will not stand here or anywhere and speak unkindly of a man whom I do not feel unkindly to. I am not talking of Mr. Joy. When I talk of him, I pay him the greatest compliment that I can pay any man, and say he is a man like the rest of us; but I am talking of the railroad director, of a man whom in my judgment is almost a monomaniac on the subject of railways, a man who has worked himself into the belief that every time he has a project, it is for the good of the community, and it therefore should be paid for by somebody else. At any rate he has that belief, and he tells you these elevated structures are no nuisance, that they are not in the way of anybody. Now, I have been in New York a great deal, and some of you have been in New York a great deal. Before I ever dreamed of any such project as this, before I ever heard of any such thing, in New York, talking with New York people on the streets, where these roads were, time and time again, I have said in my opinion, that they were one of the most fearful nuisances that were perpetrated on the people. Street after street was ruined, and any man who has been there knows that they are ruined, by these roads, and clear to the upper end of the island, the railroad going up over the roofs as it were, where they go up from the first-story window clear to the fifth and sixth, where you can look into everybody's window and see women dressed and undressed, where you have got to keep
1279 your house shut to keep it from being the worst kind of a public nuisance; that they make smoke, that they make dust, and that they obscure the light, that they are dropping from

under the tracks, and any man who has been there and has seen them knows — to be the fact. You take this Twenty-third Street, or Sixth Avenue road. Take this Twenty-third Street and Sixth Avenue road; I had a room on that corner, one of the greatest thoroughfares in New York, pretty near as great as the corner of Broadway by the Fifth Avenue hotel; any man who has been there knows that corner is drenched with oil and with drippings from the trains day and night; you can see it there, grease all along there; that is one of the funniest specimens of street railways in New York; that is generally a choice specimen for those who turn to it and say, There is an elevated road that has not injured the street. It has injured the street, and when you come to a narrow street it has ruined it. Who wants to do business in this world in darkness, in this dirt, with the fresh air shut out, with the smoke and cinders coming in, obliged to use artificial light? Who wishes to do business in that way? And of course the better class of business people will not do business in that way. I can point you out places where the elevated road is perhaps a benefit. You may take a place that touches the corner of Twenty-third street and Sixth avenue, where the elevator comes down; there is one store on that corner, and right across the street there is one big eating-house, which is benefited on account of the crowd that comes there; but outside of that no one is benefited; that is on account of the elevator where crowds rush to go up and down, and in that way that locality is benefited; but as it shrieks on until you
1280 get to the next elevator, every bit of property is hurt by it, and all the more hurt because people will not come in, who want to go to the next elevator, in the place between, they go to the station, so that the places right next to the station are helped, perhaps, by the great crowd which the stations bring; but the very purpose of bringing these great crowds to the stations takes them away from the other property, and in that respect is a damage and injury to the other property; and every New York man will tell you that. That is a great argument in favor of the roads, and the only argument they make in favor of the roads. In the streets through which they go, the men next to the stations say they are benefited, and that their benefit is to other people's injury. In the country, up beyond Central park, up at Harlem and all through there, those are the people who are benefited, and in the same way this elevated road may be a great benefit to people who want to go to the depot on Third street and on Fourth street, but at the same time it is a tremendous injury to Mr. Backus.

Your duty in these cases has been read to you and commented on by my friend and associate, Mr. Dickinson, in the opening of the case, but it is very well that you should understand what your duty is. I do not want you to magnify your duty. I have no desire to invite you to assume any office which is not yours, but I think it is a matter of great importance that you should know exactly what your duty is; a man at all times and all places should know what his duty is; you are expected to perform it, and the first step towards a proper performance of it is to know it

What is your power? What are you here for? Is this a question of the general effect of the union depot upon the prosperity of Detroit? No. The law has not confided any such duty as
1281 that to you. The duty confided to you, and you swear that you will perform it, is to ascertain whether it is necessary to use this portion of the street, and to assess the damages if necessary—whether the public necessity requires this or that street. Nobody doubts that it is a good thing to have a depot at the corner of Third street, nobody contests that question, and if that question is in issue in this case—the law does not put it in issue, it has no business here, it is an intruder, a usurpation, a wrong to my client. That depot may be a magnificent thing, and is, and yet there may be a better way of getting to it, and if there is a better way, then under the law and under the decisions of our court, Mr. Backus may urge that they should take that way. There is nothing wrong about his doing that, is there? The law says he may do it. Poor Backus does not know whether he is right or wrong since he has got into this thing. Is there any harm in his doing that? The law says he may. Now, why should he not do it? They brought him here to try an issue; he is down there attending to his mill, getting out his boxes and his lumber, and shipping them off, attending to his general business in his mill and seeing that his men are at work, and that the 134 people he employs there have their pay. There he is in perfect quiet. He has nothing against the union depot; but they send a little paper or notice to him and say, "We want to do so and so to you, come up here," and poor Backus comes and here he is, and he says, "I don't think it is necessary for you to do that, there is a better way for you to do that, you can go across the road;" and what do they say in reference to him? They say Mr. Backus is a very bad fellow for standing in the way of public improvement; they say, you ought not to do that,
1282 Backus, you are wicked and wrong, You should lay down here and let us do what we please about this. But poor Backus has an old-fashioned idea that there is nothing wrong in making objection under the law, and he says, I am brought here to try the question of the necessity of using that street; I do not think it is necessary; I think you can do another thing, and this is what we are trying here; and he is told at once that he wants to make an immense sum of money. He has the right to make an immense sum of money if the case justifies it. But he is told at once that he is here for that purpose, to levy tribute on this company. But he says, Take it across the road, then you will not have me in your way, and you won't be in my way, and you will have no necessity to bring me before a jury, and you and the Michigan Central Railroad Company can fight it out between you. And yet for all this he is told that he is wrong. And yet we ask, would it not be the better way to go along the old depot ground up to Twelfth street and cross right over and continue along the margin of the Michigan Central up to Seventh or Eighth street there, and then cross over where they are already prepared to cross over, and get onto Fort street that way. Oh, yes, that would be a better way, nobody de-

nies that; they cannot deny that as long as they have eyes in their heads; you all see that, you all know it would be a better way for the company, and you all know it would save the public highway and save the cutting off of many streets there; at any rate, it would save the cutting off of River street. They do not deny that. Mr. Joy does not deny that that would be a better way. We have not a person in this case who denies that it would be a better way. Then, we ask, why do you not do it, why not go there?

Oh, we cannot; but, we reply, you can. Here is a law Mr.
1283 Joy passed at the very same session as the union depot act, under which, we say, you can do this very thing. But we cannot do it under that. Did you not draw that act, Mr. Joy? And notice, gentlemen of the jury, every time he has been upon the stand he will not tell you whether he drew that or not. He says he does not remember. He says he might have drawn it, that it may have been his. And yet it was passed at the same session of the legislature, passed on the same subject, and no one can point to any one else who had any occasion in the State of Michigan to carry out the purposes of that act, to take the depot grounds of any other depot company. Now, that act was passed for some purpose, and yet, according to Mr. Joy, it is utterly purposeless, it is no use in the world here; and Mr. Baker can only conceive of one condition of things under which it could be applicable anywhere. I was glad that he conceded it that. Let us look at the facts. What has been done? They say you cannot do a certain thing; but I say it has been done already. They say you cannot take those depot grounds, or part of those depot grounds; and yet you know they have taken the corner of them already, they have taken the corner down to Twelfth street, and run an elevated track across there. How did they do it? How was that brought about? They say it cannot be done, but it is done. They say you cannot interfere with the property which the company has got for depot purposes, and yet they have condemned Twelfth street clear up to Seventh, the whole right of way, the whole easement in the street, properly belonging to that company for depot purposes, paying $39,000 for it. But above and beyond that, while they say they cannot get a margin for an elevated road, they have got 1,500 feet of viaduct upon that
1284 company's property, within the sacred precincts of that depot.

How was that done? By what process was it brought about? The railroad commissioner, forsooth! Can a railroad commissioner take your property, or any man's property, or a company's property, and make them do with it what they do not want to do? How can he do it? The Michigan Central railroad knows just as well as I know, and as you know, that there is no power to condemn that property. The mere *ipse dixit* of any officer of the State could not take it away from you. The railroad commissioner may have ordered bridges there over the crossing; he may have ordered them to be risen or to be sunk; he may have ordered guards there, but there is no authority under the statute for him to go out of the street; and my friend, Mr. Baker, in his speech yesterday said to you that it was confined to the street, confined to the crossway of

the street. Understand that this is not a crossing, it is a viaduct 1,500 feet long, 24 feet wide—not 24 feet, but lapsing over 19 feet onto the Central Railroad Company's property. No trouble about getting that strip. And yet they tell us that the Michigan Central Railroad Company is hostile, that they have been fighting them inch by inch in this depot project. If this railroad company is hostile, what did they let them have that land for? Mr. Baker says they were afraid the street would be closed up. What street? Twelfth street. How could they close up the street where their tracks cross, where their line is crossed——

Mr. BAKER: What I said was that they wanted to close it.

Judge CHIPMAN: The Michigan Central Railroad Company knew just as well as I and you know, that they might want to do it until they were blind and deaf and palsied, and yet they could not
1285 do it, there is no way of closing it up; they could not close the streets so as to stop the use of them, and they could not close the tracks so as to stop the use of them. How is this closing to be effected? Let us have a little sense about it. It was not that; what the Michigan Central Railroad Company were afraid of was, that instead of taking 1,500 feet, they would proceed under this very statute which we have cited to you here, and go all the way up, not a great deal further, but go all the way up to Eighth street, and make their turn up to the Fort Street depot off the grounds of the Michigan Central. My friend says that cannot be done. You have listened to authority after authority. You know that railroad companies' franchises may be condemned just as your franchises may be condemned; you know that their property is subject to the same law that your property is; and God forbid that you should ever live in a state of society where that is not the law, where such privileges should be accorded to a combination of men and denied to the individual citizen. And this company knowing that, fearing that, have dropped their hostility and have acted accordingly. My friend says this statute does not mean anything. Listen to what the Supreme Court of the United States says, and you will find in our decisions as well the same doctrine; it is like the air itself, it is free to all Americans, part and parcel of our freedom, rights for which we ought to die if necessary, one of the bulwarks against building up privileged classes, one of the safeguards against oppression, announced by every court, held by every patriot, and clung to by every good citizen under all circumstances. The United States Supreme Court, in the case of The West River Bridge Company *vs.* Dix,
6 How.. 534, say: "The distinction thus attempted we regard
1286 as a refinement which has no foundation and reason, and one that in truth avoids the true legal or constitutional question in these cases, namely, that of the right in private persons in the use or employment of their private property to control and actually prohibit the power and duty of the Government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher or render it more sacred than other property."

There it is in good English; the right of the Michigan Central

railroad to that depot is a franchise; a franchise is vested in a corporation; it would be your right, and a franchise is only a right granted by a government to this artificial body; it is called a franchise; and here the law is announced by the highest court of the land, "We are aware of nothing peculiar to a franchise which can class it higher or render it more sacred than other property." Why should it be more sacred than your home? You are only subject to this power of eminent domain. You must give way to the necessary uses of society; and these artificial persons must give way to the same rule and the same necessity.

You have already heard the citations from Justice Cooley and Justice Campbell. They were read to you at the beginning of this proceeding, in which they say that the right of the respondent, that is the right of Mr. Backus, in these cases on the question of necessity, to contest the proceedings is unqualified. He need not give any reason for it; and beyond that he may point out any better way for carrying on the improvement than the one suggested. What does the constitution say about your duty?

"When private property is taken for the use or benefit of
1287 the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law." "When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation therefor shall be ascertained by a jury of twelve freeholders." That is the provision of the constitution of this State. You are the jury of twelve freeholders; you are the men to whom this duty is confided in the present case. As I said before, and as has been said to you at different times during this case, formerly the question of necessity was decided by the legislature. Men were oppressed, it became a crying evil, and these corporations roamed about seeking whom they might devour; they would seek property anywhere, because they could get any legislation through with perfect ease. Now, if they had gone with this project to the legislature, as they might, and this clause had not been in the constitution, they would have come home here with a law permitting them to take all this property. There would have been no jury; your interposition would have been unnecessary. The question of necessity would have been settled for them by the legislature and they would have struck through that street, taking the property at all hazards, so that when the constitution of 1851 was formed, the men who formed it said, We will trust no such power to any such legislature, we will only trust that power to a jury of twelve freeholders who live in the vicinity of the property and who will be the guardians of the rights of citizens in cases of that kind. Have you any doubt
as to what your duty is and as to the full scope of it. Do
1288 you not understand that you are here to protect that man—a jury of freeholders of the vicinity of the property. Why? Because such a jury are supposed to know and to sympathize with

the man. They are supposed to stand between him and ruin, if necessary; to stand between him and the corporation, if necessary. That is what you are there for—sentinels, as it were, on the watch-tower over the rights of the citizens, guarding those rights. You are not here to be carried away by vague and general ideas of public improvement. You are not here to register the behests of any corporation, but you are here to protect that man and to see whether it is necessary to take his property, and if necessary, to give him fair and proper compensation for it.

It is not necessary to take that property because this union depot company have made a map tracing that route out. That question is touched upon in the reports, and our courts have said time and time again that a jury have no business to follow that rule. You would be just like the common council. They map out a plan and carry it there to the common council, and the common council say yes; the common council do not make the plan, but they make it. You will be just like the old legislature; they map a plan and go to the old legislature, and they say yes. The constitution says, though, that they shall not do that any more. And they come here to you, and you do not say yes; you say "We will look into this matter, and we will see if it is necessary, we will see if there is not a better way of doing this, a way which will interfere less with private property, that will take less of the public streets, and will achieve the same result." Now, is there a way? I have already said to you that nobody denies that. Even their own witnesses accede that. Ellis, Joy, every one of them
1289 say that the other way would be the best. Mr. Joy at first began saying that it could not be done anyhow under this statute; that it would require what is called a special act; but when his attention was called to the fact that there can be no special act in this State, but that there can only be general laws, he finally admits that, under the statute that we have brought to you and read to you, it could be done, provided anybody would swear in the petition to enough to start the proceeding. How can it be done? Can it be done? He makes one objection; he only gives one practical reason in all his testimony; he says you cannot do it because if they put an elevated road on the Michigan Central grounds, the posts would be an obstruction. Do you mark and understand that? Posts are no obstruction to poor Backus; they are no obstruction to business people who were there before the road came there; they do not interfere with the use of the street one single bit, and, according to our brother Joy, they are a blessing in disguise, if you only try them long enough to find it out. But when you come to put them within the classic precincts, within the sacred domain of the railroad company, then all of a sudden they become a nuisance and an obstruction. They become so great an obstruction then that no jury should permit them to be put up there. There is an old saying that you cannot eat your cake and have it too. I do not for the life of me see how you can make these things a blessing to Backus in front of his premises, and a nuisance and an obstruction to the Michigan Central railroad on their premises. They say that

street cars could run under these tracks, carriages could run under them, that all the uses of a great public street could be carried on under them, locomotives and trains could run under them; here is the locomotive on the Central track that has to run
1290 under them. All this has to be done, when you come to look at Backus' case; but the moment you put in the road on the other side of that fence, all these reasons are distorted, and they become reasons against it instead of reasons for it.

One juryman asked a question that was in my mind, when they talked about these roads being an obstruction if put up in the air there; he asked a question, Why cannot they put buildings under them? Why not? Tell me why not! You will find buildings under other such obstructions. You will find buildings under approaches to bridges, buildings in which business is carried on; and you know, and I know, that the railroad buildings, freight sheds and buildings of that kind are never run to any great height—22 feet would be a great height for one of those sheds. They certainly would not interfere with their use for that purpose.

Mr. DICKINSON: You may have forgotten Mr. Joy's testimony, that the Ludgate Hill station in London had three stories of railroad running in over one another.

Judge CHIPMAN: I have not forgotten that; but the question asked by the juror struck me as being entirely pertinent. We are not here to find a way for this company to do their work cheaply. You are not here for the purpose of saving their money. You are not here for the purpose of finding the necessity of using this street; and the moment you begin to talk among yourselves as to how much it will cost the company more or less, that very moment you fail to do your duty under your oath, you become unfaithful to your duty to Backus, and utterly unfit for the great trust reposed in you by your presence here.

Why not build the elevated road alongside there? Why not carry it right through? There is only one reason why—
1291 that the posts will interfere. But we say the posts will interfere with Backus, and the supreme court say that the business and interests of the respondent in a case of this kind are just as important and as sacred in the eyes of the law as the business and interests of the petitioner. Look at Backus, employing 150 men. How many will the union depot employ, and how many would he employ if their road goes in front there? Will they give you 150 new citizens? You know they won't. That great corporation, the Michigan Central railroad, has not such a number of men in its employ there at that depot as Mr. Backus employs. Which business is the largest, which is of the most real importance to our people, their business or Backus'? You know what Backus' business will do for this city; the merchant knows it, the manufacturer knows it; every man who is engaged in any kind of business for the making of money knows that that much at least is secure, and that that much ought to be preserved and held onto; and while we want to secure the other, and secure the improvements which the union depot company may bring, we do not want to

throw away anything we have got, but we want to keep what w
have got and get as much more as we can.

They say that you could not make a petition to a court unde
this statute that has been read so often that I hate to repeat it
they say that no man could go into court and swear to a petitio
stating that the Michigan Central Railroad Company did not us
that land and had no need of it. Would any of you find any diffi
culty about going and swearing that the Michigan Central Com
pany are not using 30 or 40 feet in the air there, and that they hav
no need of it; and have you any idea that the Michigan Centra
Railroad Company could go in and defend against it? Have yo
any idea that they can prove that they have any need of it
1292 You know they are not using it, and the only thing the
would be reduced to would be as to the question whether put
ting those posts in the ground there was such obstruction to thei
business as would defeat the application. I do not believe that an
jury would find it any obstruction. No jury would if they believe
the testimony given here, to put this road in front of Mr. Backus
place, because all the testimony brought by the petitioner is that i
is not a nuisance and it is not an obstruction. They could run thei
track under it; there would be no trouble about it; they coul
put sheds under it; it would be no interference really, or so smal
an interference that no jury would take it into consideration, pro
vided you believe the testimony given in behalf of the petitioner i
this case. Is there any practical difficulty about that? Answe
me that. They say no man could do it without committing per
jury. Would you commit perjury if you went into court and too
oath that they did not use and did not need this space up there i
the air. The fact is that they are not using those grounds in an
such manner as they are trying to make out; some of those cars la
there month in and month out, as anybody can see who goes dow
there and looks; they lay there until they are begrimed with dus
and age. They are not using it; and it was because the Michiga
Central knew that under this statute a petition could be made an
that the probabilities were that a jury would give a verdict and tha
that verdict would be sustained by the court, that they stopping
fighting this project and let them have this corner there, let them
have 19 feet for the viaduct, and they have come to terms, so that
there is no longer any fight between the two companies. Now, my
friends, there is no difficulty in this; I want to impress on
1293 your minds honestly and fairly that there is no difficulty. Is
there a difficulty? Would you hesitate to take that oath tha
they were not using it, for you know they are not using the height
of that elevated road, and they do not need it. And the company
would have to come in and prove that they were using and that
they were needing it, and they could not prove that the putting of
the posts there was an obstruction and a nuisance, if you believe
they are not an obstruction and a nuisance to Backus.

Somebody asked here whether the Michigan Central might want
to use it for an elevated road; that came up yesterday. Of course
they do not want to use it. Their whole system is a system at

grade; they come in at grade, their buildings are all put at grade, and they have no plan on hand, and they have no necessity for an elevated road there; the Michigan Central has not; so that you see that on that score there is no practical difficulty, and if you refuse to give that application to this statute, then I ask you what use are you going to make of it? If it does not mean what we contend, tell me what it does mean? That is fair. If we are not right, then who is right? Nobody will tell us what it means. Mr. Joy undoubtedly had it passed when he had the union depot act passed. Nobody vouches any explanation about it? What does it mean? Evidently it means in some way that one company may take the depot land of another company. That much everybody concedes. And yet they undertake to tell you practically that there are no circumstances under which that can be done. Now, my friends, the circumstance has arisen, the case is here, and if they can go over there it is the best route for them, it is the best route for the city. It saves you the street, it saves Backus, it keeps
1294 the railroads all together there over that fence, and the public generally will be better accommodated.

Another reason is given here and urged why they should not go there, and that simple reason is that they want to go somewhere else. In other words, they say it is necessary for them to use the street because they want to use it. That is the claim and argument—we have laid it out to go there, therefore it is necessary to go there. That won't do. What kind of men will you be if such an argument as that has weight with you? You are here to determine whether it is necessary. They ask you, Is this necessary? You reply, Yes, it is necessary, because you say you want to go there. That is what they keep urging on you here—it is necessary because we wish to go there. That is begging the question, and it is exactly what the supreme court say that the jury must not do. They say that the jury must decide that question irrespective of any plan made by the parties or of any wish of the parties. Let us see what Judge Campbell says on that subject, in the case of Grand Rapids & Indiana R. R. *vs.* Weiden *et al.*, 70 Mich., 390:

"It was objected that the petition did not show the facts necessary to make out a cause to resorting to a statutory remedy. My own view has been that the petition should set out the facts indicating a disability to agree upon a purchase, instead of making a general averment to that effect, especially as the law requires the reasons for such disability to be set forth." That is in regard to some preliminary matter. "It seems to be imagined that railroad companies are to be presumed entitled to proceed to condemn lands at their own option, and that nothing more than a formal effort is required to give them the right to do so. But under our
1295 constitution, this is not a correct view of the subject. Under the old constitution, when the legislature chartered a railroad, the right to build it became fixed, and could not be questioned, and consequently land-owners were obliged to acquiesce. But under our present constitution, there is never any presumption that a railroad is necessary, or that any particular land ought to be given

up to its uses." In other words, there is no presumption that this railroad is necessary, though we concede we want a railroad here, or that they ought to take this land that they are seeking to take, for the purposes of their right of way.

"Every land-owner, therefore, has a perfect right to object to giving up his land, and is not confined to objections concerning price or value."

Of course every man has got a right to object to giving up his land, and nobody has a right to abuse you for doing it; that is your right as a freeman; nobody has the right to say you are standing in the way of progress.

"He may object to the lack of necessity for the road at all, or for its location or extension over his land at any price, or on any conditions."

We object to their coming on our property at any price or upon any conditions. Take it, where you can take it, onto the Michigan Central line there. Backus must not be abused here for taking that position. That gifted man, that pure and learned judge, that friend of humanity, Judge Campbell, says he may object, and he is not to be abused for it. "He may object to the lack of necessity for the road at all, or for its location or extension over his land, at any price, or on any conditions." That is the doctrine of freedom, which should be written in letters of gold upon your heart; it is the doctrine necessary to good government and popular
1296 rights, necessary that you and your children and neighbors can be decent and comfortable men and good citizens under the law of the land.

"In law, his use is as presumptively as important as that of a railway company, and it must devolve on any such company to establish affirmatively all that is needful to make out a clear case of necessity."

And Backus' use is presumptively as important as that of a railroad company, and it must devolve on any such company to establish affirmatively all that is necessary to make out a clear case of necessity. Backus' use is as important as the use of Joy and Alger and all these capitalists, and of the soulless thing they call a corporation. His use, as the use of the widow Specht, is as important as that of a corporation; and I say God forbid that the day will ever come when the law will be different, and above all, God forbid that the day will ever come when juries will fail to understand that law and fail to administer it with fair and honest hands.

"And a road already established has no better claim than any other to extend or change its lines."

Mr. Baker says they have got the right of way, that they have already commenced it, and that that is an argument in its favor, and that that must compel you to find this necessity and influence you upon the question of damages in this case; but here the supreme court, through Judge Campbell, say that that is not so; and who will you believe, my friends? I have given you the words of Judge Campbell, not my own. The argument I have made is found within the leaves of those books, from men like

Christiancy, Campbell, Cooley, Morse and McGrath, from men trusted by the people, from men who have the control of your government and the protection of your lives and property,
1297 whose word is law; and they have manfully upheld that doctrine, that the humblest is as great, in the sight of the law, as the greatest. And it makes no difference how much property is involved, how much public necessity intervenes, it is the right of every citizen that he shall be protected and taken care of by a jury, and at all stages of the process the question of public necessity shall be honestly settled, shall not be determined simply by the demand of the company, and simply by the fact that they say that that is the most convenient and the cheapest way for them. Juries are not constituted to save money to a railroad; juries are not constituted to help them make their improvements; juries are not constituted for the purpose of finding necessities at their behest. Juries are constituted to protect the citizen, and it took us years to get to it; we had to change our constitution to get to it; but here we are, you, the jury, we, the citizen, demanding protection; you, masters of the situation, you, uncontrolled by aught save the law and your own good sense; you are our reliance, not only under the law, but under the circumstances now, our reliance to see that a great wrong is not perpetrated upon us.

I wish to go into the facts of this case now, but as it is late it might be well to adjourn.

Adjourned to Monday, July 13, 2 p. m.

1298 JULY 13, 1891—2.10 p. m.

Argument of Judge Chipman Continued.

Gentlemen, on Friday I endeavored to emphasize, so far as I am capable of, the scope of your duty in this matter. I then told you that it was all confined to the limits of the necessity of using this street, and in case it is found necessary, to the question of damages. Those are the limits which the law has prescribed in which we must walk, and of course we are guided in doing that by the testimony in the case. And I need not say to so intelligent gentlemen as these who are before me that it would be extremely unfair to either party in this case for the jury to take into consideration a set of facts which have not been discussed, which have not been brought in evidence before them, and which in law have nothing to do with the matter, because if it could plainly appear that the jury proceeded upon an entirely wrong basis, and any party is harmed by it, there might be a remedy, but if jurors will proceed upon something of which we know nothing of, they may be proceeding upon utterly illegal grounds, and therefore upon entirely unjust grounds, so that we must endeavor to confine our view of the case to the testimony itself, and to keep within legal limits, which I have already described to you as being laid down by the law.

Now there is one question, before I come to the facts, which I would like to call your attention to a little more fully, and that is

in regard to the power to use the Michigan Central property, or other railroad property. You have had the opinion of Mr. Joy that that would be a good route. Mr. Ellis says it would be a
1299 good route. You know it would be a good route yourselves; if gentlemen testified differently, you would not believe them. It is so patent that every one who devotes any attention to it, or gives any consideration to this question, knows that it is the best route to go that way. But we are told that there is a practical difficulty, and in the beginning Mr. Joy seemed to intimate that there was a good deal of legal difficulty in the way. Not a difficulty of fact, but a lack of authority in law to go over these premises, or to go over premises anywhere similarly situated, for a similar purpose. In his last testimony he qualifies that somewhat, and while in the beginning he seemed to think the act of 1881, which he says he might have drawn, had really little, practically little potency in it, in his latter testimony he throws the whole matter upon a question of fact, but in case there is any obscurity in your minds as to the legal aspects of this question, I call your attention to this, you have had the opinion of five lawyers upon that subject, Mr. Joy, Mr. Lothrop, Mr. Dickinson, Mr. Baker and Mr. Chipman. Mr. Baker, Mr. Dickinson and Mr. Chipman are not witnesses in the case, and they simply give you their view of the law, to which you may attach as much importance as reason will dictate. Mr. Joy is not here speaking as a lawyer, in any sense. He is here as a witness, and a witness in his behalf. He is one of the parties in interest in this case, and his views undoubtedly are colored largely by what he conceives his interest to be. I will say here that I have no question, from the outside indications, that notwithstanding all talk about the hostility between the Central railroad and the Wabash Company, in this union depot project, that I have no doubt that a complete understanding, and a mutual understanding has
1300 been reached by these opposing interests. I have no question upon that, and I believe that in pursuance of that understanding, Mr. Joy wishes to go up River street, and the other company, in consideration of his not trying to go across their grounds, have withdrawn any opposition that they had to his going wherever he pleased outside of their grounds.

The only disinterested witness who has testified as to the law on this matter is Mr. Lothrop, and Mr. Lothrop's testimony is as strongly with us as the testimony of any man can possibly be, and though Mr. Baker, in his opening speech to you, said that Mr. Dickinson had maintained some other position to that which I maintained the other day, and that which Mr. Lothrop testified to here, yet when you read Mr. Lothrop's testimony, you will see that Mr. Dickinson took no position different from what he stated in the opening of the case, where he stands now, where I stand I think he will stand when he addresses you, and where, under the blessing of God, I hope you gentlemen will stand.

The question is this: You remember Mr. Baker read decisions from Massachusetts, from Pennsylvania, from Minnesota, and from New York, and I interrupted him and asked him if any such statute

as this was involved there, and he very frankly and honorably said no, not that statute, not the particular statute that we have here, and I then made the suggestion, which I hope the jury bore in mind, that these cases merely dwelt with the general power under general laws, in the absence of a special law such as we have, for one company to take possession of the property of another, and I then said that we rested our case upon this statute, the special statute, the law of 1881, and my brother Baker said that he was glad I took that position, because it was not the position of Mr. Dickin-
1301 son. Now, those cases he read simply confirm a doctrine we all agree to. There can be no doubt about that. If, under the law, property is devoted to one public use, it requires a special law to take it from that use and put it to another public use. That is all there is in it, and that position we have maintained all the way through, and the only question was, whether we have a statute in this State which would give that special authority, and under which the thing could be done.

Now let us see what Mr. Lothrop has to say on that subject. You remember his being upon the stand. You recollect Mr. Dickinson asked him: "Will you please state whether your present recollection is that your talk with Mr. Mulliken and your familiarity with the laws which were then called to your attention, in connection with this notice of the Michigan Central, was prior to or after the passage of that act." He says he does not recollect having a conversation with Mr. Mulliken, and he cannot tell just exactly what took place with them. He does not say whether it took place or not. He says: "My recollection is that I said then that my conversation was prior to that." It was before he had that conversation with Mr. Mulliken, in which he undoubtedly affirmed the same doctrine, though not knowing of the existence of that act, because it did not exist, in which he affirmed the same doctrine which he affirmed here upon the stand. He may have thought at the time there was no authority to do it, but his whole testimony here shows that he had no doubt that the legislature could give such authority, and that they did give it when they passed the act in 1881. "My recollection is that, as I said before, my conversation with Mr. Mulliken was prior to that." That is, prior to the passage of the act of 1881. "Your impression of the law, which you stated
1302 then, which must have been prior to the passage of the union depot act, was that the franchise of one corporation could not be taken without statutory authority by another. Yes, sir."

Recollect, Mr. Baker says Mr. Dickinson held another position. But here Mr. Dickinson says, "There is no doubt of that at all. But you have no doubt that by express statutory authority, the property of one corporation may be taken by another. A. I think, as I stated before, that I always understood that all property was subject to the power of eminent domain, but that there must be, for the particular purpose of taking one piece of property that had already been appropriated for that use, taking it for another use there must be express statutory authority." The very doctrine we have contended for. "Q. In this State, legislation of this character must be general

in its nature, under the constitution of 1851? A. There was some provision on that subject." Our constitution would not allow a special privilege to be granted to any corporation. It would be impossible, therefore, to pass an act which would give one of our railroad companies power to do this thing. Whatever is passed must apply to all railroad companies, and must give them the power to do whatever act the law authorizes.

"Q. I will ask you as to your opinion as to the constitutionality of this act of 1881, An act to enable the Detroit, Lansing & Northern to take possession of the depot grounds of the Grand Trunk road, you do not think such an act would be constitutional, that is an act to allow that particular company to do this particular thing? A. I should formerly have been of the impression that it would not have been. I would not dare to answer it now. Q. Suppose an act is passed authorizing one railroad company, under certain conditions and limitations named in the statute,
1303 to take the property of another railroad corporation, or its depot grounds or right of way, do you think that statute would be constitutional? A. I can hardly dare to answer the question, but I will ask another question; do you mean authorizing a particularly specified corporation, and no one else, that is authorizing the union depot company, and no other, to do it? Q. No; authorizing railroad companies generally, under circumstances to be detailed in the act, special circumstances, which are to be passed upon by a tribunal, authorizing any railroad company, under such circumstances named in the act, to take a portion of the depot grounds, or a portion of the right of way of another railroad company? A. I am not quite sure that I understand you, but if I do understand you, I should answer that I do not see any objection, so that it would operate within the power that would govern the taking of private property for public uses." Operate within the same power under which you are acting here now, for that is the only rule under which you are acting. "Q. You have answered already when you had the conversation with Mr. Mulliken, and your familiarity with the statutory law; the union depot act, I should state to you, in order to refresh your memory, was passed in 1881. Were you advised, and did you go before a committee as to some portion of it. It is now in the new compiled laws, and was passed in 1881, in June; and at the same session of the legislature in 1881, there was passed this act?" He then reads that section 3557, the section which we have read to you so often, and under which we contend that the authority is given. "Q. At the time to which your attention has been directed, prior to the passage of the union depot act, do you recall there was any such statute on
1304 the books? A. I don't know of any such before that time.

Q. This is in the general railroad act. Under this section, to what tribunal do you understand the statute would refer in question of the actual use and the necessity for the aforesaid purpose, for the railroad company owning such land, when it was sought to take it, to what tribunal would the question, under the provisions of that statute, to pass upon the question of the actual use of the land and

the necessity for its use by the company? A. Before I would dare to answer a question of that kind, I would give this matter of jurisdiction of the tribunals a pretty careful examination, which I never did. Q. I will ask you the question, whether in the acquirement of land under the general railroad law, the tribunal provided is commissioners, to be appointed by the court, and at the election of the private individual, a jury? A. Yes, sir. There was originally a provision in the constitution of 1851, which in certain cases was afterward modified, but so far as railroads are concerned, I remember commissioners were authorized, and the right given the private parties to demand a jury. The proceedings were conducted in some court of record in the State of Michigan, and at the election of the private individual, under the general railroad law there should be a jury to pass upon the question of the *questions of* necessity and the value of the property. I do not remember any exception to that right."

Now, gentlemen, if there is anything clear, it is that Mr. Lothrop's testimony is on all fours in favor of our position in this case, in other words, that it requires a special statute to devote to one public use property already devoted to another. Secondly, that we have got such a statute in this State, and that statute is the one that we have been quoting
1305 to you here, and iterating it and reiterating from time to time all through the case, and, thirdly, that commissioners, or, at the option of the private party, a jury is the proper tribunal to which to refer the questions involved. Now, upon that point, I have nothing to add to what I said the other day. I desire to call your attention to, and emphasize the testimony of Mr. Lothrop, because he really is the only disinterested witness in this matter whom you have had before you. What value you have placed upon his testimony can only be determined by the estimation in which you hold him. We all know him, we all love him, we all regard his name, not only as a synonym of honor, but as the synonym of high legal learning, as a man of the greatest legal ability in his day and generation who has ever stood in the courts of the State of Michigan. That such testimony, coming from such a man, will receive the highest respect at your hands, and that you will justly regard it as fortifying and strengthening the position which we have taken here, I cannot, for a single instant, doubt.

Now, gentlemen, if you pass the question of necessity and come to the question of damages, of course it will be your duty to review the testimony upon that point. My friend Baker says that all we are fighting this case for is to get damages. I have no difficulty about saying this, if we must have this road, we want to be paid whatever we suffer. I have no hesitation either in stating that if you find the road is not necessary, they may take their damages and keep them in their pocket and give them to somebody else providing they will pass us by and leave us alone; and I must say that the manner in which my brother has spoken of and treated Mr. Backus in this connection, has struck me, to use entirely
1306 mild terms, as being entirely unnecessary. He not only in-

timated that that is his desire, to drive an unconscionable bargain with this company, but even went so far, when he was on the stand, that old, honored citizen, that man who possesses all that he has by hard and honest work, to ask that man if he did not increase his force of workmen at the time you gentlemen went down there to look at the mills. There was no reason for it, because if he had done that, it would have been susceptible of proof. He simply threw that out as a sort of feeler, a sort of skyrocket in the case, to go off in any direction that it might, to hit what it pleased; as if Mr. Backus really would be guilty, or as if Mr. Baker, who had formerly been his counsel and knows him so well, really in his heart believes that that man, for the purposes of this lawsuit would perpetrate a fraud of that kind upon a jury of his fellow-citizens who went down there to examine those premises. Surely that is not the right spirit for a great corporation to approach a citizen. There is a lack of respect, a lack of fairness which should prevail in doing business between fellow-citizens, and which should especially prevail when a great corporation comes in and demands of a man his property and his rights in a condemnation proceeding.

Now, my friend Baker tells you that this railroad is no damage to him, that it is a benefit to him. Well, my view of the law is that, in a proceeding of this kind, it cannot benefit a man against his will, and against his wishes, to commence with. I am entirely wrong, or the law is that the question of benefit is not to be taken into consideration here at all. He cannot receive any peculiar benefit unless he receives this railroad under his roof there on his premises. That is conceded on all hands, and this great corporation come here, and like a second Providence, tell Mr. Backus
1307 that they have a better way of doing this business for him, and because their way is better, he must take their way and follow it. They say to him, Your way of handling your lumber and bringing it from your yard is too expensive; we will put a spur in over your premises, between your fence and your factory, branching off from our line, and we will run a lot of tracks in there alongside of your planing mill, and you must have all your machines upstairs, and, instead of dumping on the ground floor the material which you use by the side of the machine, we will let you take it in on a series of railroad tracks running between these machines and alongside of them—great big flat cars standing there all day, this entire floor completely barred and ribbed with these railroad tracks, and he will have to feed his machines at such times as would suit the convenience of the railroad to give him switches, and on such terms as they choose to impose upon him.

Now let us have a little common sense. In the first place, that man's mill is fixed to do the business on the floor below, as you all understand. What should he come upstairs for? Why should he come upstairs? My friend Baker, in behalf of this great corporation, says that it would be better for him to go upstairs. Suppose this corporation wanted to take a cottage that you owned, and you had a fancy to have a hall right through the center of that house

and their tracks come right up to the front door, so that nobody can get in and get out. They say you are very foolish, why don't you have your entrance in the back; why don't you have it on the side? You say I want it there. They say, But O, my friend, you have a great big hall that takes up too much room in the house, close it up. Your door is too expensive, you can put a little
1308 cheap door in there. Your portico, where you sit at nights with your family, that is not necessary. If you were a wise man, you would never have put in a thing like that. Put two or three steps, a sort of a little cubby of a door on the side, and go in that way. You can put in something cheaper than that, and put it in better. You ought never to have had that in there. And therefore, you spoil that house entirely for your family and your living, and we will only pay what it would cost to put up a little cheap door and two or three steps on the side. There is not a man on this jury, I don't care how much he loves railroad companies, I don't care what disposition he may have to be accommodating and complacent to them, there is not a man here whose blood would not boil if a jury of his countrymen stood by and said such an imposition as that should be practiced on him. It is pure, unadulterated cussedness on the part of a jury, an infringement of man's most sacred rights, without one mitigating circumstance, and I have only this thing to characterize it, that the men who did it were doing the dirty work of a corporation which as time goes on they find cares nothing for them, and which as time goes on they would find, if the necessity of the case requires, would crush them to the earth.

How can Backus use this elevated road for switch purposes? Have a little sense about it. Adams says he has his peculiar arrangements, but when I asked him if he could move his lumber at the planing mill as cheaply as Mr. Backus does, and he asked me what the amount was, and he was told the amount which Mr. Backus afterwards testified to, he said if he did it for that he was doing it very cheap. And yet the improvement is to consist in taking up the space where the machinery should be for rail-
1309 road tracks, for serving the material to the mill from flat cars, and by moving the whole plant clear up into the second story, and so changing the entire arrangements of his business at that place. Now, gentlemen, let us be reasonable about it. The law says that if Mr. Backus prefers to do his business downstairs the railway company have no right to say he shall go upstairs. That is his undoubted legal right. You cannot here, you cannot anywhere, in any country or in any land, too strongly protect the personal right of the citizen. Wherever you are, the duty involves upon you to see to it that these rights are vindicated. Let there be no mistake about that. Above all, let there be no trampling down of those rights. The old saying is, that continual dropping will wear away a stone, and I tell you, my friends, there is a dropping going on in this country, and has been going on for the last fifty years, notably in the years since the war, in which the rights of the plain people, as Mr. Lincoln used to call them, meet with very little

mercy at the hands of these great corporations and the great capitalists of this country.

That is his right, to do his business in his own way, and my friends may talk all day long about its being better for him to do it in some other way. That does not release them from the burden of paying him damages for breaking him up, in the way in which he does business at present. He must get a new dust-arrester, forsooth. He must get a new system of switches, forsooth. He must move his plant upstairs, forsooth, he must take that mill and rebuild it from top to bottom, make a new mill, better for him they say, and yet they say you must not give him any damages, his damage is very trifling. It is not worth talking about.

Poor Backus, who has been studying the subject of fire-drafts
1310 and smoke consumption and the subject of dust-arresters all his life, they say has been an old ninny, an old fool, does not know what he is about, and he has come here and has grown gray-headed, has built up this vast business and has these two fine young men, his boys, established in that business, and he has accomplished more than some of us who talk so loud and so eloquently and so strongly have been able to accomplish with all our life-work, he has aided in building up the city of Detroit, he is filling the mouths of family after family by the industry which he furnishes and for which he pays, and this man is a poor old dotard, he does not know what he is about. Change everything, change himself, make himself over, poor old man, dye his hair, color his whiskers, put on a new dude suit of clothes to come up to the present generation of these modern improvements, and yet my friends, that man has accumulated that great dock property down there, accumulated and paid for that great warehouse property on Fort street, accumulated and paid for the roof over the head of his family, on Ninth avenue, or Lincoln avenue, has accumulated and paid for that wonderful mill, has gone through panics when rich men and strong men and enterprising men fell like autumn leaves, as you will remember who are old enough to remember that time. He has gone through the devastation of fire, stripping him, stripping him nearly bare of his possessions, and yet he has recovered, since 1881 or 1882, I think it was when the fire was there. We find he has gone on and rebuilt his mill and paid for it. We find that he has brought it to a paying basis over and above the capital which he invested in it in the process of paying for it. We find that he has stood square to the world, facing every storm, meeting without a quiver every
1311 misfortune which befell him, and we find him now in his old age, with all these trophies, this monument of his bravery, his industry, his integrity around him prepared for the rest of his life to enjoy the ease which gray hairs ought to bring to him; we find him here denounced as an old dotard, a silly man who does not know his business, a man who is standing in the way of progress, as a man who is trying to filch money from railroad corporations, this honest man, this good man, this industrious man, who, in his branch of business has been foremost in the ranks of progress, he is held up to this jury as an object of contempt, simply because he will

not lie down and surrender that which he has earned so hardly, at the behest of this company.

Now, gentlemen, that won't do. Mr. Backus is not a bad man. It is just as right for Mr. Backus to wish to be paid for his property as it is for Mr. Joy to wish to get it as cheap as he can. All the advantages are with the railroad company. Certainly the power, the strength, the wealth, all is theirs. There is no doubt about that. Why should not I take Mr. Joy and hold him up to you as a hard-hearted monster, as a bad man, because he is trying to get this property for his company as cheap as he can. If I did that, you would say that is not right. You would say, Chipman doesn't feel that way, he is only talking that way to us, we see through it, and of course you would feel that you were great fools if you allowed any such talk as that on my part to influence your judgment in a matter so important as this.

Now, the truth is that Backus probably knows more about his business than you do or I do. Those are the chances. He has kept the planing mill; he has made it successful; he has made a fortune out of it, and he has got that plant there into such a
1312 position that he gets a rental of $5,000 a year for it from the company, besides being an owner of part of the stock of that company. All the indications are that he does know what he is about. That he has been a shrewd man, and, gentlemen, I believe that all the indications are that he has been an honest man.

Now, my friend Baker knows more about the planing-mill business than he does. That is all right, but, my friends, there is not one of you who, if you desired to go into that business would go to Mr. Baker in preference to Mr. Backus. There is not one of you who would take his advice in preference to the other man's. It is true that Mr. Francis Adams came here, and he is the only man that has come here, and rather intimated that there was something wrong about Mr. Backus. It seems he did not like him. I don't believe Mr. Backus likes Mr. Adams, and so there are two of them, and that is a thing you and I have nothing to do with. He rather intimated that Mr. Backus' way of doing business is not the best way, but I take notice of this thing, Mr. Backus is in the business yet, and Mr. Adams isn't in it. Mr. Backus is a live man, Mr. Adams is simply looking on now to see what Mr. Backus is doing. Now, all that is fustian. It is nonsense. It is against every practical idea which any one of us entertains. It is a sort of talk that no man would use to any of us if we got outside of that door. It is a sort of a talk that no man would keep up an instant when you get up from these seats and go out into the middle of this floor. It is talk for the occasion. It is lawyer's talk, it means nothing. It is idle babbling, my friends. Let us take a practical, sensible view of the case instead of this view.

Now, we heard a great deal about these dust-arresters. We are not trying which is the best dust-arrester here. There is a
1313 supreme mistake which we came near falling into until the jury very wisely cut it off, a mistake which my learned friend, Mr. Baker, would very gladly humor you with. We lawyers have

a way of trying to get a jury off sometimes on a side issue. It is one of the old tricks of the trade, to hammer away and dispute about a thing which is of no earthly consequence, but what we are to discuss here is not whether Mr. Backus can get a better dust-arrester there. You decide this case and put into your verdict that you decide it on the basis that Mr. Backus ought to put a better dust-arrester in there, and can get a better dust-arrester; and the supreme court would not let your verdict stand a moment, because it would not be law, it would be wrong, it would be wicked. It would be against that law laid down by Judge Campbell, which I read to you the other day. Mr. Backus can do his business as you can do your business, in your own way. He can do his business in his own way, and he is not compelled to change and to adopt the judgment of the union depot company as to what is a better way of doing that business, and especially he is not compelled to go to the expense which is necessarily involved in order to make that change. All this talk about dust-arresters is of no earthly consequence here. There is one supreme fact, however, in connection with all these dust-arresters here, they have got a hole in the top, and whether it is a metallic dust-arrester, or whether it is a wooden dust-arrester, the hole is there in the top, the dust is there at the top, and Mr. Thompson says in his dust-arrester the dust escapes from the top. It lies on the outside, and if a spark went into that hole among the dust, if the spark has life enough in it, it will go off like powder, so that if this was a Cyclone, or a
1314 Vortex, or any other dust-arrester that they are talking about, just so long as there is a place for the air to go out at the top, just so long as there is a place for a spark to come in, just so long as there is a place, if any dust is going out with that air, or if the air veers to this way or that way and the spark comes with the wind and has vitality enough to strike the dust, it will run like gunpowder and set the whole thing off. That is as you all know. Mr. Thompson testified that more or less dust comes out of this pipe. You saw the Backus mill, you saw how clean it is. He testifies, and you saw it, that they had no trouble with dust lying around there. There is no train of gunpowder lying around that dust-arrester, to run off and catch fire and communicate with the rest. The danger all comes from the spark coming with the wind through one of these openings, the air being inside, the opening on one side and the wind blowing on the other, coming there it will set fire to the building. It makes no difference whether the dust is on a piece of sheet iron, or whether it is on a piece of burlap, any more than it would make any difference whether so much gunpowder or dynamite or gun cotton was on a thing of that kind. Touch it, it goes off, and devastation and flame follow. That is the way it is done in flour mills; that is the way it is wherever dust of flour and wood, and the dust of flour and wood are both vegetable substances, wherever dust of flour or wood is collected and a fire is ignited, that is the way it goes off, and the poor man who happens to be where it comes is scorched and shriveled up and killed, it comes so suddenly, with such a flash, and is so deadly and fierce.

Do you want me to argue it to you, gentlemen, living in this glorious nineteenth century which Mr. Baker has eulogized so, you men who are here with your eyes open to see just as much as he sees, knowing what progress means, do you wish me to argue to you that there is no danger from a locomotive? Shall I argue that? Shall I argue to you, gentlemen, that sparks from a locomotive will set fire to objects they come in contact with? Shall I argue to you that the grit and the steam and smoke from a locomotive will dirty fine wood and impair its value? Shall I argue to you that clouds of smoke and steam passing between the window and the light will darken the window? Shall I argue to you that this structure in the street there, coming up to the line of his fence nearly, and as high as the third story of his place, that that will intercept the light to a greater or less extent? I don't know why we have to argue these things. You go with me to New York. You are not trying to build an elevated road; you are simply looking around to see how things are. You and I go along an elevated railroad, cross under it, on Sixth avenue or Twenty-third street. I have crossed under there hundreds of times, and I presume many of you have who have been to New York. Your first impression is that it is dark. Your next impression is that every street that the elevated road goes through is ruined, and it is ruined. My friend Baker partially conceded that the other day, said they would not try these things on Woodward avenue and Jefferson avenue, but it was done on River street, and the very morning after he made his speech the paper was full of projecting a line of elevated roads up Jefferson avenue and Woodward avenue, running them in front of your fine residences, in front of your fine stores. And, my friends, they run out nearly every great store, and they certainly run out every fine residence, and you cannot get your women and children to live on a street with an elevated road running right in front of your door. We all know it. So that it is not only poor Backus with his factory and his little obscure street down there, but this thing is liable to strike you everywhere and anywhere. And when any man tells me it is a benefit, when any man tells me it is a benefit to compel workmen to work by gaslight or by electric light, benefit to the book-keeper to do his work by artificial light, it is a benefit to cut off the air and the light of the sun, it is a benefit to give you smoke to breathe, and steam to breathe, and those indescribable gases to breathe, I will simply say to you I don't believe, you don't believe, you can't believe it; it is not true, it may be a damage. It may be that these poor fellows who have to run these planing mills, who have to sharpen those saws and set them, who have to keep those planers in good order—it may be that their flesh and their eyesight is not so valuable as that of some of the rest of us. I think it is just as valuable, and I am very certain of one thing, that any laboring man who has a particle of good sense, who would allow himself to be forced to work in quarters like that, is a traitor to his craft and a traitor to his country and to his family, and he does not deserve the respect and the consideration which is due to a good

citizen. It won't do, my friends. You cannot choke or shove labor into dark holes and pits; you cannot make a man work all day long with scant wages and cut off from him the only thing which God has vouchsafed to him for nothing—or one of the few things—the light of the sun and the fresh air of heaven. You have to pay for your water, you have to pay for your heat, but the sunlight and pure fresh air we never have had a tax on, or made any attempt to imprison them, or cabin and confine them, until the union depot company comes in and says, On the whole, it is rather a good thing for a man to be treated
1317 in that way; it will be a benefit to that property. You do not believe that? I know you do not believe it. You may see some other way of doing this for the union depot company, but you cannot do it in the way they want you to do it. If Mr. Backus is to be robbed, he has to be robbed by an entirely different argument. You will never make that argument. You will never agree with that argument. You will never do it on the principles laid down to you in the argument which has been made to you, because you know that these principles are false, and that no community can live under them, and that no community ought to live under them.

So, my friends, here comes this railroad in front. They propose to benefit Backus by adding to his troubles, by having him erect these side tracks in front of his premises close up to his windows, and by changing his dust-separator and changing the position of everything in his mill, by changing his system of doing business and by making a new Backus of him, making him all over, this poor old man, reconstructing him. Remember, in the old days the great question was of reconstructing the South, trying to reconstruct our colored brethren, and the union depot company seem to have some idea that they can reconstruct these Backus men here, father and sons. I don't know what they can do with the young men, but the old man has got to an age when, I think, it would be rather cruel to make him over. Perhaps he has seen so much trouble that he does not want to be made over. Perhaps since this company have come tramping upon him and on his lumber piles in his lumber yard, and with their threats of using him up in that mill, perhaps the old gentleman thinks he has lived in vain—that he does
1318 not care about having a new start. Perhaps he does not approve of Mr. Baker's way of starting, anyhow, so I am constrained to think that they will get very little comfort there.

You have heard authorities read here from New York. Did you notice that in every one of those cases the judges speak of the gas, the smoke, the steam, the oil and the dirt? Now, some of you gentlemen who have been in New York know that, in spite of their pans, in spite of all they put under these elevated roads, there is a continual dropping of grease all day long, just as you see dropping on any other railroad. But on these elevated roads there are droppings of grease, and then again, in case of snowstorms, everything drips down from above, whatever there is upon the track or upon the platform, carrying it down into the street. You have seen this,

those of you who have tried it. How would you like to drive into Backus' yard, in through that front gate there, get a load of nice clean lumber, drive in and get your lumber, and you start out, and the first thing you know there comes a shower of grease, great spots of grease on two or three of the boards. You take it home, you have bought it, taken your risk about it, it does not please you, what are you going to do about that? But if the dirt was in the mill and the board was injured there instead of under the track from overhead, you would say to Mr. Backus, I cannot buy that, you must give me a clean board. But you have bought it and paid Mr. Backus, you have gone off, and the top board gets a deluge of this, or you get a few spots on it. You cannot go back to Mr. Backus with that and ask him to give you a clean board. He may have lost a dozen boards to give you one clean one, but he gave you a clean one, and you say you will go and deal hereafter in clean places.

1319 But my friend Baker says there is no trouble about that; true, you have spent $9,000 in digging that hole there, so as to give this opening on River street; fill it all up again, raise the mill up, do all your business on the Fort Street side. True, the Fort Street side is only 75 feet, whereas this side of that property is 385 feet wide; true, there is a physical impossibility for you to do the work on the Fort Street side; nevertheless, change it all around; this company wants your property; they want it bad, and they want it for nothing; change everything around simply because we ask you to. Now, my friends, that won't do. You are not going to make Backus do anything of that kind. You do not want him to do anything of that kind. You find him there contented, you find him there prosperous, you find him there with one of the best mills of a city, you find him there doing a successful business against a competition which is enormous, because you know that these mills are scattered all over this city, and the competition is enormous. What have you got against him? Have you anything against him? Has he done anything to you; done anything to the public? Is there anything about that man that you should take and turn him out of his own building, strip him naked to the very skin, to the very flesh?

Now, you see, Mr. Joy comes here and tells us that that property is practically worthless. We have a young man from New York named McIntosh, who came here and told you something else. Mr. Joy tells you that because he is interested, and wants that property. The young man from New York, McIntosh, tells you that because he is a fool; that is the reason he tells you that. He is sent on here by Mr. Gould to astonish us Western fellows; to

1320 show how the thing is done in New York; and I think we can all unite in a letter to Mr. Gould, and say that the young man did astonish us beyond all peradventure. That man would give you $400 a foot for your property over here, Mr. Freud. You have got a customer. He would give Mr. Freud $400 a foot for property at the corner of Congress street and Woodward avenue. I am not going to talk about him. I am not going to talk about Pangborn, except to make this remark. Pangborn was

got up for the occasion. Pangborn had on a magnificent white necktie, and I was in doubt whether he was a bishop or a blackleg, to tell you the truth. It is pretty hard sometimes to tell the difference; but he came out in very great style. If Pangborn was as good as he looked when he came on the stand, he is good enough to be a bishop. If he was gotten up for the occasion he deserved the other epithet. Pangborn looked with great benignity on you poor benighted countrymen. Curious they have got to go to New York to get men to come here and tell what we have to do in Detroit. He made you think of one of the Apostles of old, coming around and showering his blessings in all directions. He thought that you men did not know as much as you wanted to know, but he would forgive you, he was not going to be hard on you for that; but I say to you Pangborn did not look as fat and slick and well fed when he left the stand as he did when he came onto it. We knew about Pangborn, we knew he was coming. He shriveled, he lost flesh, he wrinkled. He did not know what was going to be poured upon him as he sat there. He came here and he talked pompously, and he talked about Martine's testimony, and yet, as a matter of fact, he did not disagree with Martine, and that whole subject of Martine's testimony simply was this—I may as well say it now as to say it by and by; Mar-
1321 time said that everything went down in the panic of 1873. We did not need a man from New York to come and tell us that. We all knew that. Some of you may have known it to your sorrow; but they brought a man from New York to tell us that. We all knew that. He said that in 1873, after the panic, all values went down, but that they recovered less in proportion in the elevated-road streets than they did in other parts of the city. Wasn't that his testimony? He put it in that way. He did not say in so many words, "I am sure that the elevated roads did this thing, but he did what you and I would do, found that wherever the elevated roads were, that the rise and recuperation of property was much slower, and was much less than it was where the elevated roads were not. That streets similarly situated, within a block either one way or the other rebounded and recovered their prices, whereas the property along the elevated road did not come back to the prices they formerly held. It was perfectly justifiable when he found one fact and one cause common on certain streets, the situation of things there, it was perfectly justifiable in saying that, in his judgment, it was the elevated road. You would say so, and I would say so. You run an elevated road up here on Griswold street and leave the street below clear—Shelby street; immediately business will go over on Shelby street, stores will be put up there, great concerns move in there, Woodward avenue and Griswold street practically deserted; you would say the roads did that. If you did not say it, what would be the cause? What else could you say? Both lose the custom and trade, and another street which was not so important a street before the roads were put there commences to boom, and you would say, of course, the roads have done it, and that is what Mr.
1322 Martine said, and that is the good sense of the thing. Mr.

Joy says he rode down the street under an elevated road, and that it was just as nice, and he says they are putting them five or six stories high in London, and that, on the whole, they are one of the blessings of a good Providence to a wicked world. You know better than that. I need not tell you, and I will not tell you, that these elevated roads are not a blessing. A great many people like the sight of overhead wires of the electric railways up and down the street, but the majority of people object to them. What is the objection to them? They have those posts put up and down the streets; wherever they are put up, and I know what I am talking about, they are resisted as a nuisance and an obstruction. They tried to put them up here in this city, and the people almost *en masse* rose against them, and the case went to the supreme court, and I read to you one of the opinions of the supreme court, that of Justice McGrath, one of the judges there.

This taking up the streets of a city with anything is a very serious matter. It may be a very great convenience to people living a great distance out, and undoubtedly under certain circumstances and to a certain extent, and to a certain extent only, it is a great benefit to trade, but after all you must be sure that it is going to help trade, not that it is going to crush it out. An elevated road up and down Woodward avenue would crush trade out, except just at the corners where the stations were; if you happen to be lucky enough to have one of those corners you would probably get a good trade, but the men between the corners would not get a good trade. So that, in that case, as far as elevated roads in the city helping trade and helping business, practically they hurt business, and for that reason, among other reasons, there has been in
1323 New York this onslaught upon these companies for damages.

The song is sung there that is being sung here, that everybody is to grow rich, everybody is to be benefited, if they build a new depot. Their building is only to cost $250,000. That is the little egg from which all this prosperity is to flow. Everybody was to be rich in New York out of these elevated roads. The business is cut off, ruined, and so they are literally thatching that corporation with actions for damages. The juries and the courts are giving them damages, and giving them liberal damages. At Harlem, clear up at the head of the island, a lot of real-estate speculators got rich. And so somebody in Grosse Pointe will say, By all means give us an elevated road on Jefferson avenue, all the way up. Somebody out at Royal Oak and some one else at Dearborn would want elevated roads, and they would get rich. In the meantime, what are you men to do who are living here, the men who keep stores, the men who have elegant residences, who have homes that they intend to live and die in. What are they going to do?

That is exactly what took place in New York. That is why these suits for damages were brought. The courts recognized at first that these corporations affected the rental value of the property and gave damages for that. Finally the court of appeals took the position that it affected the value of the fee just as we claim that it affects the value of the fee in Backus' case, and they permitted damages

for that. How is it going to affect the rental value of the Backus premises? Backus is getting $5,000 a year for that wonderful piece of property where the mill is. It is a pretty good rental, isn't it, $5,000 a year? How is it going to affect that? Who wants to rent it? He might put up a block of stores and face them
1324 on Woodward avenue, if he would build the stores in a curious shape, with a sort of ram's horn, and he would have to do it in order to make everything front on Fort street. How can he rent it for a mill? Who would want it for a mill, who would want it for any business which required cleanliness, which required light, which required good air? Yet there he is getting $5,000 a year, and that he is sure of for life. Five thousand dollars a year is a good rental to any man. A man is very fortunate who, at the end of his career, has one piece of property that he can rent for $5,000 a year—with all the taxes paid upon it, understand.

Now, my friends, do you want to go and rent that property at $5,000 a year? You are business men, you are shrewd men. Some of you men on this jury are men of very large business and large affairs, and remember the way you feel other men are apt to feel on questions of this kind. The great mistake men make in this world is to think they feel differently from other men. Another mistake is to think that they can do things better than other men. You will see it every day; one fellow gets up and says something, another says that is all right, but you don't say it in the right way, and he gets up and says it, but he doesn't say it any better. We are whittled off the same stick, all made of the same old piece. Just as you feel, other people would feel about it. There is no use of saying, "I would not do it, but somebody else might." The chances are that whatever you would do, somebody else would do in a matter of that kind. Who is going to rent that property under those circumstances? Who will take it except the Backuses themselves? And, according to Mr. Baker, it is not worth anything to them unless they remodel the whole thing,
1325 change it around front end to, and put in new machinery, new buildings, new dust-arresters, new engines, fill up the big excavation that is made there, take up the water pipes, take up the sewers, take away those thousands of dollars that are put there, or throw them away, rather, and then, my friends, you will have a nice concern there; and, mind you, he is to do all that at his own expense, and not at the expense of the union depot company. If that company want all these things done, let them come up like men and say, You give us the right of way there, and we will enter into bonds to build Backus a new mill. That is what they propose for him to do. Don't let them deceive you with this cry about railroad facilities. Backus has all the railroad facilities he needs. Why should he want any more? Why should he give any more of his room there for railroad spurs, for railroad tracks coming in? He has communication with every railroad on the continent of America, east, west, north, south, to ship goods everywhere. He has got enough, got all he wants, all that anybody wants, and yet my friend talks about giving him as an inducement, this other connec-

tion. That sort of talk is nonsense. It cannot influence you. They propose to cut off his light, propose to deluge him with gas, with smoke, with cinders, propose to endanger him with fire, they say these things do not happen very often, but they say we do not propose to take the chances of its happening, we propose that Mr. Backus will take them. Now Mr. Backus has carried insurance on his mill and yards to the tune of $250,000. He had insurance on his mill before, some $38,000, and he lost nearly $100,000 by that fire, and as things run now, he is taking about half the risk himself,
half of the loss of fire he carried and the other half the com-
1326 panies carry. But the risk becomes so much greater, that
those who insure him, the men who testified, not as experts, but as the men who are doing the business with him, the very men themselves who carry his insurance. the men to whom he looks, they come here and tell you they do not know whether they would take the risk at all, but that they would raise it to the enormous figures they mentioned, and they would expect him of course to increase the amount of insurance in every direction, so that the amount of probable loss will not be so great. They cut his yard up into four pieces, all on account of those engines coming through there, compelling him to raise the insurance, and in this mill he will have to double his insurance in order to feel any safety. They say he need not do it. Of course he need not do it. You need not insure your house, you need not insure anything. You may say a fire may not occur. That may be true in nine cases out of ten, that there won't be any fire; who will take the risk of the tenth chance? The tenth chance comes around in the shape of a locomotive and blows you up, and you say to yourself, what a fool I have been. No man wants to take such a chance in a business like that. The business is risky. It is peculiarly risky from fire. It is in that direction that the principal risk in that business lies. The very incarnation, the very worst form of that nature comes in the shape of a locomotive vomiting out smoke and steam there in front of these premises.

But they say there won't be much of it. Do you think that is the way our friends talk to the stockholders? Have you any idea that that is the way they get men to go into that project, tell them
that they are only going to run five or six trains a day? Do
1327 you believe that they put these switches in front of Backus'
place for nothing? Do you believe they will put the switches right in front of him for ornament? Are they put there because they look pretty? They are going to be put there because they are going to make up trains there. They tell you that they are not, but they are. They have all the tools to do it with, and they have put their money in there in order to do business, and these railroad people are pretty practical kind of people. They are not playing for fun, they are playing for keeps in this entire thing. They propose to win. It is heads I win, tails you lose. They are just as eager for the last penny as any man in the community. And yet, according to their story, it is nothing but a little play road, a little toy affair—a play freight-house up here on the corner of Congress and Third streets, acquiring land there just to play railroad.

They are not going to have any freight there. O, no. Going to put on toy trains; no switching there, all that there for ornament; just to give you a sample of how to build an elevated road.

My friends, this is fustian, utter nonsense; it is trifling with you, trifling with this jury, this solemn tribunal appointed by law to guard that man's rights, and to see that the rights of the citizen under all circumstances are protected. I repeat to you, gentlemen of the jury, it won't do. Their whole position here is false in general and false in detail. You cannot touch it anywhere, you cannot dissect it anywhere but what you find that their simple proposition to you is to make Backus pay for the building of this road, and to make him bear an undue share of the public improvement which this road will be. If you feel that you should be generous to the road, you men who are rich, put your hands in your pockets
1328 and give them your money. Do not give them Backus' money. I say that because they are begging you to give them Backus' money. If they should come and ask you to give them your money, you would tell them no, you would keep your money in your pocket. That is what they are demanding of Backus, and why should he pay this enormous tax for the general benefit? You might as well add on the general assessment-roll every year, when you come to Backus, so much, say we will make Backus' proportion of this tax $100,000 more than the proportion of any man in the city—make him pay this. It is the same principle. Why should he pay for the general good? Why should he pay? These burdens, which good citizenship requires every man to carry, are all right. The law is to make every man bear his own burden, but only his own burden, and the great object of justice which you are administering in this case, is to be sure that you shall not put upon him to bear that which does not belong to him, and to be sure that he gets that which does belong to him.

Mr. Backus, forsooth, wants you to give him $300,000 for his property. Who said that? When did he say it? Has he said it to you? Perhaps he has whispered it into your ears. Backus wants to force this railroad company to buy all the land between River street and Fort street and Congress and Third streets. To whom has he said that? Wants you to start in clear down at Eighteenth street and come up through that way. To whom did he say that? Where did he say it? I am authorized to say for Mr. Backus, with my friend and colleague in this case, Mr. Dickinson, that we never have said that we wanted to drive a hard bargain with this railroad. We have said to you, Keep the railroad away from us, and let them keep their money. We want none of it. But if you
1329 force the railroad upon us, then, my friends, see to it that we are compensated for the great damage which putting the road there will cost. Practically it is the breaking up of this large business. There is no theory upon which the railroad people present the case to you which does not involve an entire change and rebuilding down there. It means for Mr. Backus to change that which belongs to him, to take it and go somewhere else, and buy another property.

I was saying to you when you took the intermission that the theory on which this petition is urged and supported is that everything should come out of Backus, that all doubts should be decided against him, that every contested point should be decided against him, that his rights shall be minified, and that the jury shall deliberately make as little of the damage done to him as they can.

I may be all wrong in my view, but I certainly would not give it to you if I did not conscientiously believe I am right. I think it is your duty in a case of this kind to take exactly the other position. I think it would be your duty to give this man a little too much rather than to give him a little too little. I think it is your duty to see that by no chance he shall not be compensated for the injury which is done to him. If you gave him nothing, you do something that would be as wonderful to me as if the Lord himself should come down and help a railroad company. I should as soon expect an angel to come down here and help Mr. Joy. I have no fear of any such result as that. If he deserves nothing, give him nothing.

Mr. FREUD, a juror: How would it be if you told this company to go on the other side?

Judge CHIPMAN: In my humble judgment it would be
1330 doing just right, it would be doing what you ought to do. I dwelt on that on Friday, and I do not propose to re-echo it again; but if you must inflict this calamity on this man, do it at the expense of the railroad company, do not do it at his expense. Let them foot the bill. The old saying is that he who dances must pay the fiddler. Let them pay the fiddler in this case. If Backus has got to move, let them pay for his moving. If his business is ruined, let them pay for that. If his insurance is increased, let them pay for that. In other words, say that reasonably he shall have no harm whatever by reason of this proceeding. This company does not come here like a car of juggernaut for us to cast sacrifices to it, for people to be crushed under its wheels. It does not come here to be a calamity to this community, nor to any member of this community. It is here to help; it should come to us like the breezes, and like balm; it should come to invigorate commerce, give prosperity to our city, and in no single instance should it crush any man out or break up any man's business. I believe that I am as public-spirited as any man among you. I have no doubt that Mr. Backus is as public-spirited as any man among you; but it is a heresy to say, it is a heresy to freedom, to common right, to say that you ought not to resist this attempt to do that which is not necessary, that which will injure him, and to do it at his own expense. Put the road on the other side of the fence if you can. They began this case before all others, and when they found this question contested, instead of going on with it again, they kept it off and kept it off until they have settled with the others, and think by the pressure of that to drive you into a decision against Mr. Backus upon the questions which they could not get decided in the first case. It is very shrewd, always pro-

vided that you are weak enough and wicked enough to let
1331 any such manœuvre as that stand between you and the rights of your fellow-citizen. That was the first case the question came up in, and now among the very last they come to you and say, "Well, we have these grounds up there, we have this man's property, that man's property, and the other man's property, and, therefore, you must give us Backus'." I do not wish to hurt this corporation. I do not propose to call on you to do anything here out of prejudice or hatred against a corporation. I would be ashamed to do it; I would regard you as unfit for citizenship, unfit for this duty, if you let any prejudice or any feeling of that kind influence your action. All I demand is that the two parties be put upon the same level, not that the corporation shall come in here and say, "We are a great public improvement, and, therefore, you must throw sacrifices to us; we are short of money, and, therefore, you must give us something out of Backus' property; we have already acquired property and rights in connection with this right of way, and, therefore, you must give us Backus and his interests in order to help us out." I ask you to take simply the views of the law; to put the two parties on a level, to put them as if this was the first case which had ever been tried in connection with this improvement; as really it was one of the first that was tried before a jury. I have no objection to these corporations simply because they are corporations. I do think that corporations are multiplying too much in this land; I think there are too many of them; I think this putting of every business of life into a corporate form tends to degrade the tone of morals in the community, tends to make men narrow and selfish, and, I think, in the long run it will be found an unmitigated curse to the country. But, in a proceeding of this
1332 kind, I would not be so demagogical as to appeal to any prejudice against a corporation. Your duty is to do equal justice, and the demand made upon you by the petitioners in this case is to do unequal justice, to throw all the weight of what they have got and what they have not got, the money that they have and the money that they have not, and the land that they have acquired and the land that they want to acquire, to throw all that in the scale against Backus, and to do this thing at his expense instead of at their own. If you want to buy property you must pay for it, and, as an ordinary rule, you cannot take your fellow-citizen by the throat and bring him before a jury and say to the jury, "I want that man's property, give it to me." This corporation may do that, because the law says they may do it, but the law which says they may do it says that jurors must exercise the utmost care in scrutinizing the testimony, exercise the utmost vigilance that the rights of no man shall suffer by the proceeding. It is a very high act of power to take a man's land from him against his consent, and the law for that reason has fenced it round with this institution of the jury. It is put to you in this instance here, to you as the guardians and protectors of the citizen, to see that no harm shall come to him beyond that which the absolute exigencies of the case demand. There must be a necessity to take this street; there must be a neces-

sity to take that street from the public; there must be a necessity to take it for a great public use; there must be a necessity to take it, because there is no other way than to take it coupled with this great public improvement. And if that does not exist, then they ought not to go there, and you ought not to let them go there; but if you find that they must go there, then this scheme of making their improvement there at the expense of Mr. Backus, in-
1333 stead of at the expense of Mr. Joy and Mr. Gould, and of the other gentlemen who are connected with this great railroad enterprise, it must not be permitted to succeed.

I think I have said all I want to say to you, gentlemen of the jury. You have listened very patiently. On this hot day, to be patient and sit there and listen is certainly a very virtuous action, one of those actions for which there ought to be some reward somewhere. The prospect of reward in this world, in this instance, at least, seems to be a very slim one; I hope that you will have the supreme reward, the reward of knowing that you have done your duty; there is no reward that will endure the wear and tear of life like that; and while, perhaps, other achievements may be very pleasant, yet when the time of reflection comes, when we come to balance the accounts, those occasions on which we did our duty fully, on which both our reason and our consciences approve of what we have done, will be the occasions which will give us the most pleasure and the most substantial happiness. That is not mere preaching, it is not the mere talk of religion, it is the talk of good, manly honor; and this is one of those occasions. Here is this old man, who come's with his life's work here; he finds it imperiled, he finds that he is in danger of impoverishment in his old age; he calls on you to protect him; he does not ask you to do aught that is wrong, but he wishes you to take a fair and reasonable and business-like view. Look at this property as if it were your own property, and award such damages as you think he is entitled to, provided always that you deem it necessary that that railroad should ever come up that street at all. If you do not deem it necessary—and he says it is not necessary, and he hopes you will not deem it necessary,
1334 he says to the railroad, Keep your money and let me stay where I am, let me finish my days here and carry on my business without being molested by your smoke, dust and cinders, and your gas and your obstructions to my business.

I thank you very much for your attention to what I have said, and if I have been able to throw any light on the case I shall be very glad. I trust that I have said nothing in a bad spirit or bad temper. I have no feeling of that kind in the matter. The only feeling I have is that I want justice for that man. I believe his rights are being invaded, I believe his rights are endangered, and I ask justice at the hands of this jury.

Argument of Mr. Don M. Dickinson.

MR. FOREMAN AND GENTLEMEN OF THE JURY: Yours is, in many respects, the most tedious duty that is done in these cases. We, as

counsel, have the excitement of controversy; we move about; we examine and cross-examine the witnesses; we have the occupation from which the time seems to fly, to us; but you sit there patiently in one seat, during a session, and must take what we give you, and I know that it must on occasions be monotonous. Nevertheless it must be said of this jury that it has been exceptionally patient, none more so in my whole experience, in listening to this tedious case. It has been exceptionally intelligent, as shown by the occasional interrogatories addressed to the witnesses; and it is with regret that I feel that my duty calls upon me to still further prolong your attention to this case while I shall do my duty by my client.

And I tell you, gentlemen of the jury, that from the time
1335 that Absalom Backus was taken by the collar by this railroad company and dragged into court against his will, with this preposterous claim that River street must be taken by the railroad company as a necessity, I have said, while he has been harried and abused, not only in court, but everywhere, that this is a question of fundamental right, this is a question of fundamental right of American citizenship, and here I will stand and make this fight until I can address twelve jurymen of freemen and see what they think of it. It is a question which you are especially called upon to determine, and from the position which we take we cannot be driven by any violence, any vituperation, any vociferation. I do not believe that I stand before twelve men who, to paraphrase the apothegm of a distinguished countryman, will mistake rudeness for logic or violence for argument. And before I take my seat I shall give you the matter which should convince you, as I have been convinced, that there is no necessity of taking River street; no necessity of injuring Backus by running in front of him; no necessity of appropriating one inch of this River street for this elevated road. And I shall convince you, under authority and by the law, that the union depot company can take that margin of the Michigan Central road beyond the shadow of a doubt; and I am not here to urge any absurdity upon you; I am not here to urge any folly upon you, because to take an insincere position and to present one in which I have no confidence, or in which we have no confidence, after the consideration we have given to the subject, is not according to my methods or my habits. My friend on the other side has said that I wanted a jury because I thought I could carry the jury. Why, gentlemen of the jury, if I have ever had any successes before juries or elsewhere, my fellow-citizens will at least do me
1336 the justice to say that it is because I have been at least considered a sincere man, that although sometimes I may have been wrong, my worst enemy will not say that I have not acted from conviction, and I have not been guilty of the supreme folly of bringing into this court before a jury of twelve men any absurd doctrine, and such doctrine as advocated by Mr. Baker, that in the first place there is no law that will permit you to take that margin of the Michigan Central road for the elevated railroad.

Many things have been said to which I shall not advert. Many things have been said that had nothing whatever to do with the

case; references to myself for not acting for the Michigan Central railroad; Mr. Baker says it is politics; a reflection upon me to add to the weight of whatever argument there is in my friend's argument in answering mine. Politics! and yet he cannot put his finger upon any time in the whole short history of my life when I have asked the suffrages of my fellow-citizens for myself, once. If he wants to know the reason of my not acting for the Michigan Central Company in this contest, it is because I could not do justice to the Michigan Central Company. I am over and over again employed against the Michigan Central Company, and when it infringes upon the rights of the people hereafter, as it has in the past, I hope to be still employed against the Michigan Central Company, and I do not want their money in my pockets. I do not care to be embarrassed by the retainer of the company, and I could not serve them if I would, because it is impossible for me to make an argument—whatever other men may do, I am not so constituted that I can make an effective argument or do any good work in a cause in which I do not believe. Neither do we dwell very long upon the eulogiums pronounced upon the
1337 Pacific roads; an argument that goes to this extent, that it is good to give the public lands to railroad corporations, because you can get them cheaper, that it is good to surrender them to railroad corporations because they are the workers of all good; therefore, the simple logic of it is, let us surrender to the railroad corporations, let us bow to that government, let us be a government of the corporations, for the corporations, but above all by the corporations, that they are to give us all the benefits. Uncle Sam is not rich enough to give us all a farm any more, as we used to sing. Why? Uncle Sam has granted away all the valuable public domain to railroad corporations. And do you know what has followed? The railroad corporations to whom the grants have been made formed a syndicate, and have put a mortgage upon all the land grants, and it has passed into the hands of succeeding syndicates, at the head of which is the distinguished owner of the elevated roads of New York. You will find that the Government domain is in the hands of syndicates, instead of in the hands of the people. You will find in your own State that your choicest pine lands, if you want to buy them, will have the sign-manual from the land office, selected for the land grants of the Flint & Pere Marquette road, selected for the land grant of the Lake Superior Ship Canal Company, selected for the land grant of the Detroit & Mackinaw road; and there is no domain left for settlers. Railroads are great blessings! We are charged with fighting a public improvement, because we sit down here and ask for our simple rights as American citizens. Let us see. This company is made up of the Flint & Pere Marquette road, with an entrance already into Detroit; of the Detroit, Lansing & Northern, with an entrance already
1338 into Detroit; of the Canadian Pacific, which comes here simply to get the western connection of the Wabash, and the Wabash road. The only road that has come here is the Canadian Pacific, which crosses the river here to get the western connection of the

Wabash. Let us see about the Wabash, this road that is going to bring so many blessings. It has been bringing blessings to us since 1879, when we were solicited here for subscriptions, and public meetings were held, and we gave, for the Butler road to bring the great Wabash here, $250,000 in hard cash and bonuses.

A JUROR: I gave $200.

Mr. DICKINSON: You gave $200 and I gave $2,500; I gave as much as I could afford; as a peroration at the close of every public speech I made, and I made ten, I subscribed $250, so that I afterwards had to pay $2,500. We were in favor of public improvement, and in favor of the great Wabash connection; so have public-spirited men come forward, to say nothing of myself, and urged the advent of new railroads always. What followed after our $250,000 investment? How long did it take the Wabash to go into the hands of Jay Gould, with all the property that the bonus bought, under the foreclosure of a mortgage? I am not bringing Jay Gould's name in here because his name is Gould and because he is unpopular, but that is what happened to us, and from that day to this the original investments have been cut out, and cut out, and cut out, three times, three times have new investors gone in, and three times has Jay Gould reaped the reward. And, forsooth, we are not to say nay to these corporations; we are not to assert the fundamental law of our State, embodied in its constitution, because, forsooth, they want to do certain things. We are to be denounced as standing in the way of
1339 public improvement, we are to be denounced for taking disreputable positions, when we say that this good citizen shall have his rights under the constitution and laws of the State. Let us see and consider whether they have made such a record as would make us like to be governed by them, even in their old combination. In 1881 the union depot act was passed, and although we had then in our midst 70 acres of the finest land in the city of Detroit, the highest-priced business land given up to the Michigan Central and the Grand Trunk roads, a combination was formed and the city of Detroit was advised that we were to have a great union depot down on Twelfth street, union depot for passengers and for freight, down on Twelfth street; the land was acquired for that purpose, 40 acres or more of land; in every show-window of the city of Detroit there were pictures of the great union depot to be built down on Twelfth street, up to the time that they had acquired all they wanted of the route on the river clear down to Delray. Everywhere you had pictures of the magnificent depot that was to be given you if you gave them everything they asked; and we did, and from that day to this, with the exception of a 100-foot passenger-house, and an elevator—which cannot be acquired for public use, that is nothing but a warehouse—that has been a barren waste. Where are the various industries along that line, which is now a barren waste, below Twelfth street, and where is the great union depot? The Wabash has used it, and the Wabash only has used it. Mr. Joy says they could not get the Grand Trunk to join them, and so they want to come uptown. They have come uptown, and we say,

God speed your work if you will give us at last a union depot, but you have 6½ acres more for a new union depot in addition to
1340 what you had down there for the old union depot; leave us alone; you have got 107 acres of our best property, you railroads in this city, take no more, do not close our public streets, take the margin of the Michigan Central to get up to your new depot and leave the property-owners and our public streets alone. Let us see if the railroads are to take possession of us. They have made this country! Let us consider if we want to give up any more of our acreage in Detroit to the railroad companies. This is a public question. Chicago is a great city, built up by the railroads, or built up at the end of Lake Michigan, because it was the chief competing point with railroads to the sea by water navigation. Why, gentlemen, did you ever see a railroad magnate who invested a dollar for the good of mankind? Did he ever form a charitable syndicate to build up Detroit or to build up Chicago, just to serve mankind; or is railroading a favorite investment because it pays the largest dividends? True, railroads found business, and it was a great thing for Chicago in bringing to Chicago's wharves the grain and produce of the great West for shipment. Why has Milwaukee become a great city? Why has not Freeport, an inland city, become a great city? It was because of the great waterways of this great empire of the Northwest, the water makes competition to hold down railroad rates, that the nearest point to where shipments may be made of produce by competing water transportation will make the great city. As Chicago is made, so is Duluth being made, and so are the cities being made on the front here of the great waterways. Railroads do their part, but they do their part because they get their pay for their investment in carrying goods, getting payment from the people who are settled there, for bringing the goods.

Do you know how much we ship on the Great Lakes to the
1341 East per year—just by the waterways having to use the railroads at both ends? We ship by the Great Lakes, with a tonnage for the six months and a little over of navigation, of more than enters the harbor of New York for an entire year, with open navigation the year round; we have more shipping employed for tonnage and for carrying our great products than the harbor of New York for an entire year. We ship by these Great Lakes, in value, in the course of that six months or a little over, one billion and a half of dollars. Now, do you know what we need; and I am coming right to the public question that bears upon this case. Detroit is a shipping town; you could tell that by the railroads and the elevators that the railroads have built inside of a quarter of a century. We are a shipping point on the great waterways. Do you know how much we pay out, we the Northwest and the South together, and we pay the larger portion—do you know how much we pay for changing bulks? We want to ship by the waterways, the cheapest method. You know that the producer, if the railroads overcharge him in the winter when navigation is closed, holds it over the railroads and says, If you will not ship at this low rate—they always, of course, wait until after the close of naviga-

tion—if you will not ship at the rate that will not be enough to keep my goods over to the opening of navigation, I will hold my goods until the opening of navigation; so that at all times, in the winter season and the summer season, lake navigation and waterway transportation hold down railroad rates. So, we want to ship from Detroit, we will say, by the cheaper course, the water; we ship down to Detroit and we unload; that is a tax on the producer; that is not railroad transportation just unloading; then we
1342 put in the elevator and get taxed for storage before we ship again; that is another tax on the producer that he has to pay; next we have to pay for loading; that is another tax on the producer, outside of transportation, that he has to pay; then we get to Buffalo or to Oswego, and we want to ship by canal; we unload, and we pay for the unloading, we pay for the storage; we load on the canal and pay for the loading and the carriage, until we get to New York; then we unload and pay for the unloading; then we store and pay for the storage, and then ultimately get to the market of Liverpool, or Bremen, or South America, or any other point, with all the terminal charges, amounting to $250,000,000. What are you going to have? We are the mighty empire of the Northwest, and what is the wild dream of 25 years ago? We will have a proprietary interest in the Welland canal and the St. Lawrence canal just as sure as you and I live, and just as sure as the sun rises and sets, or we will have it in a new waterway that will widen the Erie canal and the Hudson river, and save that $200,000,000, and we will ship to Liverpool and Bremen and Hamburg and South American ports and save these terminal charges upon our products, and Detroit is going to be a seaport. Think of it; for a quarter of what it costs us now; in one year we can make the Erie canal a ship canal to the sea and have free course for our products, without a tax from here to the market, except for what a man ships. The congressional committee have been here. They are astonished at the greatness of the Northwest, and I tell you, gentlemen of the jury, that we produced the wealth of this nation; we, of the Northwest, the great West and the South; the great Northwest pours it down from Duluth, through the port of Duluth, the great West through the ports of Chicago and Milwaukee; Michigan, with her
1343 own great riches, from the Lake Superior ports and through the port of Detroit, is pouring this immense wealth out for what? A market. And while we are producing this great wealth, we who produce it, because they produce no wealth in the East, they make their money handling our produce, that we produce, the raw material that we send up to them, they make their money in handling that and in manufacturing it, while we, of the Northwest and the South, are having a struggle to live, we producers, because we have not a market, we cannot get a market without this enormous tax upon us. A company has been formed already, a Liverpool and Chicago company. The Welland canal today has been twice widened within 15 years by the Canadian government; a company has been formed for a line of steamships, of freighters built in a cigar-shaped form, to carry products from Chicago to Liverpool.

That has already been done. The canal is too narrow now for our great ships, we must have that way, and we can make it on the American soil for a quarter of the tax we pay for terminal charges in one year. You are going to have a great city here, are you not? I believe it. You take this city map, and see how much front you have got left to get to the sea without having a railroad occupy it. The space is between the foot of Brush street, if the Grand Trunk has not already bought it, towards Woodward avenue, but the space remains for us to get to the water, to this great waterway of commence, only between Brush street and Third street. First comes the Michigan Central to Twelfth street, from Third to Twelfth, nine great blocks; then comes the old depot grounds of the Wabash, from Twelfth street to Eighteenth-and-a-half street, 6½ great blocks; following below that, what follows? Why, that little joker,
1344 the Detroit & Transit road, that connects the union depot company with the outside tracks of Delray, runs along from 500 to 1,000 feet from the river bank, the whole distance down, and you cannot get to that waterway without saying, By your leave, Mr. Railroad Company. You have now in the city of Detroit, you whose taxation is increasing, and has so increased that it is now 16 or 17 mills to the dollar, you have 107 acres of your highest-priced real estate for which you pay a tax, if you own it, of the same kind that you pay taxes on—you have that 107 acres entirely free from taxation. The shipping, which gives you competing facilities and holds down your railroad rates, pays a tax at the assessed valuation of the full value of the property, to wit, $28,000,000 on vessels here and warehouses on the water line owned here on the docks. The taxes are increasing. Are you ready to give any more to the railroad companies of this land, unless you are obliged to? Is it not enough, when the New York Central depot does all its business, with 244 trains a day, on a little piece of six acres, when the New York Central road, and the combination of roads coming in there, cannot afford to own real estate in the business part of New York, because it is taxed; they cannot afford to own real estate to do their freight business on in the central part of New York, when freight business can be just as well done down on the river, or in both places. In Chicago, on Dearborn street and Canal street, in Indianapolis and St. Louis, not one of them, with the exception of St. Louis, has to exceed nine acres to do all their business on, in the central portion of the city, where the business property is in demand for other business, not one of them; and they do their freight business in the bottoms, or where the property is not good for central busi-
1345 ness. I tell you, gentlemen of the jury, that it is a public question. They shall have their 6½ acres to build the great union depot, if they will only give us one, but do not you let them close another street, unless the law compels you to do it, especially River street; do not let them interfere any more with legitimate industries of this city. I saw my brother Baker sneer when Judge Chipman said that Backus employed more men than did the Central Company at its depot. I took occasion to inquire about that. It has more men on its railroads, but most of them do not live here.

It employs more men in running its cars and locomotives and freight cars in going in and out, but the great depot itself does not employ but 50 men. It won't do to surrender to railroad companies, anxious as we are, and as we have demonstrated we are, to have all the railroad facilities come here that will come; it won't do to surrender private and public rights, public ways and private business to a railroad company or to railroad companies. It is a pretty old doctrine in this corporation-ridden country that the corporations rule, that the king can do no wrong. Let me read to you the strong words of Justice Morse. You will remember that some time ago—six years ago—the State was roused and believed that the court of last resort was partial to railroads, that the railroads were not only controlling the lower courts, but at last had got their hands on the supreme court, the court of last resort. When the people came to believe that, without regard to party, they rose as one man and put that distinguished lawyer who was suspected of railroad affiliations from the bench, that great judge, Thomas M. Cooley, and put a people's candidate, who was not suspected of affiliations or of partiality for railroad corporations, upon the bench by a majority of all parties. The people of this State, through their conventions,
1346 and the conventions are what my friend sneers at, expressed their opinion about it, the people sustaining them. You are going to hand over your lands and private property to railroads, are you, to do what they please with, according to their own sweet will? Let me read something to you from that man whom we put on the bench, and who has not proved false to the people who put him there. It was not a Democratic upheaval or a Republican upheaval; the people put their foot down upon railroad domination in the State of Michigan. It is not anything to compare with this case, but a Detroit street railroad company on a narrow road. I do not believe myself that an electric road will hurt a broad street, but on a narrow street, which you know very well—the Mack road, which had not been graded—they put on an electric track, with wires strung transversely from pole to pole, so that a load of hay could not go by on the grade between the track and the side of the street. It was a public corporation, for the public benefit, walking over private rights, and walking over W. D. Mills and all these people. It was nothing but a little electric road, but the principle was there, and two of the judges held with the railroad, that it was a great public benefit, and was no such damage that the people could complain of. Those judges were Judge Grant and Judge Long. There are five judges. The action was on the part of the street railway company to restrain the people from cutting down the poles. When they put poles on the street that stood in the way of the people getting out in the road and using the road in the ordinary way, I told them to cut them down, just as I took down the electric light pole that they put in front of my front door. Judge Champlain says that inasmuch as the use of this street is an additional
1347 servitude, inasmuch as the road has gone in a narrow street, we will not grant an injunction on the cross-bill to restrain the construction of the road; that would be useless, because the road is

constructed; but it is a new servitude, and the road must pay damages to every property-owner for taking his property. So you see Judge Champlain concurred, refusing the injunction to the property-owner, and the injunction did not go, but he agreed in principle with Morse and with McGrath, that they could not take that property; so that there were three judges against two, that the injunction did not go but these men have their remedy for damages for taking the property; they gave them a remedy by a majority of the court.

I want to read to you some words of that man that the people arose in their might and elected. They are pregnant, as Brother Chipman says, with something that we do not hear enough about except on the 4th of July, and that is American liberty. We are apt to prate, just as we go to church—we are apt to prate on holiday occasions on American liberty and the rights of man, just as we go to church and hear the creed, and see the beautiful altar, and the beautiful pictures and paintings and stained glass; we admire it at the time, but we do not take away much religion with us, I fear; we do not get it there; and so, on the 4th of July, we put up our orators on the rostrum, and we hear speeches upon American liberty and the rights of man. I am speaking of the church that I sometimes attend; I admire the beautiful stained windows and the beautiful altar and the pulpit, but I have yet to hear anything that touches my religious feelings and touches my heart in the churches that I have attended. It is very lovely, and I admire it. And
1348 so we are apt to wait for the 4th of July orators to talk about the principles of American liberty, instead of writing over the door of every palace and every cottage the living principle, and making it a rule of action in our daily life, and see it as we come in and go out of our homes with our families—"Eternal vigilance is the price of liberty." We should live by it, we should see it as we go out and come in our homes, we should train our children in the principles of liberty, and say it is a good thing to have it come to them, and come strongly from this man that the people put upon the bench, upon the question that threatens American liberty more than any other question at this time—the question of the domination of corporations. I will read what Judge Morse says:

"The fact remains that no land-owner wants such a railway upon his street in front of his home; that it is a means of travel not contemplated when most of our streets were dedicated; that the poles are unsightly, and a damage to the premises of the abutter; that the wires may and have been the means of injury and death; that the cars are more dangerous than horse cars, and more liable to frighten animals; that such a road depreciates the value of land as residence property upon the line of such road, and that it is a positive damage to the abutting land-owner. Why, then, is not his property taken within the meaning of the constitution, and taken without compensation? Why should his property rights be disregarded? It can only be justified, as before said, upon the plea that the convenience of the public is so paramount to the rights of the individual that the property of the latter must be sacrificed without recompense for the benefit of the public. We have heard

this argument before. It has been more than once made in this court in favor of the great lumber corporations of this
1349 State. It has been contended that the lumbering interests of this State were so extensive, important and valuable, and so identified with the interests of the public, that the poor farmer, with a small piece of land upon a navigable stream, must bear the servitude and burden of damage to his land by flooding of the streams and running of logs without compensation because the public would be benefited thereby; while this argument has been listened to, it has never yet been accepted by this court as sound doctrine, and thus far the poor and weak have not been denied the equal justice of our laws." And he cites the cases, "The doctrine contended for is but a phase of the old idea that the King can do no wrong. It cannot prevail in a free government. The individual in a republican form of government is the one to be protected and guarded, and in his protection lies the security of liberty to the whole people. If the need of the public demands this kind of a railway for rapid transit, then the public can afford to pay for the privilege of destroying the property of the individual citizen. In no other case that I know of has the home of the individual been permitted by the law to be damaged without recompense, that the public might reap a benefit. If the need of the public is such that it must have this particular method of transit, that need will furnish corporations with means to repay every private citizen for the loss and damage that his property must suffer to accommodate such public need. The plea that electric railways will not be built unless the property of abutters upon the street is permitted to be taken or damaged without compensation, is too puerile to be considered as an argument in favor of the destruction of private rights."

1350 I need not read the strong statement of Chief Justice Morse in favor of all proper facilities and the conferment of rights and opportunities to railroads to enter a community, "That is so," says Judge Morse, "they are a great public benefit, but the one thing that government is called upon to conserve and to protect, and which our constitutions protect, is the individual and individual rights, and thus may the whole people be free."

Adjourned to Tuesday, July 14, 2 p. m.

TUESDAY, *July* 14, 1891—2.10 p. m.

Argument of Mr. Dickinson Continued.

MR. FOREMAN AND GENTLEMEN OF THE JURY: I had endeavored to recall to your minds, rather than to advise you, how valueless are our professions of the principles of American liberty, how valueless is the government of we the people, unless we apply the principles of liberty and of free government in matters of every-day life to the individual. You will find no test of those prizes and muniments of liberty embedded in the Constitution of your Federal Government, and in the constitution of your State, except that

those tests be made in the case of some simple, plain citizen. You never can apply those tests, gentlemen, against a collective body of we, all the people. They are good for nothing unless they avail to the single humble individual, and after all government is established to protect your life, to protect your liberty and to protect your property, and the right to use it if you please. That is all the government gives you after all, taxes you equally, keeps your burden down, not steal from the public treasury for the sup-
1351 port of the government, tax every one equally, see to it that no one is imposed upon in his property, in his person, or in his liberty. That is all there is of this Government, all there is of our vaunted free Government.

And now let us make a personal application, a direct application of the general principles to the case at bar. They are the A, B, C of American freedom. It amounts to little to say that in these exist American freedom or that in these things is the protection of American freemen, unless you make the practical application, unless you take your Liberty down from her pedestal, where she wears the liberty cap and the gown, and put her down in plain calico by your table in your kitchen, in the cottage, in the palace, everywhere, and live with her and she with you. So that we will see what all this has to do, aside from its being something of the pyrotechnics of Fourth of July speeches, what it really has to do with plain everyday life in the case of Backus.

In the experience of mankind, from which we learned a lesson, from which we formed our own constitution, our last constitution, it was found that the legislature of the State, the highest legislative power in which governmental functions were reposed, the legislature of the State, could not be trusted with private rights, that is, it could not be trusted with the decision of the question of whether a combination of men could lay out a route and take the property of a private citizen for their business enterprises. Why? The legislature, it was found, could not be trusted with the power of making special legislation. Why? Not because the legislators could be bought, but because when you get a great body like the legislature of Michigan, with representatives from every part of the State, and there was brought before it the question of whether some
1352 citizen should suffer, or whether some citizen's property should be taken, in the city of Detroit, or in the township of Dearborn, or in the township of Wayne, or in some other special locality, there was no one to protect the individual's rights for that locality except the representative, and the whole body of representatives from all parts of the State cared little about it, so that the constitution provided that the legislature should not be trusted any more with this power of taking private property, it should not be trusted to make special legislation affecting only one body, or one person, or one locality; it should not be trusted, because it worked hardship, because, applying the principles of American liberty to it, it worked just the oppression that was worked by the old monarchial forms of government, when the strong hand of power took private property. That was why. They said, We will not leave it to the legis-

lature longer, we will not leave it to a general body of men, even without regard to the question of whether legislatures can be corrupted; they are not interested, and there is no one to defend the interests of the poor man, or the special locality; the whole body of the State are not interested. Therefore, it was decided in the constitution of 1851 that it should be provided that no special legislation should be had; that if the legislature passes a law affecting any body of citizens anywhere, that legislation should affect the body of citizens all over the State, so that if a piece of legislation was sought for Detroit, every legislator in that whole body should be interested in it, because he would be sure, if it were not special legislation applying solely to Detroit, under the constitution, every legislator in that body would be interested in it because it would apply to the whole State of Michigan; it might apply to
1353 Kalamazoo, or Grand Rapids, or Marquette, as well as to Detroit, so that the whole body of the State could see to it that no injustice should be done and no unjust legislation should be passed.

That was to secure private rights from the strong hand of unadvised power. It was to secure private rights from the equally strong hand of corruptive power, if the legislature be corrupt. So it was said, Mr. Corporation, railroad corporations, seeking to take rights of way away from the citizen, you shall no longer apply to the legislature with such methods as you can get through to take private property; the legislature shall no longer lay out a route and take private property; no one shall do that in the legislature, because the great body of the people are not interested in the route that runs, for instance, from here to Jackson. The people of the northern peninsula, the people of the upper part of the lower peninsula, the people of the western part of the State are not interested in that, and will give it no care; therefore, because the care of the representatives *were* not exercised for the protection of private rights, the constitution provided that the legislature shall no longer grant rights of way, shall no longer grant property of private citizens. Whom shall we vest it in, say the people? We will vest it in a body of men from the locality of the interested parties, to pass upon the question of the rights of their fellow-citizens in the proposed enterprise, and we will leave that question to them, whether the route is necessary that they have selected—whether it is the best route. We will leave it to 12 men from the vicinity, neighbors of the man whose property is to be taken. It shall be vested in those 12 men, or in three commissioners, if the property-owner prefers. It shall be left to men from the vicinity, who are
1354 the best judges of the locality; it shall be taken from the legislature and vested in a new tribunal, created by your constitution, created by the muniment of your private rights, over and above legislatures, over and above law or legislation; it shall be handed over to referees, 12 jurymen of freeholders, who also own real estate, and therefore are interested in protecting the private rights, from the vicinity, from the locality to be interested, and these shall say, first, whether this body of corporators have laid

out a road which is for the public use, and have taken the best route and the most necessary route for the public use; whether it is necessary to take it at all, and consequently whether it is necessary to take the particular lines sought to be taken. Second, if they find the gentlemen who are familiar with the locality, familiar with the interests, are tax-payers in the community, are freeholders like the men whose property is sought to be taken, if they decide it shall be taken then they shall say the man whose property is taken shall not suffer one penny's damage. There is the tribunal made by your constitution. It is left to you, just as much a governmental function, placed near the people, in 12 men from the people, vested with just as high function, for the time being, as that of the governor of the State, or the whole legislative body, or any other governmental power. The responsibility is upon the jury, and the whole question submitted to it, as it used to be upon the legislature of the State.

They passed a union depot act, and in that they provide a piece of legislation which is in conflict with the constitution of the State. One reason why I suggested that fair justice required that we should reply was because the learned counsel upon the other side, or the corporation counsel, will make statements that ought to be
1355 replied to, and you will remember that here where I said, notwithstanding he read from the statute that you might be attentive, and be instructed in the law, by the judge or circuit court commissioner to be appointed by the court, when I said to you that the constitution of your State provided that you were an independent body, independent of the judge, that the constitution of your State assumed that you could read and write, assumed that you could read a statute and knew what it meant, as well as any representative in Lansing who framed it, when I said you were to do this, by the constitution of your State, that the responsibility was yours, that the matter rested upon your own consciences, that you could not evade it, and if you did, you did an injustice—when I said that, you remember the speech that Brother Baker made. He rose, and his first words were: "I desire to contradict the statement made by the counsel that the judge cannot interfere here; I tell you he has a right to direct you." And I said to you then, in answer to that tirade, that I would reply at some time, and when I had an opportunity, I read but one authority. You will see the reason of it. Why are your representatives in Lansing? This question is the matter of what a statute means, gentlemen, a plain statute, with good, plain English words in it. The constitution of your State contemplates that you are just as able to read that statute as the men who made it. It is not a question of common law. It is not a question of general jurisprudence, as to which you may have doubts, and need a distinguished judge like my brother Chipman to elucidate it to you. It is not a question of general law; it is a question of statutory law. The constitution assumes that every citizen of this State, if he will read it, can understand thoroughly every clause of the State constitution, and he can. It is un-
1356 derstood, it is assumed by the constitution that every citizen

of the State thus called upon to serve upon a jury of this kind, exercising a high public function, can understand a statute when it is written in plain English. That is what the constitution contemplates, and it contemplates that you shall not be interfered with in your construction of that statute. The constitution says you shall not be, that you twelve men are to pass upon the necessity, and the compensation, if any. Nevertheless, Brother Baker, at the outset, said to you that it was not so, that the judge had given the matter no examination, and without any reflection upon any judge, he said it is not so, that a judge, forsooth, of the circuit court, from whom the power has been expressly taken by your constitution, taken from it by the same instrument that took the power from the legislature, that a judge shall come here and direct your consciences.

It is not true. Do you think you can read a statute as well as Senator Smith from this county? Do you think you can read a statute and understand what it is as well as the men who made it, the farmers and business men of the State of Michigan. There were only seven lawyers in the last house. Can you understand a statute that is made by Senator Smith or White, the furniture man of Grand Rapids, and Richardson, the farmer? Do you think you can read and understand a statute that was framed by our friend whose chair is here vacant, Senator Greiner, who was a member of the legislature? The legislature is made up, under your constitution, of men from all parts of the State, who can read and write the English language, and say what they mean, and the constitution says that a plain statute, made by such men, can be read and construed, on this question of private rights and on this question of pro-
1357 tection to private property, can be read and construed by the same class of men, freeholders, from the community where the citizen's rights are at stake.

I read to you from the 47th Michigan, and to show you how necessary it is for you to attend to this case yourselves, how necessary it seemed to me to reply to Brother Baker, to show you how careful you must be not to be misled. There is no position which he has taken with more strength and more vehemence than that we were wrong on this matter of the judge, and I have read to you the 47th of Michigan, putting it down by the language of Chief Justice Campbell, that language, as has been stated by my distinguished friend, instinct with American liberty, I have read that to you and shall not read it again, but to make it more emphatic, he talked again, and I will read from that.

I read to you a decision from the 47th of Michigan. I now read to you a decision, and one of the last ever rendered by the same great jurist, the same great citizen and jurist, the same friend of private rights, personal liberty, and of constitutional freedom, who stood there for 30 years, and said to corporations, Thus far and no farther. I am not reading a decision that I read to you before, showing to you that this is not a judicial tribunal by you, a jury of referees, a constituted body, created by the fundamental law of the State, upon whom was incumbent, not merely the privilege—note

the distinction, gentlemen—not merely the privilege to do this thing, to pass on the necessity of taking the right of way, but the duty, the duty sworn to be performed by you without fear or favor, the duty of passing upon the question of necessity, without let or hindrance from legislators, from whom the power is taken, and without let or hindrance from any other constituted body, be
1358 it judge or what. It is your duty you are sworn to perform, and you cannot, without violating your oaths, construe this plain English statute, except according to your own consciences; you cannot construe it according to the direction of anybody.

I refer to the case of The Railroad Company *vs.* Chesbro, 74th Michigan, 466. These were condemnation proceedings. The petitioner began proceedings to procure by condemnation a right of way over 40 acres of land owned by respondents near Grand Rapids. Says Judge Campbell: "The proceedings before the jury appear to have been conducted in a peculiar method, not within the proper rules governing such cases, and appear to have led to conclusions that cannot be maintained. The probate judge acted throughout as if he had been a *nisi prius* judge, presiding over a common-law jury, and assumed the whole responsibility of directing what testimony should go before them, and on what theories of damage. Whether he charged them or not does not appear, but his rulings on evidence had practically the same effect. Whether the constitution will suffer the jury of commission of inquest to act in a court of common-law jurisdiction under the conditions applicable to other juries, is a very serious question, but, so far as we know, it has not been attempted. The constitution in such cases as the present requires either commissioners appointed by a court of record, or a jury of freeholders to determine the necessity of public use, and to ascertain the damages. Commissioners form no part of the machinery of a court, and a jury of inquest is not a court. It has always been settled that the appropriation of private *authority* did not come under the 'judicial power,' as it is located under the constitution in
1359 courts, and except for the constitution the nature of the tribunal of condemnation would have been discretionary with the legislature. Highway commissioners act on the location of highways, and under the old constitution public commissioners condemned land for State railroads. In the railroad special charters there was no instance of action by a common law trial jury. Then, as under our present statutes, the jury was a jury of inquest, specially created, and not a trial jury. We held in Toledo, etc., Railway Co. *vs.* Dunlap, 47th Michigan, 456, where the jury was impaneled in a circuit court, that the only functions of the court were to set the proceedings in motion by organizing a jury, or appointing commissioners, and affirming or vacating the award; and we held, further, that the jury were judges of law and fact, and not subject to interference by the judge, should he undertake to go with them."

If that is not enough to answer the wonderful and vociferous and extraordinary, and almost abusive speech in reply to my suggestion, of the learned counsel, I give you a case decided recently, following

Judge Campbell, and since his death, to show that the court will not change its ideas of what the constitution is, because Judge Campbell is dead. He left a record of a judicial mind. He has left a record of defense of the people's rights, which is a palladium of liberty in itself. This was the case of this Union Depot Company against Jones, 83d Mich., 415, decided only a few months ago, December 5, 1890. Mr. Baker was in the case, and the opinion was delivered by Justice Grant and was concurred in by every justice. It was objected to the introduction of testimony, that it was illegal, and it was insisted that, because the testimony was illegal and contrary to the ordinary course of the trial of cases, that the
1360 verdict should be set aside, but the court said the jury can do as they please, it is a jury of inquest, independent of the court, and they hold that the case is ruled by the case in the 47th Mich., which I have read to you.

Now, are you going to believe me after I have read from authority, or take this vociferation of counsel. You see the difficulty. Brother Baker says, in his argument, that the jury are the judges of the law and the facts. But you are sworn in the case, in *nisi prius*, to follow the directions of the court. You have to take your law from the court, and if you disobey the judge in a ruling upon the general propositions of law, your verdict will be set aside, and you violate your oaths. In this case you are the judges of the law and of facts. This is an independent case. There can be no such questions as of general, abstruse and abstract law to come before you. You are governed entirely by a written constitution in cases like this, and by the law, no unwritten law, such as the common law. You are governed by statutory matters, framed by men not nearly as wise and discrete as this jury. You are supposed to be capable of reading and of understanding.

Now, gentlemen, that constitution says you shall pass upon the question of necessity. But my friend says that the route has been submitted to the railroad crossing board, that the route has been submitted to the common council. He has said to us there is the decision of the common council on the question of private rights, as against a corporation, that the common council has passed an ordinance, that the railroad crossing board has approved it, that the legislature has granted the privilege of forming the corporation, that the engineer has laid out the route. What have we got?
1361 Let us see what becomes of your functions, and when we get back to it we will find that all the pains of the fathers of the constitution went to naught. You must find that they did not know anything about their business. No danger to the people, or to private rights, or to personal liberty, or to private property from railroad companies combining and laying out a route and taking property not necessary. You must find that they did not know what they were about when they said that a tribunal of twelve men should be established. Just as well obviate all that trouble in the constitution and all the debates necessary to put that clause in the constitution, if they had only known, just as well have obviated that and handed it all over, to

whom? To Mr. Ellis, the engineer of the union depot company, because Mr. Ellis, swears that he was formerly the engineer of the Butler, the old Wabash connection, that he laid out this route as it is up River street himself, without consultation with any other engineer, or with anybody. That he never examined the Michigan Central route, because Mr. Baker had him swear that he was advised by counsel he could not touch it; that he never exchanged a word with any other engineer or any other living man about it. He laid out the route and submitted it to the board, and there never was a change made in it, there never was a post taken out, and another post put in, from the time he made the structure and chose the route. That is what he swears distinctly. What is the use of this trouble if Mr. Ellis is to decide? It is his structure and his route. What is the use of your constitution providing with the utmost care, that the legislature of the State cannot direct it, that the tribunal to pass on the necessity of that route shall not be left to Mr. Ellis, or the engineer, or any body of railroad men, it
1362 shall be left to you twelve men. Let Mr. Ellis fix it, and ignore the constitution, throw away the safeguards of private rights and discharge the jury, and leave it to Ellis, the general engineer of Jay Gould. Why not? That is what it comes to. Is there any mistake about it? Any change in his route as originally laid out? Did he consult anybody? No. Did the crossing board have anything to say about it? No. All the crossing board has to do is this, the engineer submits to the crossing board a plan to cross another railway and they say that is feasible, but you cannot cross unless another State agent, a State agent called a jury of twelve freeholders, shall say to you, Mr. Ellis, that that route is necessary. We simply say it is feasible. That is all the crossing board can say.

What else have they got besides Ellis and the railroad crossing board? They have got the common council. A wise thing, was it not, for the constitution to provide that a jury of twelve independent freeholders should be called to pass upon the question of route and that the council should not? Very wise. Look at the municipal legislation of your council for five years last past, and admire the wisdom of the constitutional fathers who put this in the constitution, and set you over the common council. Admire the wisdom of the fathers who knew the frailty of human nature and set you over legislatures. Admire the wisdom of the fathers who knew the frailty and the greed of human nature and set you over corporations, and corporation engineers. You are to pass upon the question of the necessity of this route. O, you are going to advocate your functions. Gentlemen of the jury, as this elevated road crossed River street, crossed from the old depot grounds and entered River street, who was at the threshold when they started in? Backus.
1363 Backus said to them, when he was called into court, you cannot go here until a jury of my fellow-citizens say that it is necessary for you to come up that street. Abdicate your functions, because after their trial and failure, we stand here at the threshold of your entrance upon this route, we have the first suit, we are the parties most to be injured. We are right at the commencement of

your steep grade, we say to you that you cannot come here until a jury say that this is necessary. Will you abdicate your functions because after attempting that and failing, they went further and got in more property there, in lawsuits, in one lawsuit that I know of, where the question is not determined, or how do you know it is determined? Are you going to try those over again? The first suit to which they were invited was here, at the very threshold of the union depot, behold us. You cannot go up this street with your union depot railroad until a jury of freeholders say that this route is necessary. Can they make you abdicate your functions by urging upon you that after they fought and lost the first suit, the question is fairly presented that after that they have gone on and acquired some property from widows and orphans, or whoever they may be, or they tried some suits of men that did not know their rights, or even if they did try a suit with men who did know their rights and try the question, are you going to abdicate your functions to pass upon the question at the threshold of the enterprise? This is your duty, and the procuring of other land above there, for the very purpose of using it before this jury, so that you will say, We will not do our duty down there, they have acquired other rights above, we will not do our duty and say it is unnecessary, be-
1364 cause they have gone on above us and got some property. Can you do that? Will you submit to being bulldozed in that way, when they knew and were advised day by day, week in and week out, in the former trial of this case that failed here for a verdict, the first case, that they had no right to use this street? You stand here today as if you were in the seats of that jury who first heard the question, uninfluenced by any subsequent consideration; to say that is what we are here for, or you would not be summoned to say whether it is necessary.

Now, gentlemen of the jury, the taking of private property for a railway company and the holding of it is not a holding for a public use. And as I go step by step I do not ask you to take my assertion, and I do not want you to take any garbled statements of authority; I want you to read them. I am going to leave the paper in the books. As I go step by step, to convince you beyond a shadow of a doubt that these people can go up the margin of the Michigan Central road, by the law, by the authority, by precedence of which there is no gainsay.

Now they had a great fight about the right to take railroad property for public use. The railroads used to insist that even with reference to crossings they ought to go around, and no other railroad should touch them, competing railroads especially, and the question came up as to whether the property by the railroad originally was held for public uses, and whether it could be taken for another railroad company. Let us see what the courts say about that. In the first place, it has been urged over and over again, and let us have an end of heresies on this question, it has been urged over and over again that a railroad corporation was a public body, that it was a public servant, and

the same has been urged by the railroad companies as a
1365 reason why they ought not to pay taxes any more than your county houses and your school-houses, and your court-houses and your jails, and you know the theory is if you get a special act of legislature authorizing you to take a jail or a public park, with the consent of the city, or any other public holding, if you get a statute to take it for some other public use, you do not have to take it, because it is the public's anyway. So that railroad property, when it is held, taken because the public necessity requires it to be taken, under the rulings of the courts, to enable the railroads to make a straight road, after it is taken, it is held by a private corporation, and it is not beyond the reach of the power of eminent domain. It is not beyond the reach of the power of any other corporation to take it, if it can show that it needs it. Let us see about this public business. Do not let us confuse terms about private and public holding. I read from the Salem case, 20th of Mich., 452, first from Chief Justice Campbell:

"Unless railroad companies can be regarded as in some way representing the public, then they cannot stand before the law on any other footing than private citizens. So far as their business is concerned, they furnish, on a large scale, and in a more perfect way, the same benefits which are extended to the population by other carriers, by land or by water, and benefits quite similar in principle to those conferred by enterprising hotel-keepers, millers and others, who find it to their profit to entertain all applicants impartially. They benefit the municipal corporation of the State in their corporate capacities in no way whatever, beyond paying their taxes, for which they are presumed in law to get a full equivalent. They benefit the neighborhood, large or small, in the way that all
1366 other business and enterprise aid it, by increasing population and stimulating commerce and industry. They do on a large scale what every industrious settler does on a smaller scale, and they do it just as every private person is supposed to conduct his affairs, primarily for his own benefit, and incidentally for any advantages that may follow or attend their private success to the benefit of others. There is nothing in the nature of their business which distinguishes them from any other persons, so as to make it in any legal sense a public undertaking. It is said, however, that by the exercise of the right of eminent domain they are affected with a public character, and become invested with public functions. If the exercise of this power is never valid except on behalf of some public agency, then it might follow that it could not be used on behalf of these companies. It is reasoning in the wrong direction to determine the character of the beneficiary from the fact of its use. But it has been customary from time immemorial to allow lands to be taken for turnpikes and canals in the hands of private corporations, because the land could not otherwise, as a general thing, be obtained for the whole line. The fact that the work was one of general utility, and that no work of that description was possible without the exercise of this power, has created precedents that were readily applied to railroads. They were always founded on neces-

sity, and were the extreme application of a power, which, in a much smaller degree, has frequently compelled private owners of property to submit to some obligations whereby their neighbors might be enabled the more securely and conveniently to use theirs. In some cities in England, by ancient custom, there were regulations concerning party walls, drains and the like, which rested on
1367 similar principles, and, in some cases, modern legislation has followed the same road."

He proceeds to illustrate that principle. Judge Christiancy lays down the same doctrine as follows:

"This theory at the first view seems plausible and just. A little reflection, however, and a recurrence to the fundamental principles upon which corporations are created by the State, will readily demonstrate that this theory is unsound upon any legal principle—a mere legal fallacy, and no more just than sound. These incidental benefits which railroad corporations thus confer by the construction and operation of their roads, are the only consideration or compensation which they pay, or which the public receives for the large powers and exclusive privileges which the State has bestowed upon the corporators beyond those enjoyed by the citizens of the State generally, including the exercise of the sovereign power of eminent domain, and which, but for those incidental benefits, would be wholly unjustifiable and highly injurious to the people of the State. No one can fail, upon a little reflection, to see these incidental benefits constitute the sole inducement and only possible justification to the government for the grant of such important and exclusive privileges."

Now, in the same case, Judge Cooley speaks of the powers of the Michigan Central railroad, at p. 480, as follows:

"The Michigan Central Railroad Company makes a business of transporting persons and property over its road for the profit of its stockholders, but at rates which the State has regulated, and on the condition which the State has prescribed, of furnishing impartial accommodations. It does so, moreover, under a charter from the State, from which it derives its authority, and for this char-
1368 ter it has rendered, or is supposed to have rendered, a compensation. The hackmen of Detroit make a business of transporting persons and property over shorter routes for their own profit, and in like manner, at rates which the law regulates, and on like conditions of impartiality."

Public necessity, they say. So is wheat a public necessity, but you do not give a farmer all the ground he wants to raise wheat on. A hotel is a public necessity, if you come in here from the country; but the hotel company cannot condemn property and say we want it for a hotel. I remember, in Washington, the Arlington hotel having extended itself into the Sumner house and into the old Cass mansion, and into Reverdy Johnson's, the proprietor took a notion that he would like to have the property of Mrs. Henery, a very wealthy widow lady who lived above him on F street, and he addressed her a note: "Madam: The Arlington hotel would like very much to extend its hotel facilities and would be obliged if you would

put a price on your house." The reply was something like this: "I would like very much to extend my flower garden; would you be good enough to put a price on your hotel?"

The record was first examined by Rufus Choate in a case where Frederick the Great wanted to build a palace in which the Kaiser lives. I read it the other day in the life of Rufus Choate. He had gathered the statistics and the details of the proceeding. The Emperor who was then King, wanted to extend his palace, to rebuild it, and there was a little cottage down there in one corner. They got all the other property-owners to clear out because the King wanted to come there, but this little fellow lived there, and his father had lived there, and his grandfather had lived there,
1369 and he kept a little bit of a garden back of his little cottage, and he raised stuff and took it to market and sold it and gained his liv-lihood and expected that his oldest son would follow him, but the Emperor wanted it, a strong power, a monarchical country. But the cottager said his father had owned it, and his grandfather had owned it and he had earned his liv-lihood by it, and he would not move out for the King or anybody else. And they tore down his house from his head and took him to jail, and he commenced his suit and carried it through to the King's own court, now called the Emperor's court, then the high court of appeals in Germany, and judgment was passed that the King's wall must come down, and he must have his property back. The decree of the highest court of Germany, protecting the rights of the people, said this man's property is his, it cannot and shall not be taken from him, for any price, if he does not wish to sell to the King. He did not make the King any more trouble than asserting his right as a true German citizen. But the decree of the court sustained the cottager against the King, and the records collected by Rufus Choate, detailed in his life, give the day and the date and the parties and the counsel and everything in that great fight for liberty and protection of property.

You want a hotel, you want a farmer to have a place that he can raise wheat, and he shows to the court that it is necessary to raise wheat and therefore it is necessary to take a piece of somebody's property. Why not? This right to take property for a railroad is one that arises from necessity, absolute necessity upon showing that there is no other way to go. That is why it is permitted them to take property. Continuing from the decision of Judge Cooley:

"To render the analogy closer, they are required to obtain
1370 a license from the public authorities to follow this calling, and for this license a fee is exacted. Like the railroad corporation they supply a public want, and if the former can be called a public agency, the latter, it must be conceded, are entitled to stand in the same category."

There is the hack-driver by the side of the great corporation, the Michigan Central, according to the decision of Judge Cooley.

Now, gentlemen, the same fight has been made against crossing, when railroad property was sought to be taken, it was so far above and beyond the protection accorded to the homestead that you can-

not touch it. We cannot take that margin of the Michigan Central. The same argument was made under the statute which confers the right to take property for crossings. Let us see what is said by the courts upon this claim that it is for public use, and you cannot take it for another. In other words, Mr. Baker puts the railroad property of the Michigan Central in precisely the situation legally that the city hall stands in, having been obtained for one public use, you cannot take it for another. It is not true. Let me read to you, and I am going to leave the mark here. It bears upon the case in principle, on all fours, and you must not be misled by the fallacy and the sophistry, however loudly enunciated into your ears. This is a decision recently rendered, in January, 1883, Grand Rapids, Newaygo & Lake Shore Railroad against The Grand Rapids & Indiana Railroad Company, 35th of Mich., 273.

"One railroad company has no right to appropriate without compensation the franchises or property of another for the construction of its road. The fact that property has been taken for a particular public use does not make it public property for all purposes,
1371 and the property rights of a railroad company in its right of way are protected by the same restrictions against appropriation by any other railroad company for railroad purposes or other public use, as is afforded by the constitution and laws in the case of private property of an individual."

They wanted to extend a spur track across the line of the other company. After discussing the authorities, you see where the distinction is made that I contend for, and have tried to illustrate here.

"The theory that land taken under the power of eminent domain is taken for the public use has really caused much mischief."

There is danger of Mr. Baker leading you into mischief.

"The term public use or public purpose is misleading. An object may be public for one purpose, while for others it would not be. Corporations have frequently, in order to accomplish their purposes, sought to give this term its broadest meaning, and then, using it as a foundation to erect structures thereon wholly at variance with all well-known legal principles. In this they have derived encouragement and support from the courts in holding that property thus taken and held by a private corporation is taken for a public purpose, in order to find some ground upon which to authorize its being taken *in invitum*.

"Now, while railroads, in no sense, are for the use and accommodation of the public, and to this extent may be considered as used for public purposes, the mistake in this case consists in assuming that the property by them acquired, having been taken for a public purpose, may be used and appropriated by any other corporation for a similar public purpose without making compensation therefor; that public property for one purpose shall be public for all. But
1372 is this true? In the case of a common public highway, every one has an equal right of passage over it; but if it is sought to appropriate it to some essentially different public use, as a railroad, it is now generally conceded that the owner of the soil would be entitled to additional compensation. A turnpike is also a public

highway, which the public have a right to use upon paying toll. If it is appropriated to some other public use, the turnpike company would be entitled to compensation, and if the new use was essentially different from the old, the owner of reversion would be entitled to compensation. In the one case the public have the right to the free use of the road, in the other, to the use upon paying toll; but in neither event are their rights considered in case of the road being appropriated to a different purpose,

If lands are taken for a site for a light-house or a fort, although clearly taken for public purposes, yet the public as such are excluded therefrom. The use for which it is designed is one that is inconsistent with individual rights, either separate or collectively. In some cases where property is required for public use, a mere temporary use or easement only is required, while in others an apparently perpetual and exclusive occupation is required. In the former class, whenever the public easement is relinquished or vacated, the owner of the reversion is restored to his original rights, while in the latter case it would not follow that he would have any rights whatever upon a relinquishment of the uses for which the property was acquired. It is apparent, therefore, that it will not do to say that property taken for a particular public use thereby becomes public for all purposes. The public may have the right to use it for certain purposes, and yet individuals or private corporations have rights therein
1373 at the same time. These rights may be considered as private rights, separate and distinct from the rights of the public. Wherever such private rights exist, they are entitled to protection, and can only be divested in the same manner and under the same laws that individual rights may be.

"Our conclusion upon this branch of the case is that the franchises or property of one railroad may be taken for the construction of another, in all cases where the property of an individual might be, upon making compensation therefor."

I now refer to the case of The Toledo, Saginaw & Mackinaw Railroad Company *vs.* The East Saginaw and St. Clair Railroad Company, 72 Mich., p. 206, where it was desired to make a crossing of the tracks with a branch or spur track. The opinion was delivered by Chief Justice Sherwood.

"The line or lines the board of directors may adopt for its road on entering a city or village, in reaching the terminal points, when made a part of the original survey or map, constitute and become a part and parcel of its main line; and when the map and survey shall have received the approval of the State crossing board, and been filed with the register of deeds of the county in which the crossings are to be made, the rights of way of other roads may be condemned for the use of the crossing road, as in the case of private property, and it will make no difference whether the new road proceeds through the place to the terminal points by one or more terminal lines. The construction of a branch or spur, or extension not included in or with the main line, and as a part thereof, after the map and survey have been adopted and approved by the State

crossing board, or after the railroad has been completed, pre-
1374 sents another and entirely different question. It then becomes an added section of the road."

Gentlemen of the jury, you would not have any elevated road if it were not for the order of crossing the Michigan Central tracks, because the elevated road instead of coming up on grade is to cross the Michigan Central tracks. Will the learned counsel tell me, under these authorities, if the elevated road is required by the State crossing board to go across the Michigan Central track, why the Michigan Central Railroad Company cannot be compelled to give them a crossing on its own line instead of taking the public street? Think of it, when a crossing is provided for, the railroad seeking to cross the track of another, it may take the property of that other sufficient to enable it to cross. The railroad crossing board said to the union depot company, You cannot cross, for the protection of life in the city of Detroit, you must not cross the Michigan Central at grade. How shall you get across it? Through the public highway. There is a decision of the court of last resort of Michigan that if the railroad crossing board think it necessary to make an elevated-railroad crossing, if it must be done there is the decision of the court of last resort, in four adjudicated cases, that the property of the Michigan Central, as to that means of crossing the public highway, and leaving the public highway free is precisely, and of no higher dignity, and has no more protection than the property of a private individual. Aside from that, you bear in mind that you would have no other crossing except the city authorities say you must not cross the Michigan Central at grade. To enable you to go over the Michigan Central by the direct route, the Michigan Central property is of no higher dignity than the cottage of the mechanic.

1375 Now, gentlemen of the jury, I think you can read English and understand it as well as Senator Smith or any other of the gentlemen I have named. The constitution, as I have said, contemplates that you can read this statute for yourselves. On the other hand, whether we are entitled, if it were not a crossing, whether we are entitled to go up and take that margin, as we have drawn it there, and take the property from the Michigan Central road, I have shown you that it is deserving of no more protection than the property of a private individual, but there must be a statute. The union depot act does not forbid it, because the union depot act provides, not that you shall not take depot property for terminal facilities, it does not prohibit that. If it did prohibit that we could not proceed. That I admit. It provides:

"In case any such company is unable to agree for the purchase of any real estate, property or franchises required for the purpose of its incorporation, it shall have the right to acquire the title to the same in the manner and by the special proceeding prescribed in this act; but there shall be no power, except for crossing, to take the track or rights of way of any other railroad company without the consent of said railroad company."

There is no prohibition against taking depot grounds, is there?

Then turn back to the statute passed at the same time, passed for the purpose, as suggested by Mr. Joy, to enable some railroad company at some time, somewhere—he cannot remember to have drawn it—to enable some railroad company, somewhere or at some time, to condemn the depot grounds of some other company that is not using it. Whereabouts has it been done? And why did Mr. Joy draw the act, and why is it drawn in connection with the
1376 union depot act, at the same session, except to enable them to use the grounds of the Michigan Central? This is plain English. I think you can understand it, and will not take the statement that it cannot be done. This is a part of the general railroad law, which has heretofore provided that land may be taken under the constitution for the use of railroad companies, on the verdict of twelve freeholders, or on the appointment of three commissioners, precisely the business you are doing here, and this is the end of a section added in 1881:

"When any part of the land of any railroad company in this State, in or adjacent to its depot grounds is not in actual use for depot or other purpose pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company organized as aforesaid, needing such land for the purpose of a depot or terminal facilities, to acquire the same in the same manner as may now be done for such purpose from individuals. The question of actual use and of necessity for the aforesaid purposes by said railroad company owning and not using said land, shall be determined in addition to other questions as provided by law in cases of condemnation of lands for the purpose aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals."

Mr. FREUD: Provided it is not in actual use.

Mr. DICKINSON: Yes, and provided it is not needed, but let me tell you, you provide by law that no man shall enter a house in the daytime, it shall be a crime to do it, if he does it secretly. If
1377 he does, certain things shall be done. You do not take that man right up and send him to prison, if you find him doing it. You have to give him a trial before twelve men. Now, when you find a statute providing that the land may be taken if it is not used, or needed, and it provides a tribunal to try it, would you forestall that tribunal by deciding at the outset that you cannot succeed before the jury?

And now I am going to read you the testimony of their witnesses, to refresh your memory that this land may be taken, that this land can be taken for this elevated structure, and that it will not interfere in any way with the Michigan Central road, with the use of its property. That it does not use this structure in the air, that its own property is at grade. You must take the property as you find it today, taking the Michigan Central as you find it, aside from the question of their needing the premises today to do their freight business, aside from that question; and it must be a need

in good faith, as Mr. Lothrop says, when they can do their business at the junction, or elsewhere. I shall show you that that business can be carried on under that elevated structure just as well with the elevated road, and show it by their witnesses.

Recess.

I address myself now, gentlemen of the jury, to the question propounded by the juryman, Mr. Freud, as to whether the road use it and need it, as to whether the road can use it and can need it. And I think it well to call your attention to some of their witnesses. Mr. Joy said, you remember, when he had stated that it was impossible and impracticable to run up the Michigan Central ground, that he never heard, until this trial, that we proposed they should take the margin of the Michigan Central road; and
1378 he finally acceded that that was the best route. I then read to you the closing argument made by me, which he said he listened to from beginning to end—not my opening argument but my closing argument; I read extracts from my closing argument that he said he listened to, showing that in every sentence connected with the question of necessity, I marked out this route as the most practicable along the margin of the Michigan Central road—on the former trial, Mr. Joy having sworn that he never had heard of such a route. He, however, at the end conceded, after much questioning, that this was the most direct route from the old depot ground, and you can see that it is. Bear in mind that here is Backus' planing factory, and here is Twelfth street, and here is where they now enter River street (pointing to map). You can see that from the old depot grounds, at this point, as they have laid it out, as it is already laid out, before they cross Twelfth street, the most direct route is up the margin of the Michigan Central, the most direct route that they can take; that this route that they do take, crossing here into Twelfth street, is an injury to the road, this being the most direct, leaving River street free, and crossing River street there at an elevation. I call your attention to this line of track. I do not know whether you have seen it, but I have seen it since this trial commenced; it is a side track connecting with the Diamond Match Company, the Peninsular stove works, the flour mill, and with all the property beyond here; I have seen it crowded with locomotives and cars—this side track running along the margin of River street out about the sidewalk. And it is important that you should see that, if you have not seen it, so that you may form a conclusion upon the testimony that has been introduced here by Mr. Ellis, by Mr. Joy and by Mr. Mulliken, that the
1379 elevated structure, if it runs up River street and bestrides this track, will not in any way interfere with the running of freight cars and locomotives. It is important, you see, that it will not in any manner interfere with their locomotives and freight cars and freight business on that track when they run up there, and it will not so interfere with them. (Juror Charest says that the jury have seen that side track.)

Now, in direct connection with the question asked me by Mr.

Freud, let me refer you to the testimony of their witnesses; and first I will read the testimony of Mr. Ellis, at page 111 of his testimony:

"Q. In going along this street along by the stove works and the Union mills and the Diamond Match Company, or the old Richardson match factory, which is still used as a match factory, is it not—A. Yes, sir. Q.—you discovered the old side track there, which had been there for many years? A. Yes, sir. Q. Which had been in use for loading freight from the stove works and the match factory and the Union mills and so on? A. Yes, sir. Q. Right up the street on the side, and they run engines in there, don't they? A. Yes, sir. Q. It is a broad-gauge track? A. Yes, sir. Q. They run the ordinary locomotive in there, and the ordinary freight cars of all descriptions? A. Yes, sir. Q. How are you going to get along without destroying that business? A. We span the whole thing; we give them the clear standard height for locomotives and cars under it. Q. And you won't interfere with them in the slightest degree? A. I don't think we will. Q. They can run their freight cars in there, and load their flour and wheat and stoves and matches, just as well as though you didn't have your elevated structure there? A. Yes, sir. Q. On this broad-gauge track? A.
1380 Yes, sir. Q. And you don't interfere with it or injure it? A. No, sir; they have a franchise there of their road. Q. That runs up pretty close to the Manufacturers' building? A. It runs in the paved portion of the street, 15 feet away from them."

Now, there is Ellis, the engineer of the road, whose elevated structure is not going to interfere in the slightest degree, who will not even admit that it will give a shadow of injury, with the carrying of this large freight business with all these manufacturing concerns there. The Michigan Central own it, of course. It is their side track; here it runs from their own main line right up the street; the Michigan Central is not injured by the taking of that track there. Do they want to run a track under here? (On map.) Or do they want to leave their freight sheds here, 14 feet in the clear, or 18 feet in the clear here. If it will not interfere with this track in the slightest degree, will it interfere with this track in the slightest degree? Answer me that. Is it a taking of the Michigan Central property to take that side track, over which runs a great freight business, all the stove business of the stove works there, all the match business of the Diamond Match Company, all the wheat and flour business of Kidder & Piper, the great freight business of those manufacturers, it being necessary to have locomotives and the broadest-gauge cars, the highest cars and the highest locomotives? If it will not interfere with it, if it is not taking that side track, is it taking anything that the Michigan Central want when it comes here and spans over? Are they using that structure in the air? I ask my friend, Are the Michigan Central, or is this side track using the air? Could they use the air, when their whole system is at grade? Do they need the air on their side track, on River street,
1381 when their own engineer, the engineer of the union depot company, the immaculate union depot company, the com-

pany that is going to have charge of our private rights and our private property, when that engineer, the man whose functions you would have said are superior to yours when he laid out a track, when he tells you that they do not take an inch, they do not take an ell of the property in that side track, because they do not interfere with it in any way, their structure spans it. If there is a juryman on this jury who does not know, in the face of that testimony, that it is a mere pretense on the part or in behalf of the Michigan Central Company, who is not here—a mere shadow of a pretense when they say that you can leave that there over which the elevated structure is spanned, or it is proposed to span, with this side track, then that juryman has listened to the testimony and to the principles which we have labored to present, to little purpose. We have been engaged in no child's play; we have been engaged here, as I said at the opening, standing here against all comers, upon a question of fundamental right, and we are here to say that if it is not necessary to take River street, if it is not necessary to injure property there, if your best route is up here, and to take no man's property, we want you to go across the road and keep your railroads upon the property already acquired by railroads; and we may want some for the great Pennsylvania road, and for the great Delaware & Lackawanna, to come in here. Shall we not, so long as there is room here, so long as we do not interfere with any other business, upon the testimony of their own witnesses, shall we not keep our streets free, and keep our thoroughfares and keep our property for our manufactures untouched?

Oh, but there is another witness, a man who comes in here
1382 as their witness, a man who built and who must have largely the credit for the pushing enterprise of the Detroit, Lansing & Northern, Mr. J. B. Mulliken. They put him on the stand and ask him some questions, and I want your marked attention to his testimony. I refer to Mulliken's testimony at pages 440, 444, 445, 446 and 447. I asked Mr. Mulliken some questions on cross-examination, to which I call your attention; and for all there is in the case, I have not the slightest idea that you could get Mulliken to bend one way or the other from what he deemed the truth. I think Mr. Baker got an unexpected answer when he asked him a question. Mr. Baker says to him:

"Q. It is proposed to build a railroad up River street, an elevated railroad. I suppose you are familiar with the property down there? A. Yes, sir. Q. And the Fort Street Union Depot Company has laid out a route for its road along River street. Suppose it is legally impracticable, legally impossible for the Fort Street union depot to acquire the right of way over the property of the Michigan Central, what would you say, that being the case, about the feasibility and the practicability of the route that was selected along River street? A. I think it is perfectly feasible and practicable. Q. Do you know of any better route into this proposed union depot? A. No, sir, not if they could not get in over the Michigan Central grounds. Q. If they could get in over the Michigan Central grounds they would have as direct and as good a route? A. I think so. Q. But if you

cannot go in over the Michigan Central grounds, you think that is the best one? A. I think it is as good as any."

Then on page 442 he testifies as to cinders. On page 444 I questioned him as follows:

"Q. I show you this map of the Central grounds. Here
1383 are the Michigan Central grounds, here are the old union depot grounds, and here it is where they propose to cross into River street at Twelfth. Now, taking the line of the union depot track, running along the margin of the old union depot grounds, what, from that point at Twelfth street, is the most practical route and the best route into the depot grounds? A. The most direct line would be the most practical. Q. Which is that? A. Following along the margin of the Michigan Central property. Q. That would be the best route, would it not? A. In my opinion. Q. Mr. Baker has asked you about legal difficulties; do you know of any legal difficulties in the way? A. I do not; I am not an attorney."

He is then asked who is the counsel of the D., L. & N., and says Mr. Lothrop.

"Q. The most direct route, you think, would be up the margin of the Michigan Central? A. That would be the most direct line. Q. In the Michigan Central yards, between Twelfth and Third streets, they do a passenger business? A. Yes, sir. Q. And they do a freight business there? A. Yes, sir. Q. Most always you find freight cars standing in their yard, filling it up? A. Yes, sir. Q. All about Twelfth street is frequently stored full of freight cars? A. Yes, sir."

Within two years Mr. Mulliken resigned as manager of the Detroit, Lansing & Northern, but for fifteen years he had full charge of their freight and passenger business, he being the head and front of the management of all its business. He knew that yard from a to izzard. They had grounds of their own, extending from that street clear through to the river bank. He continues:

"Q. If there can be conducted under this elevated structure
1384 on River street a switch, over which may be done all the freight business of such factories as the Diamond Match Co. and stove works and Union mills, where freight cars can be run under with the locomotives of this elevated structure, standing sufficiently high in the clear to permit the conduct of freight business under that track, do you see any reason why, if the Michigan Central desire to use a track on the margin next to River street, they could not as well conduct a freight business under that as can be done on the switch-engine under the elevated structure. Do you see any practical difficulty? A. I think not. Q. So that if the elevated structure was run over there, the Central could carry on a freight business under that margin? A. Yes, sir. Q. They do not now need or use the space that would be used by the elevated structure? A. No, they do not use the space above ground. Q. Have you noticed the old freight sheds and tumble-down brick house they have on the margin along River street? A. I know they have some buildings there. Q. Do they use them for anything? A. I

do not know, I am sure, whether they do or not. Q. You did your business there with the Michigan Central for the D., L. & N., so far as the practical conduct of the business was concerned, to say nothing of the annoyance from competing roads—you carried it on well, didn't you? A. Yes, sir. Q. The passenger trains ran in and out in good shape. A. Yes, sir. Q. They had no more than the ordinary delays in any depot? A. No, sir. Q. You had a contract made with them, when they agreed to give you place, that you would not compete with them? A. Yes, sir. Q. That was the difficulty? A. Yes, sir. Q. You were perfectly comfortable so far as the running of your road was concerned on their grounds and depot? A. Yes, sir."

1385 Can any one make an oath that the Central do not need it in the air? Can any one make an oath that they do not need or use it in good faith, when Mulliken, who knew the yard from beginning to end, who had property in the yard, or his company had, says that they used it for storage of freight cars, even if the question were not as to whether they need the room in the air, when their whole system is at grade. Can any one swear to it? Mulliken has sworn to it, that they do not use it in the air and they do not need it, with their system up here. Do they need it, if they went through at grade; could we take that margin; do they use it in good faith? Mulliken says they use it for the storage of cars. Gentlemen of the jury, they have two elevators there, an elevator and warehouse; you cannot take property and condemn property for public use, for the use of an elevator. The Michigan Central had room enough for two elevators; in their yards, with all their business, they store their yard full of freight cars, and Mulliken says, and Mulliken is a disinterested man and knows all about these things. Are you going to try the case upon the testimony?

Mr. Backus, will you take and move that elevated structure; put the elevated structure with the railroad on one side and put the other on the other. (Mr. Backus does so.) This plan is accurate, drawn to a perfect scale; as the elevated structure stands with reference to that building, in size and in distance and in measurement, so in the greater structure are the distances, precisely drawn to a scale, to the fractional part of an inch in the larger structure, so that you can form your comparisons. Now, Mr. Backus, put on your elevated crossing for teams on the other side. (Mr. Backus does so.) I believe there is 24 feet when you put the cause-

1386 way for the teams in the street. How many feet does that give us from the building? (Mr. Backus says:) From our line it gives 7 feet; from here it is 80 feet.

Now, Mr. Backus would not have that elevated structure, that railroad, run at the place where it is proposed to run it, for $150,000 or more. He says, You fix that road, as I have suggested with this model, use your elevated structure for teams over on the Michigan Central up there, use this space, and put your elevated structure and your cars, and your freight and your passengers, over there, as it will stand beyond the viaduct for teams, and do not give us one penny.

Mr. BACKUS: We do not need that structure for teams; we do not want it.

Mr. DICKINSON: But if they do put in the elevated structure over there we do not want one cent; we do not need it.

Now a word more as to the power to take it. Mr. Baker has laid some stress on that, and I will only add a few words to what my distinguished associate has said and to what Mr. Lothrop has said. I call your attention to his testimony again. He swore on direct examination that he had some conversation with Mulliken at some time with regard to getting a right of way in from the junction. He said at that time that he was very positive there was no law which would permit them to acquire property of the Michigan Central road. He did so testify. But do you remember that on the cross-examination I said to Mr. Lothrop: Do you remember the passage of the union depot act? Yes, sir; I aided, said Mr. Lothrop, in advising the judiciary committee of the legislature as to some parts of it. Now, said I, Mr. Lothrop, was your conversation with Mulliken before or after the passage of the union
1387 depot act; in other words, was the time when you said there was no statute providing for the combination of the depot grounds of the Michigan Central, to give the Detroit, Lansing & Northern a passage, before or after the passage of the depot act by the legislature? He says, I am clearly of the opinion that it was before. So that you see at the time he had the conversation with Mulliken, at which time he says he knew no law by which the grounds of the Michigan Central could be taken, this act for the taking of the union depot grounds was not passed, because that was passed at the session when the union depot act was passed. What value is his testimony, when his attention had not been called to it? It was not called then, because no such act was passed. But now he says the proceeding provides—whether it is constitutional or not we will not say—but under it it is provided for the question of the need of the Michigan Central owning it, or its use of it, and that is a question of the use in good faith and the need in good faith, and it is to be tried by a jury like this. That is his testimony.

Now, I want to know whether the jury are going to pass upon this question of necessity, or are going to pass it by, because of the acts of the union depot company since, in getting ready for this trial by buying property since the first trial. I want to know, secondly, if there is a man on the jury that believes in the face of the testimony, that any other jury of twelve of their fellow-citizens is going to say, in the face of the testimony of their own witness, Mulliken, that they need that space there. If you find that they do not use it—and Mulliken says they do not use it, because their system is at grade—how can you find that they do use, or that any jury would find that they use it? How can you find that
1388 they need it, when Mulliken says that they use it for the storage of freight cars? I do not care anything about the Michigan Central employés they bring in here. They brought Mr. Sutherland here. I asked him on cross-examination about this.

Let us see about this question of use and need. I remember what he testified: You accommodated the Grand Trunk up to the time it left? Yes. You have accommodated since the Detroit, Lansing & Northern? Yes. The Flint & Pere Marquette? Yes. The Bay City road? Yes. You accommodated all these roads that are going out and have gone out? Yes. You have just bought this immense area of 400 feet on River street, clear through to the river, from the Detroit, Lansing & Northern? Yes. You have room enough on your grounds to put up two elevators. All these roads are going to leave you—the Detroit, Lansing & Northern did not leave you because they were not fully accommodated. Mulliken says they did not. Mulliken says they were perfectly comfortable; had all the room to do their freight and passenger business that they desired in the Central grounds, and that was not the difficulty; that the difficulty was that they had extended their line, and had to carry on a competition with the Michigan Central Company. These are going out. What are they going to do with the room that is left after they go out? Cannot they give us these few feet, if it does not injure their track? Think of it and take it home to yourselves, gentlemen of the jury; and take this home to yourselves: Who of you—and this is the test—fellow-citizens of Mr. Backus, board of arbitration chosen to protect legal rights, chosen to protect an individual from the schemes of these railroad corporations which are organized not for charity or for the benefit of the city—who of
1389 you, in the business in which you are now engaged, would like that structure within that distance of your place of business, on that narrow street, spanning it from curb to curb? That is the question. Take it home to yourselves. That is what you are appointed for. Take it home to yourselves, in your business, whatever it is, who of you would have it if you could avoid it, spanning the street? And bear in mind that it is at the summit of the declivity of a grade of 52½ feet to the mile; the very worst place in the whole elevated structure is as you approach the top of that grade. Can you not hear the locomotive from the Canadian Pacific; can you not hear the locomotive from the Flint & Pere Marquette, and from the Detroit, Lansing & Northern, and from the Wabash, coming up that grade and getting on top of it with a load, in front of Backus; can you not hear it, in wet weather, this powerful locomotive, broad gauge, pulling a load, stretching over that track, as the wheels turn and the load will not come? You can hear the whirr of the wheels, as she tugs on the slippery track, and the load will not come up the grade, although the locomotive may be over the grade. Can you hear the puff, puff, puff of that engine as she tries to pull the load up? Can you hear the whirr of the wheels as the train hangs back on that steep grade of 52½ feet to the mile, as the wheels will not catch the track? She puffs and puffs to gather her power, and she throws sparks and smoke and steam. If you would not like such a neighbor in your business, if you are looking for a place of business, would you rent such a place? Let us have no sophistry about this; let us have no sneers about this. Mulliken says that at 52½ feet to the mile, it is possible you might run

with dampers closed, but no engineer ever did it or ever will
1390 do it. Let me read what Mulliken says about that, at pages 441 and 442:

"Q. On this proposed railroad there is a short grade of 52 feet to the mile, and then it is practically level in the union depot grounds; the place where it is 52 feet to the mile is upon the old union depot grounds beyond the foot of Twelfth street, and it is proposed to run an elevated road through River street to the corner of Third street; will you state whether it would be practicable, in operating the railroad, to run over this trestle-work, that commences at Twelfth street and goes through to the vicinity of Eighth street, with the dampers closed? A. It could be done. Q. Could it be done without any very great trouble or expense? A. I don't think it would cost any more; I don't think it would be done in the regular transaction of the business; I don't think it would be carried out. Q. Why? A. Simply because the engineers would not do it; I think it would be a great deal better, if you wanted to avoid smoke and dust, to burn a fuel that it did not make any difference."

Now it is a nice thing to theorize about stopping smoke and dust, but practically the question is, how the engineer is going to conduct a road. There is an ordinance to prevent smoke, but look on the river and see the smoke; look on the railroads and see the smoke. If they have got to burn anthracite coal you will have cinders and smoke, as they have in New York where they burn it. We have to take things as they are; we have to avoid smoke and dust. What are you going to do if you do not? You are going to be fined $20. How will that help Backus? Are you going to believe that cinders and smoke and steam will not be thrown out going up that grade? Apart from all the fineness and details of the testimony, would you like it by
1391 your own business? And if you would not like it by your own business, just as you are situated, how would you like to rent the place for a manufactory in any business? Would you take it as a gift and go down there? Is it necessary to interfere with this business of Backus when there is a statute which permits them to cross the street? They say they cannot take the Michigan Central property. What is the real thing they condemn along this street? Why, the property of the Michigan Central. Held for what? To approach its own sacred precincts; it is property in the street that they have condemned and paid for. Do not you know that if the Michigan Central property was safe from condemnation, the property in that street is equally safe. Mr. Baker says they hold it for the public use. If they hold it for anything it is as a corporation, inside their yard, just as you might hold property, and can maintain trespass. And the Michigan Central have no property in the street, for which they got $29,000, except their corporation right continues to their abutting property; they hold that title, the same title that they hold these grounds over there. And the Michigan Central is hostile and fighting this scheme all the while, and you cannot take its property because it is all appropriated to public use. They would have let it touch your property, would

they not? To say nothing of the bargain. How did you come to get it? Fighting? When did you disagree on your contract? Once; and they said you have got to go to law, and we will fight you on the question of taking this property. You got there and took that property, and that was just as much their property to the center of that street as Backus' property is to the center of that street, where they want to pass him; it was property of the
1392 Michigan Central corporation that they had to get and acquire before they could pass over the street. Those grounds are no more sacred property than the grounds in the street. They would not be here condemning property if they had not property in the street. That is the proceeding here. Will some one tell me how it is that they can take the Michigan Central property in the street, held by the same title as their grounds, used by them as an approach, if they could not do it legally, if they could not take the yard property legally, when the title is precisely similar, subject to public uses? They have been paid nothing for the viaduct for teams over there, but they have been paid this $29,000 for this corner down here where they cross at Twelfth street, a little corner there, for the property of the Michigan Central on this River street, for their elevated structure and for the property of the Michigan Central here on the other side of the street. That is just what they paid, $29,000. Did they condemn it? Oh, they are fighting this thing! Now, they cannot break the argument that though the Michigan Central was hostile to it, yet it yielded its property rights in River street; yielded before a commission appointed under the constitution of the State for condemnation purposes. Why didn't the Michigan Central say to these people whom it was fighting, Remove thy shoe from off thy feet, the ground on which you tread is our ground. Now, will some one tell me if they are not giving away their property; will some one be good enough to tell me whether that is property in River street, and property of the Michigan Central held as its own in fee, subject only to the public right to go over it? How do they take that property from the Michigan Central road if you cannot take the property of the Michigan Central road because it sets over on their ground there? They say
1393 they have acquired all that property of the Michigan Central. The fight has disappeared for some reason or other. The fight was on some time or other, and yet you find the Michigan Central not only yielding River street and submitting to condemnation proceedings, but it yields 24 feet of its own sacred grounds besides the viaduct for teams. It is funny. And the Michigan Central is hostile, bear in mind, fighting the union depot company, as a competing line, tooth and nail. Hostile, says Mr. Baker. The only evidence of moment on that is that there is not any more fight, and Mr. Joy says, You just give us what we want here, Mr. Michigan Central, or I have got a little joker on that statute book which I will try on, and we will come along here and close Fourth, Fifth and Sixth streets if we want to, and carry on things here at our own sweet will, and be at peace, or we will walk over your ground. That is about the size of it. And the next thing we know,

when I am out at the legislature, appealing to the legislature to tax these railroads, I commenced the agitation, that is all I expected to do, so that there will be sent from the people of this State all over at some time, to some future legislature, a body of men who will tax the property of corporations just like business men's property is taxed, who will tax the real-estate property of the Michigan Central as business property is taxed, so that they could not afford to hold any more than is held in other cities, for freight business; it is a valuable property they hold for freight business; when I was out there insisting upon it and laying it before the joint committee of the legislature, whether it was right and just that the man who had a feed store on River street should pay the full assessed value of his store and taxes, and for police protection and all, and the
1394 vessel men should pay taxes, upon millions and millions worth of property, to the municipal government here, and the Michigan Central should pay no taxes—urging upon them that the Michigan Central road should pay taxes, to lessen the average of taxes, which have reached the enormous burden of 17 mills to the dollar; and Mr. Joy was there, and made an argument in favor of the Michigan Central and against taxing it. I tell you peace has been declared. War was on between these companies until this right of way had been obtained from the Michigan Central and these people had contracted to divide that street and to shut up, by a piece of legislation passed at the last session, more streets. Mr. Joy says he could not stand it to hear that it should be urged that the Michigan Central property should be taxed. But just the same, the legislature of 1892 will pass an act to impose local taxes upon the Michigan Central property, just the same as if Mr. Joy had not been there. So that they will retire. They have retired in New York, gone uptown, when business property became too valuable to do freight business downtown, they planted their passenger depot on 6 acres of land and did their business with 240 trains a day on that amount of area, and moved their freight business to the river, as they have done in Chicago, and given up the area to manufacturing interests and to business that wants to come and build up the city and pay taxes for the advancement of all our people; they will have to do that here, as they have done in Chicago. No man invests a dollar over there that does not pay taxes on the investment; and Chicago is a great city. Every railroad pays taxes, and they pay taxes there to the amount of $750,000 into the city treasury in Cook county alone for railroads. The Michigan Central railroad uses its depot there and pays its
1395 share of taxes there; the Grand Trunk and the Wabash pay their share of taxes, that go to swell Chicago. But here in Detroit no taxes are paid by these companies. True, this union depot company, when they got their charter through, said they would pay two and a half per cent. on the gross receipts, not on their real estate, not on their property, but on their gross receipts, on terms to be made by the company itself; and their receipts will be just what they are for the street railway companies, just what they please to send in.

I want to comment for a moment upon the testimony. You are here, and we are supposed on both sides to produce for your enlightenment the best testimony of which the case is capable. On the pretense that the elevated road in New York was a criterion as to the damage made by an elevated road of three or four grand trunk lines, they brought Mackintosh here as a witness; Mackintosh, a clerk in the office of the attorneys and counsel of the elevated roads of New York; Mackintosh, with the idea, as my friend Judge Chipman said, that we were something of hayseeds out here anyway, and he would teach us a wrinkle about the damages occasioned to property by railroads running by them. Of course Mackintosh was ridiculous and absurd, and I will not dignify him by referring to his testimony before you twelve men, but I only refer to him to show what kind of people we have to deal with, what kind of testimony this company will bring, when it has all the means necessary to get the best evidence of which a case is susceptible; and I say to you that Mackintosh was sent here because it was fit that such a man as Mackintosh would just about suit the intelligence of us people out here; and he was sent here to fool us. The
1396 cross-examination developed that he had been a clerk in that office; that he retired once for two weeks and took the case of a woman against the elevated road; that he returned into the employment of the elevated road before he had settled that case, and then settled her case with the elevated road. That is the kind of lawyer Mr. Gould employs. You would hoot him out of court in Michigan. Imagine it—a man going out of their employment, so that he can get business by saying that he is no longer in the employment of the elevated road; getting a case of some poor woman against the road, going back into the employment of the company, after he has had the case for about two weeks, and then settling the case. That is his testimony given in cold blood. That is the kind of people they send here; and it is not respectable to send such testimony here; and he testified to ten dollars a foot damage to the planing mill, and he thinks it might be $100 a foot over in front of Mabley's, and you, under your constitutional duty, are to take the testimony and do justice, and they know it, and they gave you such testimony as that in a suit in which Mr. Backus has been collared and brought in here, and is entitled to fair treatment and entitled to a fair appraisement of his property. And they have abundant means to get good real-estate men in New York, to get good business men in New York, to get disinterested real-estate agents in New York; yet they bring an attorney of the attorneys of the road as the first of their witnesses. And the second of their New York witnesses is a man who has been in a hundred and sixty to two hundred railroad suits as a stock witness. They did not bring his associate, Hawes; I expected Hawes; they hunt people in couples; and I was ready for them; they brought those two men here, and when their second witness
1397 was sworn and examined, I asked, on cross-examination, if he had been cross-examined by Mr. Rodger Foster and Rufus H. Peckham, and you will remember that I could not get him to

say in any single case if he had sworn what I asked him. Why? Because if he said he did not so swear, I could assign perjury upon him, and he dodged every such question I addressed to him of that kind. Those are the witnesses they bring, the creatures of Jay Gould that are brought out here to insult with their methods the intelligence of our Michigan citizens. I won't bandy words about it. The class of blood-suckers and vultures that he sets upon the people of New York; with his forty million blanket mortgage to hold up to the people and say, "You get your judgment if you can." No wonder they settle with him. And this witness would have you believe that, in the testimony he gave and Mackintosh gave, the damages were the whole damages to be the criterion in the Backus case, whereas, over and over again—and I have a collection of the cases from beginning to end, every case that went to the court of appeals—the New York courts held, up to the Lahr case in 104 New York, that those damages were damages to the rental value of the property; and that was to be a criterion in the Backus case. There has been an attempt to defraud you upon these facts, and it is worthy of the man who owns the elevated roads, and who has cut out honest investors three times, worthy of the man who is a wrecker, and has made his $200,000,000 from wrecks of the fortunes of others. Not long ago one of my New York papers related how he quietly went down there with his Manhattan elevated road and took possession of the only outlet that the people had to the water to breathe God's free air—Battery park—without leave or licence took possession of it with his structures, put
1398 his elevated road over it, poured cinders and dust and steam in that park, for the people of lower New York, and the council of New York, moved by public sentiment, did actually, by a unanimous vote, give him warning to get out of that, and put the police force at work to tear down the structure; and I cut out the cut from my New York paper, the World, where Gould is going over the fence with his coat-tail application for Battery park in the mouth of a bad dog, the common council. For the first time, old Father Knickerbocker says, "Well, there is one good deed by a very bad dog." That is all they want to do here. That street is public property. Why do they take it, except they want it? They do not want to pay for going anywhere else. They say Backus said, Go right in back of me, before the railroad commissioner. I will tell you what Backus said to the railroad commissioner; he didn't have any counsel there; he said to the crossing commissioners, "Gentlemen, the crossing of this elevated structure in front of my place, according to Mr. Ellis' plans, will ruin my property, you might just as well go right in back of me and take it." And Mr. Baker would have that twisted into a statement that he wanted them to take his property. He did not know that he could send them over the Central road. Do you think he was speculating on the railroad companies? That point has been made from beginning to end of the case, that Backus wants to speculate upon railroad companies. Who would not like to own that property there, his 7 acres of lumber yard and his great river front, his place on Fort street for stor-

ing, his admirable situation for his planing mill, with railroad facilities with the Michigan Central, buying a piece here and a piece there, getting clear through to Fort street, by buy-
1399 ing pieces now and again, gathering together the great plant that makes that magnificent piece of real estate, constituting his plant of his planing mill, his lumber yard and his storage place. Does he want to sell it? Why, he has just made his lease, not more than six years ago, arranging for old age, looking forward to 24 years o equally good business for the boys; he made his lease six years ago for 30 years; that was only in 1885, and has 24 years to run. Who has not seen Backus, early and late, and I fear on Sundays, through that panic that I knew about, carrying a great load of indebtedness that came upon him, with his paper never dishonored? With no indorser stuck one copper; he paid every debt he owed; his life-work was saved, saved for the boys, and this magnificent property paid for, all with his two hands, and with hard work, and without a cent from his father to bless him with as capital, nothing but his two hard hands; is he to be charged with being a speculator upon railroads, especially on the charge of this man who seems to be at the head and front of this, and whose creatures are representing him here? Backus is entitled to fair compensation, no compromise at 50 cents, no compromise at 25 cents, no compromise at 99½ cents, but dollar for dollar; he went through with it night and day, and I was his neighbor; you saw him out at daylight in those days, when I was an early riser on Fort street; I sleep later now; he was there all day, his little luncheon in his basket, trying to pay his debts through that dark time, when banks were tottering and merchants were failing all around him, trying to make money in order to save his credit and commercial honor and pay his debts; and he did it—and he is the man who is charged with robbing a railroad when he has paid every man he owed,
1400 dollar for dollar, without asking even for an extension, helping men with his credit in that dark day, and paying the debts that he owed. Not only that, but coming through, with the boys in business, working without salaries, building up and accumulating this great property, paid for, the mill saved, and leased to a corporation made up of himself and his two boys, so that the thing may run when he dies, because if he hadn't put it in a corporation, and he should die, after his hard work, the property would have to be sold at executive sale; he put it in a corporation, so that the boys should not be embarrassed by his death, as he had embarrassed no one by his life; he fixed it for them. And they say he is trying to rob a railroad, trying to sell his great accumulation of property. I tell you that it is a case where there should be a careful search for the principles that apply under our Government to individual protection and we should not be shouted down nor whistled down the wind. It is not right. It is not just to such a man as this. Instead of abusing him, put your hands upon a witness that will testify that he is not a man of honor. You have a right to do it. That he is not to be believed; you have a right to do it. Bring a witness here to attack the character of

Backus for truth and veracity, instead of bringing Pangborn and Mackintosh and Hawes, whom they failed to get across the border.

Adjourned to Wednesday, July 15, 2 p. m.

1401 WEDNESDAY, *July* 15, 1891—2.10 p. m.

Argument of Mr. Dickinson Continued.

MR. FOREMAN AND GENTLEMEN OF THE JURY: I hope to finish within 30 minutes, as I promised yesterday, and I shall briefly review, in a plain business talk, some of the testimony, at least refresh your memory as to the witnesses that have been sworn and the purport of their testimony. Before doing that, however, I should say that something has been said about this company having local investments here. There is no one in Detroit, upon the board, or in the management of the Fort Street Union Depot Company, except R. G. Butler, of the Wabash Road. R. G. Butler came here as the representative of the Wabash Road, and he is the only man in the board. Mr. Joy is the treasurer of the company, but is not on the board. Every other man in the management is a non-resident, so far as that is concerned, and you see the management of the Fort Street Union Depot Company is peculiarly and wholly a Wabash management. The testimony is furnished by the Wabash manager; so far as the foreign testimony comes here, it comes from the Wabash people in the city of New York. Mr. Alger and Mr. McMillan were in the old union depot scheme at the foot of Twelfth street. They are not in this company. The old union depot line has been turned over to the Wabash, and will undoubtedly be rented, if it has not already, to the Fort Street Union Depot Company. Those gentlemen are not in the Fort Street Union Depot Company. The articles of association do not embrace any of these gentlemen, and Mr. Joy said that the only man living in Detroit, on the board, was Mr. R. G. Butler.

1402 Something has also been said by Brother Baker about the practice of having lawyers put on the witness-stand, and he said Theodore Romeyn was sworn as to the laws of New York. This is true, and the reason is that in Michigan and in every other State, the laws of each State are in some respects different and they stand to each other as foreign States, as another country, so far as local laws are concerned, so that if you want to prove the law of England, you can put a witness to testify it. If you want to prove the law of New York, you can put a witness on to testify it, if you do not have a copy of the statutes, if there is any kind of a law peculiar to New York you can call a witness and show that he is competent and has practiced under the law, that such is the law, and it goes for what it is worth. But imagine our putting a lawyer before my distinguished associate, Judge Chipman, when he was on the bench, to testify as to the law of this State. Imagine Judge Chipman on the bench listening to any member at this bar going on the stand and swearing to what the law of Michigan was. You can see the absurdity of it; and I would not be guilty of the fla-

grant impropriety of putting any lawyer on the stand to corroborate the testimony of Judge Chipman, as he gave it to you in his argument, or to corroborate my own examination of the question, as to the statute of this State to show you what the meaning of the statute was. There was nothing improper about putting Mr. Lothrop on, inasmuch as Mr. Mulliken had testified as to what he was advised by legal counsel. I did not criticise the action of the gentleman in putting Mr. Lothrop on. The testimony of Mr. Lothrop was that he was not aware of any statute at that time. There was no statute at that time, and so far as my having criticised Mr. Lothrop,
1403 I said, railroad lawyer that he was, and counsel for the Michigan Central and counsel for the Detroit, Lansing & Northern, nothing could make him say that that property could not be taken under the statute. I waived the oath of Mr. Lothrop, and I think he would tell you that the counsel who now addresses you who followed him when there were few to follow him, in the old days, who had followed him wherever his white plume shone in the old days, when there was but a handful of followers, in the cause which he led, would be the last man to reflect in the slightest degree upon G. V. N. Lothrop.

Now, gentlemen of the jury, I am convinced myself that you are not going to say that it is necessary, in view of the testimony, to put this elevated road up River street. I thought it might shorten the trial somewhat if you would dispose of the question of necessity and then take up the other question, or make it unnecessary to take it up, but as you have chosen to take both questions which might be submitted to you into consideration, it is my duty to refer briefly, and I shall very briefly refer to the question of damages, if you do take River street, a question which I sincerely believe you will never reach in your deliberations. We want no damages. We simply want you to do what we said you should do before they attempted to put a hole in the street, to build your structure. We want you to go over there and leave River street alone, and take this land and this space in the air for your structure, and pay us nothing. We ask no verdict from the jury's hands, and that you understand perfectly.

If you do take River street, I have said to you, in such a case, that — the taking of property, and as read you by Judge Chipman,
1404 the taking of the street is the taking of property. I need not say any more than to read the union depot act, that makes careful provision on the subject; in case the jury should find the taking necessary, I read from section 3461:

"And in case of the construction of such tracks on any public street, lane or highway, the same shall be on such terms and conditions *and* shall be agreed upon between the company and the common council of any city, or the village board of any village, or the commissioner of highways in any township in which the same may be; provided that such tracks shall not be constructed on any public street, lane, alley, highway or private way, until compensation be made by the company therefor to the owner or owners of property adjoining such street, lane, alley, highway or private way,

and opposite where such tracks are to be constructed, either by agreement between the company and each owner, or ascertain- and paid as hereinafter prescribed for obtaining property or franchises for the purpose of its incorporation."

There is the statute for taking that street. But the taking of the street and the easement is the taking of property, and my brother Chipman has read to you the law of New York, holding distinctly that the taking of property for an elevated railway is the taking of the property of an abutting owner, in the meaning of our constitution, which provides that no property shall be taken until a jury of freeholders shall decide that it is necessary to take that property, and this is property within the meaning of that constitution just as much as if it were his front-door yard or his mill. That is what I shall address myself to for one moment, aside from the statute.

In the case of Pearsall *vs.* The Board of Supervisors of
1405 Eaton County, 74th Mich., 558. There a street had been laid out and it was proposed to close it, and the question was whether they could close it against the protest of private owners. The courts say, all the judges concurring:

"The benefits to be received by a person whose land is taken by the public for a road are a part of the consideration for the release of the land, or its condemnation for a road, and when once vested in him, or he becomes entitled thereto, they are as much his property as the land itself, and neither the State nor any of its subordinate agents can deprive him of them, except in the manner pointed out by the constitution, and that has not been done in this case. Notice, finding a public necessity for taking, and compensation ascertained by jury, and made, are wanting, and without these the proceedings are void."

Now, as to the injury to Rackus' business, as to whether that is to be taken into consideration. I refer to the case of The Grand Rapids & Indiana Railroad Company against Weiden, 70th of Mich., 392, and again we have the strong language of our own Campbell upon this question. In this case he says that the property-owner may object to the lack of necessity for the road at all, or for its location over his land, under any condition. Here the jury did not do their duty by the property-owner. They paid him for his land and let the business go to the devil. With reference to the damage to the man's business, the court says:

"Both of the appellants were using their property in a lucrative business, in which the locality and its surroundings had some bearing on its value. Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the
1406 change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of the business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy a business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered must be compensated. Appellants are not legally bound to suffer for petitioner's benefit.

Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses."

Mr. JULIEN: If we come to the question of damages, have we got two parties to give damages to, that is A. Backus, Jr., and the company?

Mr. BAKER: They will have to be separate. We will submit the form of the verdict to you.

Mr. DICKINSON: Bear in mind that the planing mill was stocked with machinery before it was leased, and then it was leased to this concern for $5,000 a year. The corporation is made up of Backus and his two sons, so that it makes no great difference as to how the amount of damages are apportioned so long as you together give enough, if you reach that question.

Now, upon the question of damages, I am going to refer very briefly to the testimony in this case. You are aware that in all branches of manufacturing and business, competition is so great that profits are necessarily very small. Money is not made in these days in manufacturing, except it is made by doing an enormous amount of business. Competition is so great that the line between the making of money on a million feet of lumber and the loss of money on a million feet of lumber is very narrow. The
1407 chance of making money on 30,000,000 feet of lumber is the chance of having an enormous number of sales after it is manufactured. Thus they make large money by handling an enormous product, but you see that the line is so narrow between profits and no profits in the business itself, that a quarter of a cent cheaper, or one per cent., may mean bankruptcy or success to an enormous concern. Now, to do business properly and to make money in handling this immense trade, and you know by the testimony of the millmen here and the testimony of all parties, this is one of the largest concerns in the United States, has more machines, and it is better equipped than any other mill that has been named to you. They do an enormous business, and if you do a thing to these premises by which they will be crippled in their manufacture, so that they cannot manufacture as cheaply as before, or so that their product will sell for one per cent. less, it is the end of the business. You can see that. The margins are so narrow that they must be able to realize; with sharp competition all over the United States, they must be able to realize very small profits in that competition, and they must be able to make things good, make them to advantage, and to have sunlight and cleanly atmosphere, and have every facility to keep their products clean. You can easily see how it is if it injures them to some little extent in the matter of the soot getting into the knives, if that injury will be very slight, that has the effect of increasing the cost; or, if it has the effect of injuring their product, that alone, in the enormous business they do upon such small profits, as the business must necessarily be done, may mean bankruptcy to the business. Is there any doubt about it in any man's mind? So that they cannot say they will throw a few cinders in there, they cannot say they will throw a little smoke in
1408 there, they cannot say that sometimes it will be very smoky

and at other times not, they cannot say sometimes it will drop on their lumber and other times not, from the edge of the ties in wet weather, and it may drop on some of their product, because if you injure their business, they have got to go out of the trade. Their business is worth nothing the moment it does not make the half of one per cent. or one per cent. or five per cent. over and above the cost and expense, that moment the business will not pay, and it is worthless to Backus, who has built it up down there, and compel him to go out of business, because it would be much better for him to leave it a wreck than to keep on and lose money.

Now, let us look at the witnesses they have brought here on their side. We have referred to Mr. Mulliken's testimony, and I refer you again to the testimony that he gave in reference to the throwing of cinders. You understand they put this contrivance on all the Detroit, Lansing & Northern cars, as well as on the Flint & Pere Marquette, and it had been on when Mulliken was general manager; that you cannot stop, and they have not been able to stop the flow of cinders. They will come in, even into the passenger cars.

I will not touch upon Mr. McIntosh. I am not going through every witness they brought. I have said all that I care to say about him.

Mr. Ranney is a real-estate agent, and they put him on the stand to testify as to the value, and he says that the real estate is worth from $100 to $150 a foot as it stands, without the mill. That is all he testifies to.

Mr. David S. Sutherland has testified as to the need of the
1409 Michigan Central for the property. He is the yardmaster, and has charge of the cars. We have against it Mulliken's testimony, and Mr. Ellis' testimony, all of which I have talked to you about yesterday. You know that Mr. Sutherland said they needed that great yard there so as to get onto the boat. Do they have more than one freight boat at a time to take a train? Cannot they be run from Delray or anywhere else to the freight boats? Their docks are not lined with freight boats. They can only put one train on at a time. Across the river you will find they run their freight cars right on the double track of the Michigan Central, on the other side of the river. It does not take any more room to get the cars on the boat than it does to get them off, if they make them up somewhere. That is all I wish to say about that.

Mr. Phister simply swears to the value of the real estate. He was never in the planing-mill business, but he swears he does not think it would injure the Backus property, although he never was in the business and knows nothing of a planing mill. Pass him.

David Beveridge testified upon insurance. David Beveridge is an expert, and I wish to read very briefly from his testimony as to whether rates would be increased. He reminds me of a lot of experts who came to Grace hospital, and all agreed that Francis J. Dunn, who had gangrene in his foot, could be saved; after a full and careful examination as expert medical men could make, his leg was taken off at the knee, and they were all of the opinion that he

was all right and would live. They cut it off in order to save his life. He died. There is a practical demonstration as against expert testimony. Mr. Beveridge, although he never insured the Backus mill, says the insurance rate would not be increased.
1410 That is what his testimony was, superficially, on its face, that it would not be increased for this business, that it would not be increased on the lumber yard by the passage of those trains through. We put the two men who do the insuring on the stand and they swore as a matter of fact, notwithstanding that in practice, Backus' cost of insurance on the lumber yard, as to which this man Beveridge had testified, had been actually doubled. There was theory of an expert against practice, and Backus is the man that has to pay the fiddler. Beveridge did not think the insurance rate on the mill would be increased superficially. He is an expert, never insured it nor examined it for insurance, but we have the men that do the insuring for Backus and give him the cheapest rate he can get, and they swear that they do not know whether the companies will take it at all, but if they do they will charge him from one to one and a half per cent. increase of his present rate, and besides, he would be required to increase his risk so that it may be divided among other insurance companies, so that on the $88,000 of insurance covering his mill and the stock on hand, amounting to a million feet of lumber, worth from $40,000 to $50,000, he must carry an increased amount of insurance, because of this increased risk, and to pay an advanced rate on the insurance he now carries, besides carrying an enormous amount of more insurance to save himself, and both insurance agents doubt whether the companies will give it on a largely increased amount. Thus, if he is paying three and a half per cent. now, he would have to carry, with the lumber and stock on hand, $150,000 to save himself, or $62,000 more than he is carrying now, and he would have to pay on the new insurance the increased rate on all that new amount, to
1411 wit, four and a half per cent. He would have to pay one and a half per cent. more on the $88,000 than he is paying now.

Let us see what Mr. Beveridge testified to and what he meant by it, and I shall be very brief about this. (Page 485.) You will see how his testimony reads and what it amounts to. Mr. Baker's question is, "It is a brick building and box factory, and it is proposed by the Fort Street Union Depot Company to build an elevated road in that street, where the superstructure will carry the engines about the height of the second story, or between the second and third stories of his main building, etc.; as a man familiar with this business, I desire to know whether or not the construction and operation of the elevated road along River street, as I have described, the road to be operated in compliance with the statutes and ordinances, with all the skill that is known to the art of operating railroads at the present time, in regard to dampers, spark-arresters, and so on. A. If operated in the manner which you describe, so that sparks would not be emitted, there would be no increase in the risk." Are you going to have any road operated so that sparks will not be

emitted, no sparks emitted at all? Are you going to have it at the top of this grade, are you going to have it operated in the highest style of the art? The ordinance does not require the highest style of the art. The general ordinance says that no business shall be carried on in Detroit which emits this black smoke. There is no ordinance that requires anthracite coal, even if that would stop it. This man is telling whether there would be an increased risk, and he never had anything to do with an elevated road, except in one place. On cross-examination I asked him, "Would you think that the running of a railroad through a lumber yard would increase the
1412 rate? A. I don't think it would increase the rate if it were run according to the ordinance. If it is run according to the ordinance, so that there is no emission of sparks, it would not increase the rate. Q. Did you ever inspect their lumber yard? A. Yes, sir. Q. For the purpose of insurance? A. Yes, sir. Q. Did you recommend any increase of rate because of the railroad? A. No, sir. Q. How did it come that they trebled the rates when the railroad went through? A. I don't know. Q. Didn't they increase the rates after the running of the railroad through that lumber yard? A. I never did. Q. Did the insurance company? A. I am sure I don't know. Q. You do not do the insuring? A. No. Q. The insurance companies charge what they please and refuse to insure? A. They refuse to insure when they do not wish the risk. The insurance is not compulsory. Q. You have testified as to the situation of the building; will you please tell the jury what is the situation of the building with regard to this new railroad? A. As described by Mr. Baker, I judge that it is to be about 39 feet distance from the elevated road," etc.

You see he testifies he would not increase the rate on the lumber yard, when they have increased the rate on the lumber yard. Backus is not taking insurance for fun. There is your expert against that.

He continues further: "Q. Do you know of any railroads on which sparks are not emitted? A. Yes, sir. Q. Where? A. The West Shore road, running through Newburgh. Q. I am talking about Detroit, Michigan; do you know of any railroad that does not emit sparks in entering this city? A. I notice they generally shut down. Q. Do you know of one? A. In going through
1413 the city I notice they do not emit sparks. Q. Which one? A. None of them."

Is that true?

"You are as positive about that as anything else that you have testified to? A. Simply from my own observation; my own observation shows me that. Q. You think the fire risk would be greater alongside of the railroad if it were six feet than if it were 30 or 40 feet? A. Not if they do not emit sparks."

You know that all railroads that come in do emit sparks. You know from your own observations that his testimony is not worthy to be considered, because his testimony is just as strong that the rate on the lumber yard would not be increased, and yet Backus, getting the cheapest rate he can, has to pay more.

Mr. CHIPMAN: The jurymen who went out to examine the engine know whether sparks were emitted.

Mr. DICKINSON: I did not go with you. You know better than I do whether it emitted sparks that night when it was being run as a test. You know perfectly well that it is as true that two and two make four that the locomotive engineers who are bound to get into the depot on time will run their engines up that grade in such a way that sparks will be emitted. I am not going to take any more time with Beveridge.

Thomas J. Hattswell, the master mechanic of the Flint & Pere Marquette, testified as to the machinery in the locomotive to prevent smoke and cinders.

Mr. Morris, the superintendent of moving power and the rolling stock of the Detroit, Lansing & Northern road gave testimony to the same effect, as to the use of these improvements.

1414 Barnes, the superintendent of the Wabash road, testimony to the same effect, the use of the spark-arrester and smoke-consumer.

Simpson is a locomotive engineer on the Bay City line, has been running about three months, and he testified that he never set fire to anything in those three months.

McIntosh swears there never was any fire in New York caused by the elevated roads. There was one chair factory burned down, as shown by one report that we happened to run on by chance.

Mr. Conger is a locomotive engineer on the Detroit, Lansing & Northern, and tells of planing mills at Muskegon. They run about 150 feet from some Muskegon mills, and they never burned up the town, and they run at grade.

Mr. Robertson, a locomotive engineer on the Detroit, Lansing & Northern, tells of planing mills 50 feet away at Lansing that have never been burned up.

Those are all the witnesses that they have called. They have produced no planing-mill men. If they could get Pangborn and McIntosh of New York, with their power to give us the best testimony of which the case is susceptible, would they not have brought planing-mill men if they had been able to? Not one from all the United States do they put upon the stand to give you the best evidence on that point, whether they could take a planing mill, whether they could run it to advantage and not ruin themselves, alongside of that elevated track. I am not going to argue to you that even the elevated road in New York, with all the cases that we have brought here that have been laid for damages to the rental value and the fee, for the smoke and the steam and the gas and the cinders that are emitted from that light structure, with those

1415 light locomotives, carrying nothing but passengers—I am not going to argue to you the distinction, and the worthlessness of such testimony, as compared with the effect which would be produced with four great railroads running over an elevated structure on a trunk line, hauling heavy passenger cars and heavy freight. It does not compare. I am not going into that, for the purpose of showing that there is no comparison, although in every case they

have been compelled to pay damages for the rental value and are now being compelled to pay for the fee, even with those light structures with street cars—even with all that, they do not compare and you know it, with this structure, with the standard locomotives, with the engineers of the Canadian Pacific and the Wabash and the Flint & Pere Marquette, and the Detroit, Lansing & Northern getting in on time and going up this grade with a load.

We called Mr. Wardle, you remember him, the witness that lives at Ionia, and the special agent of the four companies which he named. He testified it would be undesirable to insure Backus at all, with this structure by the side of his mill. If they took the insurance at all, they would increase the rate one and one-half per cent. Is that for the purpose of deluding the jury that he says it, or is it true?

Mr. James A. Jones has the rest of the Backus insurance. On the present insurance he says the rate would be increased, and Backus must carry increased insurance, and that he did increase the rate by the order of his companies on the lumber yard, and Backus had to pay it.

John B. Eldert, you remember the honest fellow that came here, with his blonde mustache, who had been an engineer on the Michigan Central railroad, and had been lately on the Texas road. He says that the throwing of sparks and cinders, where they use
1416 substantially the same device for spark and cinder arresters as they do here, cannot be avoided. He says they will have cinders and they will have fire out of the locomotive, and that it sets fire; he corroborates Mulliken in the fact that you cannot stop cinders. He says it is absolutely impossible to run a fifty-foot grade with the dampers closed. Do you cast aside the testimony of such a man because he has been in the employ of railroads. In all his experience he never saw any device for going up a grade or working in a yard that did not throw sparks sufficient to start a fire.

Mr. Sutherland, the man who had charge of cleaning cars and the general foreman of the depot of the Michigan Central road, the red-faced man, you remember.

Now, you have got a device, haven't you, to stop cinders and sparks. Mr. Sutherland testifies that he takes from one to three pints off from a passenger car that comes in over the Flint & Pere Marquette, and over the Detroit, Lansing & Northern, although he is not so familiar with the Detroit, Lansing & Northern cars; that the sparks do get in, and he says he frequently finds holes burned in the cushions inside the car.

William F. Tripp, the inspector of lumber in Backus' yard, says the accumulation of cinders on the lumber is very great; says that the lumber which comes in over the Flint & Pere Marquette, off of one car of lumber, he considers sufficient to half a ton of coal sifted, and he shows you the kind of cinders they are, and these come from cars on the lines which they say have this device to stop cinders. He says that the lumber in the yard for a distance of 30 to 60 feet from the track has holes burned in it by cinders from passing

locomotives. They put no planing-mill men on the stand.
1417 We put on E. L. Thompson and George W. Robinson, in competing business with us, and they both testify that that planing mill, on account of this elevated structure going by there with the steam and smoke and cinders, this planing mill could not be carried on there, and they would not run it and they would not have it, either of them. Here are planing-mill men to instruct you who are not planing-mill men. Have they, on the other side, enlightened you as to whether there is a man who will take that mill as a gift, alongside of that elevated structure, with an investment to carry on their planing-mill business and take the risk of it? These are planing-mill men, not our creatures, not our stock witnesses, not our friends in the business, but competing with us. These men would not carry on the business, they would not run the place and they could not do it.

Next comes Maltz, car-cleaner on the Michigan Central, who testifies to the burning of cushions on passenger cars, and as to a car coming in within the last day or two on fire.

There is the testimony, and the effect of the testimony is, beyond any question, that Backus' business, a lucrative business, from the immense quantity that he does, cannot be carried on in that place. It cannot be carried on. What shall we say of light? Does not every one know with that structure put before him, when you think of it, it does not look as it does on the model, that structure with three tracks upon it, and the switches with the ties but eight inches apart, that that is going to make a black hole in front of Backus' property, with the engines running by? Is it going to give him the flickering light of which they complain in New York? Is the steam going to pour out when they run by? Are the cinders going to pour out in the same way they pour upon the lumber yard, and if they do pour out, are they going to send sparks as far as in the lumber yard, and if they do go as far, are they going to fall
1418 upon Backus' property? Are the cinders going to fall upon his fine material so that it will injure the knives? Are they going to fall upon the clean product? In wet weather will the oil drip on his products? What have you to say as to whether one of you would take this institution, this business, and carry it on. The lumber and planing-mill men say that they would not have it, that it would ruin their business.

Now, as to the matter of damages. You figure up the increased cost of insurance on the $88,000 that he now carries, on the undisputed testimony, at one and a half per cent., which it would cost him more than it does now, and then add to that 4½ per cent. on the additional insurance he must take, and then, how long is the lease to run, 24 years, and you see what the damage will be to Backus, if you take that off his profits, and what the damage is to him, under the decision of Judge Campbell, concurred in by the whole bench, if he has a lucrative business, you must see, if you go into this question, that he does not suffer at all. If he would not have the increased insurance, if he did not have the rate increased, without doubt, he could carry on his business, but the rate is increased, is

it not, by reason of this road going through, and if it is increased at this rate, what would be the damage to him in the end, say in 20 or 25 years? But if he cannot carry it on, if you believe he cannot carry it on, what is the damage to Backus to break him up and to compel him to go elsewhere in order to save the rest of his plant, to wit, the lumber yard and the storage-house on Fort street? He has got that property. It is a necessary adjunct to this planing mill, in which he has made money. Can he get out and buy another piece of property and put up a planing mill? You know the cost
1419 he has been put to, that he has paid out since the fire $116,000, that he had his office saved and his kilns saved, making the total value of the property, exclusive of the real estate, $150,000. There it is. Now, gentlemen, that $150,000 is worth nothing with this thing alongside of it for this business. Is there any doubt about it? In the first place, if he cannot carry on the business, will any one rent it? If they will rent it, will they rent it for a planing mill and save him all his machinery? They will not. The planing-mill men say they would not have it. If the value of the property is not saved for a planing mill, what is it good for? It may be good for locomotive shops, but that is the real estate. Locomotive shops cannot utilize his vast expenditure in that planing-mill plant. He cannot sell his planing-mill plant for locomotive shops, and he cannot rent it to locomotive shops; it is a planing mill, and it has cost this money exclusive of the value of the real estate. He may rent the real estate, but the planing mill, which is worth at least $150,000, is lost, to say nothing of the value of the real estate which he has accumulated there. Is there any doubt about it at all? Do you believe, under the testimony, where both sides presumably have given you the best testimony which they could get, do you believe that they can carry on the business with profit? If not, it is of no value?

Think for a moment, the Michigan Central road have 1,500 feet along this line, and for that piece alone they got $15,000. They got for their front there, and for this corner here where they enter River street, they got, all told, $29,500 for the corner, for their frontage on River street, not taking any of their property within their lines. Is Backus' damage ten times what the Michigan Central's is? What do sparks do with the Michigan Central
1420 railroad? What do cinders do to it? They have sparks and cinders themselves. What does smoke do to them? What does vapor, or gas or steam do to the Michigan Central? And yet they get these damages. How is it? They get the damages and compensation for taking the line of the street, and they are furnished with a viaduct along next to their road besides. They get that amount of money. Do you think Backus is damaged ten times what they are, with his 230 feet, damaged ten times what they are for 1,500 feet? Let us see what the elements of damage are. Cinders, do they hurt the Michigan Central? Steam, does that hurt the Michigan Central? Gas, smoke, it is the same line of business. Just compare the business of the Michigan Central with that of Backus.

Gentlemen of the jury, I have prepared a verdict which I shall submit when you enter upon your deliberations, finding that public necessity does not require the use of River street in front of Backus' property, and I shall ask you to sign it as your vervict. Brother Baker will submit to you a form of verdict for you to sign, that it does require them to take that property, and a form of damages that you shall give. I shall provide no form of damages, because I do not believe you will reach that question. We want no money. We are not responsible for their spending a dollar until this question was decided. We would not have this structure alongside of us for any money that you could give us. It is the business we have. We don't want your money, we want you to leave us alone. We have a better investment than all the money you could give us. We have something that will answer us, something that has lasted Absalom Backus all his life. He has all the railroad connections he wants, and he can get no better return for his
1421 money than he can get out of that mill. He cannot invest it to any better advantage. Since 1882, the date of the fire, he has been paying off $116,000 of debt, and his income for the last year over and above the rent is $27,000 a year profit, besides paying him his $5,000 a year rent. How can he do better with the money? He does not want the money. He wants his property, he wants it free and clear, and he doesn't want a dollar; he doesn't ask you to consider the question of damages, if they will cross the street, as they may.

Gentlemen, I have endeavored to do my full duty in this matter. The question here is a question that was argued before the other jury. We have come to you for a final decision upon it. The Morton case, to which reference was made by Mr. Baker, has nothing more to do with this than a passage in the Koran. They took for union depot purposes the homestead of the late Mr. Brooks, and his daughter wanted to stay there. I contested the constitutionality of the law. The supreme court sustained the constitutionality of the union depot act, and the question of the taking of it for the union depot, the question of the public necessity of the union depot has nothing to do with this case. This is a question of the approach, and what is the best route to approach.

The union depot is a public necessity. The union depot has come to stay. We welcome it, we are glad to have it. We say that it shall approach the depot by the best route and not destroy business along the line of the approach. It is a question of the approach and not of the union depot. That is the question for you to decide. As I have said, I have with some labor endeavored to follow all the position- of my brother Baker which might mislead you. I
1422 have laboriously presented to you an exposure of some of his fallacies, as I believed them to be. I feel that I have done as well as I can, and I leave it to your consciences as citizens of Detroit, and as fellow-citizens of Backus, to do your duty under the constitution of the State.

Closing Argument of Mr. Baker.

MR. FOREMAN AND GENTLEMEN OF THE JURY: When I opened this argument and occupied about two hours and a half of your time, I thought I was trespassing somewhat upon your patience and your forbearance, but I thought it would be excused on your part because of the importance of the case to my client and to the general public that resides in the city of Detroit, and as, according to your own decision, the burden of proof rested upon the petitioner. But now that my very learned and distinguished friends on the other side have occupied four days of your time and have talked about ten hours, I think I may be pardoned for asking your indulgence for an hour or so in reply.

It has been said that the human breast is like a harp with a thousand strings, and if there is any chord that my learned friends have not endeavored to strike, in their arguments, and their appeals to you, I know not what that chord is. If there is a single argument that could be addressed to your intelligence, your prejudice, your hatred or your gratitude, in any way to influence you in behalf of their client, that argument has been made in a very forcible manner; and I was surprised that Judge Chipman, who is getting into the sere and yellow leaf, should stand up here and talk with the force and power he did for some four hours and a half.

The counsel have said a great many things to you that
1423 have a bearing on this case, and they have said a great many things that have no bearing on it whatever, in my judgment, many things that would have been better for them to have left unsaid; but it is customary with counsel, in the argument of cases, to present their cause in the best possible light from their standpoint, but it is not always true that counsel understand a case perfectly, or understand a case as the jury do, and it frequently happens that counsel, in their zeal and ardor make arguments that are of no force or effect whatever, and in fact are a boomerang and tell against them. It is not surprising that our learned friends here, in the course of their arguments, have set up a great many men of straw for the purpose of knocking them down, and to declaim here, for fifteen or twenty minutes about something that is entirely imaginary and of no practical consequence. I thought Judge Chipman was guilty of an act of that kind when he asserted here in the opening of his argument that it was not wrong in Mr. Backus to demand a jury, that it was not a crime or an offense known to the law in Mr. Backus to demand a jury in this case. No one had asserted that it was wrong upon his part to ask for a jury to come in here and determine the question of necessity and the question of damages. He is entitled to a jury under the constitution and laws, but it is worthy of comment that the same statute which authorizes a jury to be impaneled also authorizes the appointment of three commissioners by a court of record, and that, in the first instance, commissioners will be appointed, unless a jury is demanded. Now, my brethren and their client did not want commissioners, although

it would be quite clear to most any one having this kind of business in charge, that three intelligent men could sit down and
1424 go over this case and dispose of it with quite as much facility and with quite as much ease and quite as much care as a jury. I rather apprehend, when you come right down to it, that instead of demanding commissioners, they have demanded a jury because they thought, not that they were entitled to a jury, or because they thought they would get more justice from a jury, but that they rather proceeded upon the theory that if they increased the number from three to twelve, it was possible that among the twelve they might find some one that might possibly agree with them about this case, and it would increase their chances just that much, because, from our standpoint, at any rate, it would be impossible for a jury to be impaneled in this county in which any considerable number of them would have the same views in regard to this case that have been expressed by my learned friends in behalf of Mr. Backus.

They have made a great argument here, they have made a great contention from the beginning of this case about this question of necessity, as if some great outrage were going to be perpetrated upon Mr. Backus because this elevated road was to be built in front of his property. But, gentlemen, is that true? Is it true that an outrage is going to be perpetrated upon him, or upon any property along the line of that street by the construction of this elevated road? Is it not true that that elevated road leaves the street entirely open, as before; that it merely occupies a line along the curb-stone upon either side, with a row of posts 35 feet apart, and overhead is a structure capable of carrying railroad trains, locomotives and cars, and that the physical effect, the actual damage to the respondent's property is very small compared with the actual value of the property?

It is undoubtedly true that this elevated road might have
1425 been located in streets in the city of Detroit where it would have been objectionable, upon general and public grounds; but there is no such fact in existence here as would make it against the public interests to occupy that street down there for half a mile with an elevated railroad, because, in the first place, the property upon the south side is devoted to railroad purposes. The property beyond there, upon the old union depot grounds, is already devoted to railroad purposes, and all the property is either now, or will be in the immediate future, manufacturing property, while there are a few old residences along the north side of that street; the value of the property, as you all know, rests in its value for manufacturing purposes. It is located in a manufacturing vicinity. It is valuable for such purposes, and it is valuable for no business or residence purposes, I submit. Such being the case, it is a little remarkable considering what has been done in this case, that Mr. Backus should come here and contend, as he does, that we ought to go along the margin of the Michigan Central property.

If, in 1889, when this project had been started, it had been known to any one that it was possible to lay out a route along the Mich-

igan Central property, we would have very gladly done it, because it would be very nice indeed to come up over the Michigan Central property and cross Eighth street, and go on to the union depot grounds in that way, if it could be done. It is undoubtedly true that you can build an elevated road there that would not interfere very seriously with the Michigan Central property, that is, you can span a track of the Michigan Central property along the margin there, so that, to some extent, they could continue to use the property. That is undoubtedly true, but it would be to some ex-
1426 tent an interference with their property and their rights in the premises, and, as I have pointed out, and as Brother Chipman, during my argument conceded, unless there is some legislative authority by which we could go along there, it is an absolute legal impossibility for us to do so. If, as suggested by Mr. Joy, we could suspend that elevated road along there without having any posts at all, it might be legally possible, but it is not true. This elevated road, wherever you put it, has got to be supported on posts, it has got to be maintained by iron pillars, and they necessarily would be about the same distance apart as they are upon this proposed elevated structure along River street, to wit, from 35 to 40 feet. It would necessitate coming along the margin of the Michigan Central property the entire distance from Twelfth street to a point just beyond Eighth street, and it would be utterly ridiculous to believe that we could ever obtain the consent of the Michigan Central railroad to occupy that extent of their property. Brother Chipman promised, during my argument, that when it came his turn, he would explain how we could do this, how we could condemn this right of way, how the necessary petition could be verified, and the necessary proceedings could be taken to acquire the right of way, and I leave it to you whether he did explain it in any such way. When he came to that part of it, I noticed that the first thing he asserted was, why you have done it already, you have already condemned a triangular piece of land across the corner of Twelfth street and River street, and I suppose he thought that settled this controversy as far the power was concerned. But, gentlemen, I have only to recall the fact that appears in evidence here, that under an agreement that was entered into between these two companies about the erection of a viaduct for teams, that
1427 had been ordered by the State authorities, the Michigan Central had consented that we take this triangular — at a price that might be agreed upon, or, if we could not agree upon it, that it should be left to be determined by commissioners, or by a jury, and that, in pursuance of that agreement, the case was submitted to commissioners, and they awarded, for going across the triangular piece of land the insignificant sum of $2,900, or about the value of a lot 29 feet front on Twelfth street, and extending back 150 or 200 feet. And in that case, the tracks were so situated that it was necessary to cut off standing room for two cars, and it was done because the Michigan Central wanted to get this viaduct for teams constructed, and in order to get it, they consented to it, and the only disadvantage it would have been to the Fort Street Union Depot Company

would be to have swung out a little sooner upon River street. We could have obviated the difficulty very readily by going over on River street just before we got to Twelfth street. So that, so far as that is concerned, it is simply a case where the Michigan Central did not see fit, after the commissioners had awarded the sum of $2,900 for that property, to further contest it. I do not know how that would have come out if the Michigan Central had insisted that we had no right to go across there, and had denied the validity, as they did at one time, of the agreement that they had entered into with this company in regard to it. But the facts in regard to it are, as they appear in evidence before you, that the railroad authorities, that is, the State crossing board, or the commissioner of railroads, ordered these two companies to put in a viaduct for teams, and reserved the right to approve of the plan. The Fort Street
1428 Union Depot Company submitted a plan that left River street open, so that you could drive under it from one end to the other. The Michigan Central railroad submitted a plan by which that was to be closed by abutments, and claimed that that was their understanding of the agreement that had been entered into by Mr. Crapo upon one hand, and Henry Russel, the attorney of the Michigan Central, upon the other, during the absence of Mr. Ledyard in Europe, but the railroad commissioner finally decided that he would approve of the Fort Street Union Depot Company's plan, which left the street open. The Michigan Central desired to close that street, because they desired to avoid a dangerous crossing there, by which teams and vehicles are constantly going across there in front of their engines and trains. They desired to occupy that much of the street as a railroad yard, and to have it inclosed, so that nobody could molest them in the use of that street. As it is, they are obliged to keep flagmen here and a gate at a considerable expense, and keep a constant outlook, and exercise great care in transacting their business over that street. They were very anxious to close it. They consented to all these things with the hope and the expectation that they would get it closed; but so far as actually putting up abutments was concerned, the decision of the State authority was finally against them, and under the circumstances the right of way was condemned in front of that property, and they were awarded altogether the sum of $28,560, or upon an average of $11 a foot. Part of it was $10 a foot, and the residue was $12.50 and $13.50 a foot, for a distance of nearly half a mile.

When my learned friends contend that we had authority to condemn this land, because we had condemned a right of way
1429 in front of that property along River street, they simply have contended to you that because we could condemn a right along River street, we could therefore go through their property, and they cited authorities to show that the property-owner owns property to the center of the street. In one sense a man does own his property to the center of the street. He owns the fee, subject to the public easement, as a highway, but of course it is not used and occupied by him, and you must clearly understand this statute by this time, that where it is not used and occupied it is subject to

condemnation. There is no question about it. It is their property within the meaning of the statute. If it is not occupied by them within the meaning of that statute, it can be condemned, but to condemn a right of way in front of their property is a very different thing from condemning a right of way through their property.

But there is another view to take of this, and I was very much pleased to have Mr. Backus change that model over and put his elevated road over on the margin, because while he, in his desire to say something to protect himself, asserted it was not necessary to have any viaduct for teams at all, his counsel realized the absurdity of that, and he said, Put that approach in there, in front of his property, and told him to put the inside, that is, to make the masonry in the street. Now, gentlemen, that approach has been ordered in there by the State authorities, and I desire at this time to call your attention to the statute to show the extraordinary power that is exercised in such cases, for the purpose of showing that it is wholly independent of this Fort Street union depot enterprise. It was within the power of the railroad commissioner at any time to order the Michigan Central to put a bridge in there, and they would have to do it. They had occasion to do it when we proposed
1430 to build an elevated road there. They did, upon the application of the Michigan Central, because the Michigan Central wanted to put a viaduct in there to obstruct the passage of the union depot company.

The authority of the railroad commissioner in such cases is found in section 17 of the act creating that office, and this is the language of it:

"Whenever, in the opinion of the commissioner of railroads, the safety of the public would be more efficiently secured by stationing a flagman to signal trains where a highway or street is crossed by any railroad, or when one railroad crosses or intersects another railroad, or by the building of a gate or bridge at such highway, street or railroad crossing, or intersection, or street railway crossing, he shall direct the corporation or corporations owning or operating any such railroad or railroads to station a flagman, or to erect and maintain a bridge or a gate at such crossing as the public safety may demand; and in case such flagman is directed to be stationed, or gate or bridge directed to be erected and maintained where one railroad crosses or intersects another, the expense thereof shall be borne jointly in equal proportion by the companies owning or controlling each of said railroads."

Then it makes the company subject to a fine of $100 and a continuous fine of $25 a day for every day that they refuse to put it in, and it is a frequent occurrence for the railroad commissioner to order these crossings to be put in throughout this State.

Now, gentlemen, suppose the railroad commissioner had ordered a viaduct put in there for teams. Under that statute it would have to be done at that crossing. He has ordered it done, and if
1431 you put this railroad over on the margin the street crossing would necessarily be in the highway; there would be no other place to put it. It would be ridiculous to put it still further

over on the Michigan Central property, and to make an angle in the street to get to it and another angle to get from it; it would be absolutely ridiculous to do any such thing as that. That statutory power is to put it in the highway, so as to make a crossing there, and if it was done it would be necessary to make an incline, an approach of masonry, or partly of masonry and partly of iron, and it would be necessary to commence back far enough upon the street so that when you reach the Michigan Central track you would be 18 feet in the clear, and it cannot be done without seriously interfering with the property of Mr. Backus. It cannot be done without injuring his property more than the proposed elevated railroad would injure it, because it would cut off his ingress and egress to the back part of his premises, if you build that approach. You must remember that this model that he has shown, the wooden part of it only shows that part of it, only goes part way to the Michigan Central. In other words, the entire elevation is not reached until you get to the Michigan Central track, and the order of the railroad commissioner was that the grade should be at the rate of 25 feet to the mile; so that if this were done, if you change this road over as they propose here, it would be necessary to injure Mr. Backus' property a great deal more than it is injured now. Of course, I do not contend that he would not receive his damages. Of course, if that was ordered in front of Mr. Backus' property they would have to pay him damages, but we would have this advantage, that the Michigan Central would have to pay one-half of it, and it
1432 would not all fall upon the Fort Street Union Depot Company, but, so far as Mr. Backus' property is concerned, it would have just as serious an effect, just as injurious an effect as the elevated road will have when that is constructed.

So that when you come to consider this whole question, I think I can submit, with a great deal of confidence, that my brothers have not made out their contention, on their part, that it would be, practically, the best route, or that there is any authority for it at all, and, in this connection, I desire again to call your attention to the case which I read to you from Pennsylvania.

Mr. CHIPMAN: There was no statute like this in that State.

Mr. BAKER: No, there was no statute, but I have shown that the statute does not help you any.

The question is, whether they could do it at all, not whether they do a little injury, but whether they did a great deal of injury, and all my brethren contend for here is that it might be done without a great deal of injury, as far as the Michigan Central is concerned, but, gentlemen of the jury, I do not think that is true; we would have to put our posts upon their property, upon property that is occupied by them, on property that is needed by them, or, at any rate, property that it is reasonable to believe any jury that would be called would find that it is needed by them. My brethren say that you ought not to consider the other verdicts that have been rendered in these cases. But how would you ever build a railroad unless it is considered what had already been done? It certainly is a fact that if a jury excluded what had been done, and went upon

original ideas in regard to it, you would be liable to have just as many different decisions as you had routes. One jury would
1433 say one route is the best and another jury would say another route was the best, and you could not proceed an inch, you would be exactly where you would be if you had to buy the property by private agreement with the property-owners, because, how can any one of you say that if you impanel twelve men to pass upon the Michigan Central route, and the Michigan Central came in here and contested it and made their showing, and they would be entitled to a hearing and to be represented by counsel, and they presented all the facts in regard to their road, that they would not say that the best route was River street. The Michigan Central certainly would make that contention. So that if we went on in that way we could never build a railroad and never have a union depot in this city. I do not say you are bound by what they have done. You have the power, and if you think they have all made a mistake, you have the power to set it all aside and to stop this enterprise; but men situated just as you are, for all that appears men who are just as intelligent as you are, men who have listened to testimony just as patiently as you have, jury after jury have put upon record decisions in favor of this necessity, jury upon jury called from the body of this county, and with one or two exceptions, every one residing in this city, have said it was necessary; and this is practically the last case to be submitted to a jury. I think it is entitled to some weight, and to be considered, and that this enterprise ought not to be frustrated or stopped or delayed on any such question, and that Mr. Backus ought to take his just and fair damages and make no further contest upon the ground that there is no necessity for going along this street. In addition to that, we have the approval of the State authorities and of the
1434 common council, and I think Brother Chipman went a good ways when he undertook, in an indirect sort of way, to influence you by questioning the motives and the purposes of the common council of the city of Detroit as illustrated in a controversy that has recently existed in this city in regard to the street railway franchises, because he stood up here and implored you to ignore the decision of the common council, because the common council were some horrid or outrageous body of men that ought not to have any respect anywhere. But allow me to call your attention to the difference between the two cases: In the one case the common council was taking something that the people of this city and the newspapers of this city did not approve, but when they granted the right to the Fort Street Union Depot Company to build a railroad along River street, the granting of the right was approved by every newspaper in the city of Detroit, and it was approved, as far as I know and was able to learn, and I was actively connected with it, by every man, woman and child in the city of Detroit, with the exception of one or two property-owners down there, and the only ones that showed themselves at any meeting were Luther Beecher and Absalom Backus; but outside of those two there was not a voice within the corporate limits of the city of Detroit that was raised

against this grant or the giving of this privilege; because the terms that were proposed to the common council were fair and just, and the common council were virtually compelled by the pressure of public opinion to grant the right asked for.

Mr. DICKINSON: Didn't you know that there was a petition sent in against it?

Mr. BAKER: As I say, some property-owners objected to it,
1435 but outside of those interested parties there was not a man, woman or child in this city that opposed it, and every newspaper in the city was in favor of it, and it was granted by the common council because it received the public approval from Delray to Conner's Creek; but counsel are driven to such straits here that they appeal to a prejudice that they suppose exists against the common council at the present time, that you should ignore their decision, although it was rendered under such circumstances and under such a condition of public sentiment.

In my opening argument, I made some allusions as to how easy it was to paint a great outrage; how easy it was to find fault with something that had been done a great many years before, and I took occasion to say that there were a great many things about the land grants that were made to the Northern Pacific and the Union Pacific that were commendable; and my brethren branched off into a tirade here, condemning those land grants, because they think it is something that will catch the popular ear at the present time. But go back to the time those roads were built, go back to the time when those enterprises were started, and see whether or not the giving of the land grants was approved by the people of the country. Why, without the land grants the Northern Pacific would never have been built; and although the man who encouraged it more than any one elese in this country, the well known Jay Cooke, who was the financial agent of our Government during the war, and as honest and true a man as ever stood up in this country—although he encouraged it, and obtained this land grant, we all know that the panic of 1873 was brought upon this country because of Jay Cooke's failure in endeavoring to put that route through from sea to sea, and while he put it through and built it up, there are
1436 four or five States occupied by people, by thousands upon thousands of people, by farm after farm, village after village, and city after city, and it has grown to be a part of the great empire that exists upon this continent; and my brethren claim great credit because a year or two ago the Congress of the United States forfeited some unearned land grants in the northern peninsula of this State. That is true. A land grant had been made and the land was not considered good enough, was not worth enough to justify an investment to build the railroad, and the railroad was never built, and they simply forfeited — as unearned; it is Brule river; and they claim they have done a great thing, because, afterwards, minerals were discovered upon it and it became valuable—that they forfeited it as unearned land. Now, that will do to talk to the marines, to people who have no knowledge of business and affairs in this country; but we know, at the time these grants were made

to these railroad companies, the companies that built the Union Pacific and the Northern Pacific, that the grants were approved by the people of this country, and if they had to do it over again they would give it just as readily as they gave it then. They might exact something different in the light of experience. In the case of the Union Pacific they not only gave them a land grant, but they gave them financial aid, and through some want of judgment or management the Government took a second mortgage upon the property, and it is upon that property that the indebtedness is due, and they have not been able to collect it, simply because there is a first mortgage, and that is a first lien upon the property and the assets of the company. Now, those things have been done in this country; these public enterprises that will be of great good to this country have been encouraged by the people simply because the American people are progressive, simply
1437 because they do desire to subdue this continent and to occupy it with cities and villages and farms and a teeming population from the Atlantic to the Pacific, and the great instrument that has enabled them to do it is the railroad system of this country. And you take the Jay Cooke route, the Northern Pacific; it runs through a country that would be uninhabitable if it was not for the railroads; it would be worthless for all practical purposes if a railroad did not run through it. And it is just so in the growth and development of cities. We can sit down here and we can let Toledo be built up. We can let Port Huron be built up. We can let Chicago be built up, and all these competing places that surround us; but unless we go forward and furnish some sort of facilities and some sort of advantages, we will simply be left in the struggle, and Detroit will be nothing more than a big village.

My brother seems to think that he did a very great thing that ought to help him in this case here, because some years ago, when they desired to build the Wabash line down to Butler, they raised some $200,000 by subscription in this city. He seems to regret it. He is a very enthusiastic man, and he made a speech in its favor, and he closed his speech by subscribing $250. I suppose he did it because he thought it was a good thing and that it would be approved by his fellow-citizens. He made another speech and closed it by subscribing another $250, and in the end he made ten speeches, and he wound them up in the same way, and he subscribed $2,500. Was that honorable to him? I think it was; I think it is a refutation to his argument or his attempt to use it in this case; and any one who has any knowledge of the business in this city would gladly raise $200,000 more than to be deprived of the advan-
1438 tages that the Wabash road has furnished to the business men of this city. It brings in a very large amount of traffic, it taps the Southwest; it taps the corn and the pork country of the United States. They bring in more grain into the city of Detroit over that road than over all the other roads put together, and it has built up institution after institution from Twelfth street down to Delray, that can exist and do business there, because the railroad runs through their side tracks and they can be maintained.

You go along from the Backus property down to Twenty-fourth street; among other things you will find there is a garbage works—we all noticed it when it was there—but there are other manufacturing institutions, large institutions, where a large amount of business has been done, and which could not be done and transacted in this city if that railroad did not run there. So that my brother was doing an act that is contrary to his argument in this case, contrary to the purpose for which he desires to use it in this contention here, he was doing something that was in accord with public spirit and with public progress, and the erection and maintenance of suitable public works and improvements.

Now they say this will be a great injury to Mr. Backus, that it will destroy his mill and he will have to move out of there. Do you believe any such thing as that? Judge Chipman claimed that I abused Mr. Backus in and out of the case. I have no recollection of any such thing. I have certainly no such feelings towards Mr. Backus. He is one of the respondents in this case, and he owns this land. All I can say in regard to him is that I do not think Mr. Backus would swear to a lie or misrepresent anything upon the stand, but I do say that he is very extravagant in his
1439 ideas as to the value of his own property, and is very extravagant in his notions as to what his actual damages should be in this case, and I have only to illustrate it by one piece of testimony that he gave here, in which he testified that that real estate there was worth $150,000. The best testimony that they could get in the case put it at from $100 to $150 a foot; and if you figure it up you will find that that piece of property is less than $50,000; it is $46,250, or thereabouts, at $150 a foot. And you know, and I know, every man in this city who has any familiarity with real-estate values in this city knows, that you can go and buy a better piece of property than that for $50,000, with more railroad facilities, and of more value. Fifty thousand dollars is a good round price for it. And still he comes upon the stand here and undertakes to make you believe that that piece of real estate is worth $150,000. Now, we have to take their own figures as to what this planing mill costs, and they estimate that at $150,000 as what it cost. I did desire to have some experts go there and examine that mill, and make an estimate as to what they would duplicate it for, but Mr. Backus did not see fit to let them examine the property, and the result was that I was unable, in the hurry with which the testimony of this case was closed, to produce any such testimony, but there are some builders or men who are familiar with building on this jury; you have seen this property and the machinery in it; you have heard his testimony as to how he values the real estate, and you can form some sort of judgment, putting all these things together, as to what that property is really worth, as to what you could duplicate that property for if you started out to do it today;
and I will submit this proposition, that none of you would
1440 hesitate to duplicate the entire thing, machinery and all, for $100,000, and perhaps considerably less. It may have cost all they claim, but it was built years ago, and we know that at the

present time everything can be built a great deal cheaper, and that when you value that mill and the machinery as it is there today at $100,000, you are putting a big price upon it. But the question here is, how is that property affected in value by this superstructure and this elevated railroad? Practically the rule of damages is, how much would it sell for if the railroad was not built there, and how much would it sell for after it was built; and I submit that it would not sell for any considerable sum less, because the advantages that that property will receive from the railroad are fully equivalent to any damage that will occur to it. How can it be damaged? What is the thing that is to damage it? In the first place, all Mr. Backus uses River street for is a place to draw lumber along, a street to draw loads of lumber up and down that street and into that property. Can he not do it just the same after this road is built as before? Precisely the same. The posts will span his gates, they are 35 feet apart, he can drive right in there, where there is a telegraph pole now, there will be a support of an iron pillar for this elevated superstructure, and the elevation of the superstructure will be greater than the timbers he has over the top of his gate; so that so far as ingress and egress are concerned, he is not injured one iota; the only possible way that these posts can have any effect upon him would be in case they desired to put up a new building or something of that kind, years and years in the future, that it might be necessary to plan his building a little differently, so as not to have a doorway or a gateway, or anything of that kind, right in front of a post. So that as far as ingress and egress
1441 are concerned he is not seriously damaged. To some extent those are an annoyance, and will interfere with the free use of the property, but it is not serious.

What other elements enter into it? They say that his light will be affected. As far as that is concerned, he has put his planing mills on that first floor in a dark room, he has put them so that the head of the machines are over against a dark wall, a blind wall, and the workmen seem to get along there first rate, they do his work at any rate. And this elevated superstructure will not seriously interfere with that light, because it is all open, it is about forty feet from the elevated structure to his building, and that is all open, with nothing but a fence and an open shed with windows in, next to the street. So that as far as that is concerned, while it will have some little effect upon his light, it will hardly be noticeable. It certainly will have no such effect upon his light as to make that a ground for any great amount of damages, and I do not suppose that if he goes on with his business there, it would be long before he would put in at quite inexpensive rates an electric system of lighting for his entire plant, so that he could run night and day if he desires to. It would be only in the nature of an improvement, that would enable him to work nights as well as days. So there is nothing there on which you can base any very great amount of damage.

As far as the noise is concerned, when that machinery is in operation, you cannot talk with one another in that building anyhow;

I have tried it. When his machinery is in operation it makes so much noise now that you cannot hold a conversation in that mill unless you get off to one corner and halloo. So that as far as the noise is concerned, the fact that a train will go up and down
1442 there occasionally would have no effect upon the men working in that mill. In fact, they could not hear it, they would not know that it went along that trestle there.

Then, what is it? Here is light and noise, and the only remaining thing that can be thought of in the case, is the fire risk, and my brethren have talked from nine to ten hours in the case, and Mr. Dickinson spent about 15 minutes just at the close of it, talking about the fire risk, the only thing that deserves any very serious consideration at the hands of the jury; the only thing upon which they can make an apparent showing that they are somewhat injured. But let us look at that a little, just as it is shown by the testimony and by experience, to see whether it does the injury that is asserted here, and involves such a great loss. In the first place, we have a practical demonstration right down upon this property that is a complete refutation of their argument, and that is that the Michigan Central line has run right alongside of this property ever since 1871, and has never set it afire. They say it is too far away. How far is it away? When you go down there look at it; you go around to this shed that they have made here (on model); go around to this post and see how far the Michigan Central tracks and their main tracks run from this shed, with it open here, over the tops of these cars, open here, and the lumber piles along here, as it is represented here, as open and exposed a place as you can conceive of; that has been in operation some 20 years in that way, with a railroad yard where engines constantly are at work in and out, right alongside of this property, and it never as much as caused a blaze, with the wind blowing the sparks and cinders right in over those cars, and through those open spaces, and through that shed, and
1443 through the mill in every direction. It is a complete refutation of the contention they make in this case.

They say no planing-mill men were introduced. I expected they would make such an argument as that. But as this case closed I asked the privilege of putting Mr. Dwight upon the stand. But you all know where Mr. Dwight's mill is. Mr. Dwight's mill has been built after the railroads were constructed, and has been built right in the fork, the "Y" of the Bay City and Michigan Central, this side of West Detroit. The planing mill and lumber yard stands bounded on each side by a railroad that is in constant use, and it has been in use there for years, and it has never yet burned up. There is another planing mill down here by the Milwaukee yard. Some of you are undoubtedly familiar with it—the old Ross mill; I don't know who runs it now; but there is a planing mill right alongside of that yard, and it has been run there for years, and you have known it and seen it, and it has never been afire yet. Then we have the Murphy chair works and the Peninsular car works that are out at the other junction. Murphy makes tables and chairs, and his business is fully as dangerous a business as a

box factory, and that is located right in the junction there. You cannot have such institutions and you cannot do that kind of business where you handle lumber and manufacture it, unless you do have railroads, and the more you have the better you are off. And it is not such a terribly dangerous thing as they try to make out. Were my brethren entirely fair when they brought in the fire reports in this city and they counted up during the year 63 fires that had been caused by locomotives, and come to look them through,
there were three or four of them out at the junction, and one
1444 or two places only where fires had been caused to the adjoining property by locomotives; all the others were where wooden railroad bridges had been set afire, where the bridges were immediately above the smokestack. There were not as many fires set by locomotives in this city within twenty odd as are set on fire by the ordinary chimneys of our houses, because the same report said that there were twenty-odd fires in this city caused by the sparks that come from the ordinary house chimney. And then they searched the entire reports of the city of New York over, and they found just one fire in the entire city of New York that was occasioned by the elevated road. We do not know how dangerous the property was, in what unsafe condition it was left. I have no doubt but what if you leave a lot of rubbish and stuff at the side of a railroad, and there comes a dry time, it is liable to catch fire from sparks from a locomotive, but it will be because of the dangerous condition of your premises, and it will not be because of the great heat that is contained in a spark from a locomotive. What is a spark from a locomotive? It is simply a piece of unconsumed coal or carbon or wood, if they use wood, that is small, and it would be almost impossible to start a fire with one of them; that is, it will go out—three-quarters of them will go out before they get fifteen feet from the engine, and the rest of them will go out immediately when they strike anything, the minute they strike anything, just as the sparks from Mr. Rivard's engine, as they fly from his hot iron, as soon as they strike the floor. So that, when you come right down to practical experience, it is not such a great increase in the fire risk, and Mr. Beveridge tells you that the West Shore road
went through the city of Newburgh, and not a single rate
1445 was increased on account of it, and that this rate down here would not be increased if this road were properly run and operated.

We have a statute that makes the union depot company, or any company liable for any fire that is occasioned by their negligence. Mr. Backus is not entitled to pay for his mill before it burns up, and if we run that road improperly, he not only could maintain a bill against us but he could recover any damages that he sustained on account of it. But the fact is that it is not dangerous, and if he will use a little common sense and make a few changes down there, he can get his insurance for a less rate than he is now getting it at, even after the elevated road is erected. He has got a dust-arrester there, and he undertakes to show how it is necessary to have air. The air must escape from that dust-arrester, and it is possible that

sparks may go through there and set that burlap afire. The jury did not desire to hear that testimony. I suppose the jury did not desire to hear it because they knew all about it. Because they knew from their own observation and knowledge that these metallic dust-arresters can be put upon such property, and that as far as fire from the outside are concerned, they are practically fireproof. But Brother Chipman, showing his knowledge of it, stands up and says why, a metallic dust-arrester has got to be open at the top. That only shows how easy it is for a learned lawyer and a learned Congressman to be mistaken.

Judge CHIPMAN: I said that the testimony in this case shows that; and that is all the testimony does show.

Mr. BAKER: I will leave it to the judgment and observation of this jury that where you have a dust-arrester—and one purpose of it is to take the dust and shavings out and send them in one
1446 direction and send the air in another direction, and when it is in use the force of the air would keep any sparks from going into it in any shape or manner; there is a great pressure of air coming out of the top of this dust-arrester, and when it is not in use it is perfectly easy to put an automatic cover upon it; so that when it is not in use that cover will fall back and cover the opening in the top of it, and the opening is not more than three or four or five feet in diameter anyhow. That is all there is of it. You can have an automatic cover, so that the minute you stop your mill running it will fall right back there, and it is absolutely fireproof as far as any outside exposure is concerned. In addition to that, what is that great box and frame that he has got on top of his dust vaults there for? What are those cleats, that lattice-work for? It is simply a place to let the air escape. But he only has three pipes there forcing air into those vaults. How much of a mechanic would it take to put in say three times as many pipes at the further end there and take every particle of that air out over on the other end of it, or to make a pipe there and bring it down towards the ground and west so that the air could escape? All it is for under heaven is to simply let out the air that is forced through these pipes; and the dust falls down to the bottom and the air goes out; so that all he has got to do with that dust-arrester, if he wants to keep that, if he insists that is the best one there is on earth, and he wants to keep it, is to put on an arrangement of that kind and simply have an opening somewhere that will take that air out in such a direction that there will be no fire risk connected with it. And they kick or squirm, and they got you to exclude that testimony, because they knew I could prove to a demonstration that his machinery is not right, and that a dust-arrester could be
1447 fixed, with hardly any expense over the present expense, so that it would be a thousand times better than it is at the present time. But my friends contend that you cannot make Backus change this, he has got a right to go on in that stubborn kind of a way and burn up if he wants to, and you have got to pay him for it, and pay him for it now before he does burn up. But is that true? Is that the right way to look at this? Is it not a bet-

ter argument to say that if there is any increased danger there, and you can avoid it by a trifling expense, that you must do it, or at any rate that you cannot expect damages, you cannot ask from this jury damages upon the theory that you are not compelled to do it, and that this loss must be suffered anyhow. Why, it would be ridiculous for any jury to award damages upon any such theory, when, by a trifling expense, not to exceed $100, he can fix that present dust-arrester so that a spark would not get into it in a thousand years from the locomotives upon this road; and if he put the new improved dust-arrester in, such as are in use all over the United States and all over this city, he could get his insurance a great deal less than he is now getting it at. And all I can say about it is that you have a right to go upon your own judgment and observation, to go to these institutions and see how they manage it, and get along without any great fire-trap such as he has got there on top of his premises.

What other element of damage is there? What other consideration to influence you in reaching a verdict in this case? Upon what theory could you award him any considerable sum of money? Why, they say, Backus would not have that built there for $150,000.

Well, that is well enough to assert, that is very nice talk, but
1448 where a man has got a piece of property like that and wants to unload it upon this company as he does, it is not entitled to very much belief. Brother Dickinson says he did not mean it when he went up there before the railroad crossing board and said this route ought to go along Fort street. He did not mean that. What did he say it for? What did he go up and ask to have it laid out there for, if he didn't want the railroad company to buy this mill? Why, that is just what he does want them to do, and that is all they argue this question of necessity for, that they think if they can get one or two jurymen to agree with them upon this question of necessity, perhaps the depot company will go down there and buy that entire property and get out of it in that way. That is all they insist upon that for, and the reason for it appears in Mr. Backus' own testimony. He went on from 1871 down to 1883 and 1884, and he told you just what they made every year, running from $15,000 to $72,000 a year; but when he got down to 1883 or 1884, and down to 1890, there was a vacuum, he could not tell you a figure, and he finally admitted upon the stand that he did not make anything, he kind of hemmed and hawed upon that, but finally admitted that he didn't make anything during those years, but Mr. Dickinson talked with him and got him upon the stand again and he said he was paying up debts, and tried to explain it in that way. But he was paying debts all the years before, and if a man had made $30,000 or $40,000 and he paid so much money out to pay his debts, he would know what the figures were, and when you come down to figures, he could not tell you what debt he had paid or anything else, and when you come right down to it, they didn't make anything those years; and when you come right down
1449 actually to the situation of that mill, with the yard half

a mile away, it is not a desirable situation for a planing mill, considering the competition that there is in the business, and their own witness, Mr. Thompson, who was brought here to testify in their behalf, tells you so. And any ordinary observer can see that it is not a suitable location to haul lumber all the way it has to be hauled there, in order to feed those machines. But Mr. Backus saw fit to rebuild his mill there, although there was plenty of room down upon the river, but if he went there he would have to use the Wabash road more, and he finally concluded to rebuild it where it was, and he put it up there, and he has got it, and he has got a right to enlarge it and to make all he can out of it, and to sell it to anybody that he can sell it to; it is perfectly legitimate and all right; but when the depot comes along and merely goes in front on River street, he is entitled to just such damages as he sustains and no more; and he has no right to inflict those damages; he has no right to elevate the value of his property beyond its real market value and worth, and to undertake to recover a fabulous sum of money for an imaginary wrong and an imaginary injury. And in this connection, I desire simply to call your attention to what the supreme court of this State has said about this enterprise. Brother Dickinson referred to this case, the case of The Fort Street Union Depot Company *vs.* Mrs. Morton. She owned a piece of property down on the corner of Fourth street, built by the late N. W. Brooks, I believe, and Brother Dickinson appeared for her and insisted that the union depot act was unconstitutional and there was no necessity for any such thing; and this is what Judge Morse in deciding the case for the whole court said about it:

1450 "That a union depot like the one sought to be established by the petitioner in the city of Detroit would be of great and incalculable benefit, no one who reads this record can doubt. The act stamps the property to be taken with a public character and imposes upon it a trust for the public use, which cannot be divested by any act of the corporators of the company. The law of its existence plainly prevents it from becoming a mere private corporation or from disregarding its public uses."

There was some question made about the title to the act, and it was claimed that it did not authorize the building of independent railroads, to wit, the establishment, maintenance and operation of railroads, independent of depot purposes. Judge Morse as to those objections says:

"Neither of these objections to the title is good. The acquiring of land is a necessary precedent to the construction of depots and railroad tracks, and the means by which it is to be acquired, and the power granted to acquire it, need not be stated in the title; and the operation of local trains under section 30 of the act is confined to its tracks. This object is stated in the title as follows: 'With the necessary connecting tracks and the management of the same.' And the building of these tracks in connection with the depot, and the running of trains upon them, are all a part of the same general object as the construction of the depots and station-houses of the

company, to wit, the increasing of the facilities and comforts of travel and transportation of passengers and freights."

Showing that they had their line upon this question of connecting tracks and railroads. Then it was claimed that there was no public necessity shown, and this is what they say about the necessity:

1451 "We think also that the question of the necessity was properly determined under the evidence by the jury," in favor of the depot company.

And that is a decision in regard to this very enterprise, by our own supreme court, where this whole scheme and plan was laid before them, and is upon record, to stand there as a monument for all time as the wisdom of the court.

There is one other question that I want to talk a little about, and that is your right to ask the advice of the circuit judge. My brother Dickinson insists with a great deal of ardor that you are an independent body, and do not need any advice; that you are to do as you see fit, and ought not to ask the advice of anybody; do it on your own hook. But what makes him so afraid of the advice of the circuit judge? What makes him so anxious to exclude the assistance of the circuit judge? Don't you think it is because he knows that the advice of the circuit judge would be against him? Don't you believe that if he thought the circuit judge was going to give advice in his favor, he would waive all these questions of constitutional law and about you being an independent tribunal, and would only be too glad to have the circuit judge come in and decide on his side of the case? My brother is fully aware that if you leave this question to any member of the bar who has occasion to look at it, his decision would be against him, that his proposition is one that could not be sustained. He read from the decision in the case of Railroad Company *vs.* Chesbro, 72 Mich., p. 476, where they reiterate the doctrine that a jury are not a court, and can act independently of the court; but there is no decision that has

1452 yet been made that says the jury cannot ask the advice of the circuit judge, if they see fit to, if they think it would be of any use to them; and I have only to read from Judge Champlin's decision in the same case, to show you that that is the understanding of the court:

"The statute permits the judge of probate to attend the jury, to decide questions of law and administer oaths to witnesses. But, as we have frequently held, the whole matter is in the hands of the jury after they are sworn, and the decisions of the probate judge are merely advisory. If he attends them at their request, and decides upon the admission or exclusion of testimony, it will be presumed, unless the contrary appears, that the jury have sanctioned and adopted his decisions. In this case no testimony was excluded from the consideration of the jury upon the question of damages; and having viewed the premises, they were enabled to weigh the opinions of witnesses who testified both as to the value of the land taken and as to damages."

In other words, the statute authorized the judge to attend and to

take part in the proceedings, under the decision of the supreme court, that is to be done or not to be done, at the request of the jury. If the jury permit the judge to come along and give instructions, and to aid them in their deliberations and to pass upon testimony, the supreme court say that it will be presumed that they adopted his decision and conclusions.

Now, you can go out and consider of your verdict in this case. You can first go and view these premises; you can consider in your own minds all that has been said by counsel; you can look this whole subject over; all I can say to you is this, that if you get into any difficulty about it, if there is any question with any single member of the jury upon this subject of this necessity, it is
1453 perfectly competent, under the decisions that the supreme court have made, for you to ask the circuit judge to come in here and ask him to advise you in regard to it; just as you did upon the question as to who had the burden of proof; and if a majority of you desire that advice, I have no doubt the circuit judge would attend for the purpose of giving it. I make that proposition to you; I have no question as to how you would decide it if it was left to your own judgment and to such arguments as you might address to one another; in the end you would all be agreed that we have no legal authority to go along the Michigan Central property; you can take these decisions, you can take that statute, you can argue it among yourselves, and the more you argue it, the more you contend upon the subject, the weaker the person will be who takes up the argument of our friends upon the other side; but if you are unable to solve it in that way—and there is not the slightest confusion upon the subject—ask the circuit judge to come in here, and hear what he has to say about it, if you think it will be of any assistance to you in your deliberations. But do you really think that this argument is made here in dead earnest; that they really think that any jury would ever find against the necessity in this case? Do you think our brethren upon the other side have any such hope? Is it not an argument that they make more because it is something with which they can present their side of the case, with the hope and the expectation that if they convince one man, any one of you, upon that question, when that man comes to the question of damages, after he has receded upon that question, he will vote for higher damages than he would if he had originally been convinced. A man convinced against his will is of the same opinion still, they say; and while in the end he might admit that he had got
1454 the worst of the argument upon the question of necessity, he might turn around when you undertook to fix the damages, and vote for the entire value of the property, and hold it away up so that it would be utterly impossible for the other jurymen to agree with him. It is just an effort on the part of these people in contesting this question of necessity, to get all the money they can; if they could get such a verdict from twelve men, if you should go out and bring in a verdict against the necessity, under the form that will be submitted to you by Mr. Dickinson, they know that Mr. Backus would be in a position to sell his property, that we

could not get by there without making terms with him in some way, and that he would have this enterprise by the throat, and could demand whatever he saw fit; and if they cannot convince twelve men of that, they are in hopes that they can convince one or two of you, so that when you go out and consider your verdict, and consider it upon that question, you will vote away up in the thousands, and that will prevent an agreement; but this is a question that has got to be decided, and it has got to be decided correctly, sooner or later. They succeeded in obtaining a disagreement before one jury; it is possible they can succeed in obtaining a disagreement here; but sooner or later we are entitled to have, and will have a verdict from a jury that this is necessary, and assessing the damages of A. Backus, Jr., and A. Backus, Jr. & Sons at a reasonable amount. They say they are dragged into court here, but I noticed they came in with a very good deal of force; they have employed two of the most eminent members of the bar; and they come in here and contend, week after week, trying to wrench from this jury damages that they are not entitled to, an award that should not be rendered. But the case is in your hands. We desire to go
1455 on with this union depot, and to complete the depot and the railroad that is to connect with it this year, if possible, but rather than be robbed, rather than pay an extortionate award, we would rather that you would disagree, and enable us to fight it over again, until we can have justice from a jury of this county; because it is just like this, gentlemen of the jury: We desire to go on and erect this building and to build this railroad; we are perfectly willing to pay any fair and just damages, such damages as twelve intelligent men would agree to, but when they expect to exort from us the entire value of that property for going in front of it, we say it would be an act of injustice; it would be a wrong that we will fight and contest against as long as there is a breath of life in us. Why should he have superior rights to anybody else? Why should he not make some concessions and yield something for the general good? We are going in front of his property. You ought to be able to tell quite accurately just what his damages are. You ought to be able, talking it over among yourselves, looking at the property, to arrive at a just and proper conclusion. You are to decide, in the first place, how much Absalom Backus, Jr., is entitled to for the injury to the fee, to the land. If you took the money that was paid to the Michigan Central Railroad Company, to wit, from $10 to *to* $13.50 a foot, you would not *not* be out of the way as to the injury to the fee, which would be some $2,000, $2,380 or $2,500 or something like that. Then when you come to the injury to the corporation, A. Backus, Jr., & Sons, who own the building and have a lease there, the question is how much will they be really damaged in that plant and in that business there because this railroad is built and operated in front of them upon that property. The
1456 building belongs to the company. The land itself is all that belongs to A. Backus, Jr., the naked land. The business and improvements and the buildings belong to A. Backus, Jr., & Sons. We have twelve men here that know something about property,

that know something about business, you can go and look at that property, look at this building, look at the sections of this railroad that are being built; and you ought to be able to determine with a good deal of accuracy what the damages are. And you have a very good illustration in some of the cases in New York and in some of the cases right along this elevated road, in the awards that have been already made. It is for you to consider, it is for you to determine; all we insist upon is that this verdict should be a just and reasonable one, and that they should recover what they are justly entitled to, and not one cent more. It is in your hands to determine, gentlemen of the jury, and I trust that in the end you will be enabled to agree upon a verdict that this is a public necessity, and that their damages do not amount to any very great sum of money. That is all I wish to say to you.

Mr. DICKINSON: Mr. Baker has said that Mr. Backus refused to permit people to go in and look at his planing mill. He has never refused any one to go into his planing mill, until Mr. Mackintosh was here the last time, and he refused to let Mr. Mackintosh come near him. On the next day after Mr. Mackintosh went away, and after the testimony was all closed and the arguments had commenced, there were two men, Mr. Dee and Mr. Spitzley——

Mr. BAKER: It was the day before the case was closed. They reported it to me before the case was closed.

Mr. DICKINSON: The testimony had been closed. Mr. Mack-
1457 intosh had applied and was refused admittance, and then the testimony was closed, and Mr. Spitzley and Mr. Dee came the next day.

Mr. BAKER: They went down there before the evidence was closed. I sent them down there before. I sent Mr. Henry Spitzley, as reputable a man as there is in this city, down there, and he was denied admittance, and I did not get his testimony.

Mr. DICKINSON: That was after the testimony was closed. No man was refused admittance during the pending of the testimony before the jury, or until after the testimony was closed, until after Mr. Mackintosh was here the last time.

Mr. BAKER: All I can say is it was reported to me the other way. It was reported to me before the testimony was closed.

Mr. DICKINSON: You had no right to state it anyway, unless you gave us a chance to meet it.

The jury states that they will go to view the premises again in the morning—Thursday morning, and they are instructed by counsel for both parties not to talk with any of the Backuses. The jury also state that they will retire to the jury-room to deliberate upon a verdict at 2 p. m. Thursday.

Adjourned to Thursday, July 16, 1891, at 2 p. m.

1458 The following is the award and report of the second jury:

Award of Jury.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

To said court:

We, the undersigned, inhabitants and freeholders of the county of Wayne, duly impaneled and sworn as jurors in this cause to ascertain the necessity of taking for public use, to wit, for the purpose of constructing a union railroad depot and station grounds in the city of Detroit, in said county, with the necessary connecting railroad tracks and accommodations, all of the real estate, property, franchises, rights, easements and privileges described in the petition in this cause, and to ascertain and determine the compensation or damages which ought justly to be made by the Fort Street Union Depot Company to the above-named respondents therefor, do respectfully certify and report that we met at the court-room in the market building in the city of Detroit, on the 8th day of June, 1891. That the Fort Street Union Depot Company appeared by F. A.
1459 Baker, its attorney, and the respondents appeared by Don M. Dickinson and J. Logan Chipman, their attorneys. That we proceeded to hear the proofs and allegations of the parties, and also proceeded together to view the premises proposed to be taken, and for that purpose we continued our sessions from day to day until the 16th day of July, 1891, when this cause was submitted to us by said parties. That we caused the testimony and arguments of counsel before us to be stenographically reported and reduced to writing at the request of the parties, and the same are herewith returned and filed.

After said cause was submitted to us, having maturely considered the proofs and allegations of the parties and the arguments of counsel thereon, we did ascertain and determine that public necessity requires that said real estate, property, franchises, easements and privileges should be taken for public use, to wit, for the purposes of constructing, maintaining and operating a union railroad depot and station grounds in the city of Detroit, in said county, with the necessary connecting railroad track and accommodation by the Fort Street Union Depot Company, under its articles of association and the constitution and laws of this State.

And thereupon we did further ascertain and determine that the compensation or damages which ought justly to be paid by the Fort Street Union Depot Company to respondents for the said real estate, property, franchises, easements and privileges as described in the petition in this cause is as follows:

To Absalom Backus, Jr., as the owner of the fee of a parcel of land hereinafter described, the sum of seventeen thousand eight hundred and fifty dollars.

1460 To A. Backus, Jr., & Sons, a corporation as the tenants in possession of said parcel of land, the sum of seventy-eight thousand two hundred and ninety-three dollars.

To James N. Dean and William H. Davison, executors of the estate of Crosier Davison, deceased, the sum of one dollar.

The real estate, property, franchises, rights, easements and privileges referred to in this award are more particularly known and described as the right of way to construct and maintain a viaduct or elevated railroad in, upon and along River street and in front of the property in which the respondents are interested as owners or otherwise, in accordance with the ordinance agreed upon between the common council of the city of Detroit and the petitioners, the orders of said railroad crossing board and of the commissioner of railroads, and the general plans and designs adopted by the petitioners and as approved by the State railroad commissioner, which were filed and served with and constitute a part of the petition in this cause.

The property in which the respondents are interested as owners or otherwise, in front of which said viaduct or elevated railroad is to be constructed or maintained, is situated on the north side of River street, in the city of Detroit, in the county of Wayne, and is bounded and described as follows: Bounded on the westerly side by a parcel of land owned by Barbara Seadley, and on the northerly side by Fort street west and the Michigan Central railroad, on the easterly side by a strip of land seventeen feet wide owned by the Michigan Central Railroad Company, and on the southerly side by River street, formerly known as Woodbridge street. Said property is known as the Backus planing mill and box factory, and it has a frontage on River street of two hundred and thirty-eight and forty-hundredths feet.

(Signed) J. H. LESHER.
P. H. HICKEY.
JOSEPH C. WALLICH.
FELIX JULIEN.
JOHN KELLY.
WILLIAM M. QUENBY.
EUGENE CHAREST.
MAXIME J. RIVARD.
CHRISTIAN M. TRAUB.
PATRICK SPILLANE.
LEOPOLD FREUD.

Detroit, July 16, 1891.

1461 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

And now comes the said petitioner by F. A. Baker, its attorney, and moves the court to vacate and set aside the verdict, award and report of the jury in this cause, and to grant a new trial of the questions of public necessity and of the compensation or damages, which ought justly to be awarded to respondents.

This motion is based upon the following grounds:

1. The jury was not attended by a judge of this court, or by a circuit court commissioner, to decide questions of law and administer oaths to witnesses.

2. The attorney for the respondents, taking advantage of the absence of the judge, did improperly, erroneously and falsely claim and pretend to and before said jury that the petitioner, The Fort Street Union Depot Company, has power, under the statutes of this State, to condemn right of way for an elevated railroad along the margin of the property of the Michigan Central Railroad Company on the south side of River street, and for that reason the jury
1462 ought to find that there is no public necessity for taking a right of way in, upon and along said River street for the elevated railroad proposed by the petitioner, and thereby said attorney did, by repeated arguments and assertions, to and before said jury, convince a number of said jury that the property of the Michigan Central Railroad Company could be condemned by the petitioner under existing statutes, so that when said jurymen came to yield on the question of necessity, they were so biased and prejudiced against the petitioner that they insisted upon the most extravagant, exorbitant and grossly excessive damages, to the great wrong and injury of petitioner.

3. The attorney for the respondents, in opening their case to the jury, among other things said to them:

"Now, for its application, gentlemen of the jury, I say to you that there is no necessity whatever for this elevated structure to come up River street; I say to you that I shall show to you beyond a shadow of a doubt, by the statutes of this State, a provision in the statutes of this State, and in an act passed at the time of this union depot legislation, providing that this union depot must confine its routes to approach its union depot along the line of railroad property already acquired within the city limits."

"I tell you this union depot company, if it does not make its agreements with the Michigan Central not to do it, and does not come into court with it, they can come up on the margin of the Michigan Central property on the south side of River street, and leave Backus' property untouched, without paying Backus a dollar.

The Michigan Central does not want them to; they say, Use
1463 River street and leave us alone. Why don't they condemn
Michigan Central property instead of condemning our property in the street and imperiling our business? They say they won't do us any damage. We say they will. We say they will ruin our business. We say, 'You will ruin our business; if you think you will not, if you don't want to pay us, and we don't want a dollar of your money, this business that we have built up is worth more than all you can pay us—it is the business of this man's life, he has just settled it so that his boys can run it, and he can have some rest after he has accumulated this property—if you don't want to pay us, and we don't want your money, go over there and condemn Michigan Central property, condemn your line along the Michigan Central ground 25 or 30 feet up River street, and don't pay us a dollar, leave us our street free.' And I tell you, gentlemen, to say that you cannot condemn Michigan Central property is the merest sophistry. I will show you the statute which says you may take the property if it is not needed by the other road. But how shall the question of the need of the other road or company be passed upon? Precisely as these 12 men are passing upon this question. It goes before a jury of 12 for condemnation. The Michigan Central will say to the union depot company, 'It is not necessary to take our route,' just as we say that it is not necessary to take this. They will say to the union depot company, 'We need all our property.' 'Very well,' says the union depot company, 'you need all your property, we will try that question before a jury of 12 men in the city of Detroit, whether you need 38 acres of ground of the best business property on River street to carry on your business.'"

1464 "How are you going to get rid of it? Why, here is your statute which provides, the legislature having taken thought at last, that if any railroad company shall refuse to give terminal facilities to another, that other may take under proceedings laid down in the statute. If any railroad company does not need any part of its property, it may be taken for the approach of any union depot railroad company, or any other railroad that desires to enter. Now we will say that you gentlemen, not in this case, but we will say you were a jury called in a case of the union depot company against the Michigan Central, and the Michigan Central say, 'I cannot let you go up this margin of mine up the River road, I cannot let you build your elevated road up this margin beyond 30 or 40 feet there.' 'Why?' 'Because I need it.' The union depot company replies, 'We will go to a jury upon the question of whether you need 38 acres of land, when you bought nearly half of Grosse Isle down here just to keep your money invested; when you bought land all over here, around the suburbs, we will just go to a jury and see if you need 38 acres of that land on the river front; we will go to a jury and show that jury that no other railroad on earth has such a holding of property near a business center, and does not need such a holding of property, and never has to exceed ten acres;' and how long do you think it would take us, on a presentation of

facts, to get a verdict of the jury that the Michigan Central shall play dog in the manger no more, but shall give this land at a fair price to the union depot company?"

"We shall urge upon you with confidence, that your duty will not be done to Detroit, or to your fellow-citizens, the duty which
1465 you are expected to perform under the constitution of your State, as explained and fully illustrated by the highest court of your State, if you permit this route to come up there, when we shall show you, by such men as Mr. John B. Mulliken, that the best route for the union depot company itself is up this Michigan Central property."

4. The attorney for the respondents on his cross-examination of the witness John B. Mulliken, put the following questions for the purpose of leading said jury to believe that the petitioner could condemn the property of the Michigan Central Railroad Company, and that Mr. G. V. N. Lothrop, the general counsel of the Detroit, Lansing & Northern Railroad Company, had so advised that company:

"Q. Who is the general counsel of the D., L. & N.?
"A. Mr. Chas. B. Lothrop.
"Q. Mr. G. V. N. Lothrop before that?
"A. He was formerly.
"Q. That being the best route, was there ever any talk about the power of the said railroad company, wanting terminal facilities, to condemn the Michigan Central ground?
"A. Mr. Lothrop told me at one time there was no difficulty in doing that.
"Q. Which Mr. Lothrop?
"A. G. V. N. Lothrop."

5. Although it clearly appeared on the further examination of said witness John B. Mulliken, and by the testimony of said G. V. N. Lothrop, that the advice and opinion of said Lothrop was, that the property of the Michigan Central Railroad Company, or of any other railroad company, could not be condemned without
1466 additional legislation, the attorney for said respondents did claim and pretend to and before said jury that under the advice and opinion of said Lothrop the petitioner could condemn a right of way along the margin of the Michigan Central property on the south side of River street.

6. Although it conclusively appeared by the testimony in the case that the property of the Michigan Central Railroad Company, on the south side of River street, was all in actual use by said company for depot or other purposes pertaining to the operation of a railroad, and the same was needed by said company for the purpose of a depot or other terminal facilities, the attorney for the respondents, at the close of the testimony for the petitioner, made the following statements and assertions to and before said jury:

"I now read the section which I claim gives the power to condemn the right of way in this case, over the grounds of the Michigan Central Railroad Company. The section is as follows:

'When any part of the land of any railroad company in this State, in or adjacent to its depot grounds is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company, organized as aforesaid, needing such land for the purpose of a depot or terminal facilities, to acquire the same in the same manner as may now be done for such purpose from individuals. The question of actual use and of necessity for the aforesaid purpose by said railroad company owning and not using said land shall be determined, in addition to other questions, as provided by law in cases of condemnation of lands for the
1467 purpose aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose, as now provided by law where land is acquired for such purpose from individuals.'

"It is very clear that this matter of the use and occupation of the grounds, and of the need of the railroad company for such grounds, are questions which must be determined by a jury, called as you are called. They must pass upon the question of whether this is the best route. They ask the Michigan Central for the privilege of occupying the grounds, and if they fail to agree, they take it before a jury. How long do you suppose it would take a jury to determine it?"

7. The counsel for the respondents, who assisted the attorney on the trial before said jury, at the close of the testimony for the petitioner, made, among others, the following argument or statement to and before said jury:

"But it is a noteworthy fact that this very section, quoted here by my brother Dickinson, was passed in 1881, the same year that the union depot act was passed, and also that the two acts were the product of the same mighty brain and the same strong hand, to wit, Mr. Joy, the head of the union depot project. Both acts passed by the same legislature, both coming from the same man, twins, my friends, born at the same birth, christened after the same father, both of them the progeny of this union depot scheme. What did Mr. Joy draw that act for? You know and I know that he is a man that does not act without a motive. What did he put senseless stuff, if the interpretation of my friend Mr. Baker is correct, upon this statute book for? What was its purpose? Do you doubt for a single instant that he had in view the practicability and the
1468 possibility of using the Michigan Central grounds in connection with the grounds he acquired, touching them at Twelfth street for the purpose of getting further up into the city? Have you any question about that? In what other cities in the State of Michigan is there any project of this kind on foot? Where else does any necessity arise for legislation on this point? Can you tell me; can any one show me? It does arise here, and it was born here, came from the same source that the union depot act came from, the same session of the legislature, to wit, 1881. That is a fact worth considering. And that Mr. Joy was right, that you can take part

of these grounds for other railroad purposes was demonstrated by the history of this case.

"Almost the first departure from the union depot grounds at the foot of Twelfth street takes the elevated structure of this railroad within the sacred precincts of the Michigan Central railroad grounds, their 20 acres cuts off a corner of it, not only crosses their tracks but goes within the holy of the holies, into the very temple itself, into this mystic and magic 38 acres of depot grounds, around which the mighty protection of the law, according to my friend Mr. Baker, is put. How does this happen? According to my friend's argument, you cannot get an inch of it. According to his argument the thing is so absurd as a matter of fact, that no jury in the world would ever permit it to be taken."

"So my friends, in view of the history of this matter, it is all, I was going to say, nonsense, but it certainly is not law to say to you that this statute does not bear the meaning which my brother Dickinson puts upon it. Let us look at that statute. Tell
1469 me what it does mean; what can it mean? I have asked you already what was it drawn for? Why, it was a sort of Siamese twin to this union depot act. If the meaning that is contended for is not the meaning of it, tell me what is the meaning? What case is it meant to fit?

"When any part of the land of any railroad company in this State, in or adjacent to its depot grounds, is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by such railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company, organized as aforesaid, needing such land for depot or terminal facilities, to acquire the same in the manner as may now be done for such purpose from individuals.

"That is very plain, isn't it? Can anything be plainer? This act says in effect—it does not say in effect, it says positively—that where the land is in use or needed for depot purposes, that it may be condemned like other land—needed now, needed today, needed this instant, not needed ten years from now. I think the gentleman was in error when he said this term needed referred to what might happen in the future. When it is in use now and needed now, that is the meaning of the law. But when the land is in actual use and needed it cannot be taken. When it is not in actual use and not needed, then, my friends, it may be condemned exactly in the same manner as your property, or Mr. Backus' property, or anybody's else property may be condemned, but with this condition. There are two other facts to be submitted to the jury in this connection, added to the investigation to be made by the jury, to the fact to be inquired into in that case, like the present one. In
1470 the present case you are to inquire into the necessity of using Mr. Backus' land, and, if necessary, to ascertain what compensation he should receive for the condemnation, but in this case the question of actual use and of necessity for the aforesaid purposes by said railroad company owning and not using such land, shall be determined in addition to other questions, as provided by law, in

case of condemnation of land for the purpose aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose, as now provided by law, where land is acquired for such purpose from individuals.

"So that in a case of this nature you are to make the same inquiry which you make in the case of Mr. Backus, but in addition to that the jury is to answer whether the land is in actual use and whether it is needed by the railroad company for depot purposes. Now, it seems to me that is very plain; it is as plain as words can make it. And yet my friend says it does not mean anything. He says you cannot do it and you must not do it, and he says if a jury should determine that the land was not in actual use, and by use is meant *bona fide* use, a real use, not a use for the purpose of preventing somebody from taking it, but a real, *bona fide* use, and the need is meant a present need—and yet he says if the jury should find it was not in such use, and that there was no such need, that there is no court in the world that would let the verdict stand. It will be a sad day for the people of the State of Michigan if the supreme court of that State ever carry out the threat made by my friend Mr. Baker, and overturn the verdict of an honest jury in their endeavors to protect the rights of the citizens and of the public in a matter of this kind. The supreme court, under such a state of facts, he says, would not
1471 sustain the verdict. Mr. Lincoln had a homely way of saying that you had better not cross the bridge until you get to it, and I do not think that you gentlemen had better bother with the supreme court until we get to that. One thing is certain, that a judge on the bench, when the case is being tried before him, will not tolerate the lawyer who threatens him with the supreme court. He gives his best judgment, uncaring and unapprehensive as to what the result will be. His only aim is to do justice, and so your aim must be to do justice and to act according to the lights which you have before you. I say to you, if it is worth anything to you, if it is worth as much as Mr. Baker's assertion, I say to you that the supreme court would not do it, that there is no principle upon which they could do it, that this is a mere question of fact in a matter which the constitution has given you supreme control over. Further than that, that the constitution has given you more control in a matter of this kind than even a subordinate court, than it gives a jury in a court of record, because you are judges both of the law and the facts, and your findings on the facts cannot be assailed. In what way can they be assailed? How can the supreme court, as a matter of law, determine the weight of testimony? How can the supreme court determine whether you believe Mr. Backus most or Mr. Joy most, when their testimony *are* in conflict? And yet this matter of the use and the need of that road there would all be matter of testimony for you to weigh and determine, with such lights as your experience has given you. How, I ask you, could the supreme court overturn your judgment?"

"Now take that statute and read it and see if it does not bear

us out in the position we take. Tell me what it was made
1472 for, if it was not made for a case like this. Tell me if it would not be better for all concerned for this railroad to go up on the Central grounds instead of going up River street. Tell me if Mr. Backus' interests are not at least on as important a level as the interests of this company in this proceeding. The law says they should not take this street unless it is necessary, and we say it is not necessary, and we invite you to that conclusion. We show you the route which they themselves, or at least their leading men, agree would be a preferable route; but they say they will not take it, because under the law they cannot take it, because they know in advance that a jury, if called, will determine that the railroad are using their ground and have need to use their ground.

"Now, my friends, I have asked you already, would a jury determine that? What do they want with their grounds? What business have they at all with that immense quantity of ground? They are there as an enemy to civilization, they are a hostile foe within the limits of your city. No other city would tolerate such a state of things. They are standing in the way of progress in this city. Railroads come here to benefit us. The good they do us is incidental. They come here to benefit themselves, and above all, my friends, no improvement can benefit a community which overrides the right of the citizen and which stands in the way of the proper advancement of that community. They have got the whole river front, and it is as much as we and our wives and our little ones can do to catch a glimpse of that beautiful river, the scene of the sports of our youth, to which we resorted for health and pleasure. Thirty-eight acres there and 48 acres just alongside of it, and yet we are told that a jury could never be got but would find
1473 that a strip of the width of this elevated structure could not be taken from the air of heaven 38 or 40 feet above the track of that road, because they were in actual use and needed for depot purposes by the railroad company. My friends, that is an insult to your intelligence, it is against the facts and it is against common sense. There is a moving out from that 38 acres of the Michigan Central. The Grand Trunk has gone out, the Detroit, Lansing & Northern is going out, the Flint & Pere Marquette are going out, three great railroad corporations have gone and are going elsewhere to do their business. My friend Mr. Baker desires you to believe that any jury who will be called upon to pass that question would treat it as nonsense, and that if they did agree to it, the supreme court would overrule them. We take a different view."

8. After the testimony of Mr. G. V. N. Lothrop had been introduced, the attorney for the respondents made the following argument or statement to and before said jury, relative to the testimony of said witness:

"For the first time in a somewhat long professional career, although a young man, counsel have seen fit to call upon the witness-stand lawyers to testify what the law is. Nothing was ever heard of it the time before, and for the first time in a long professional career we have been charged, or I have been charged, with not

doing my duty, because I would not do such an unprofessional thing as to call a lawyer to testify as to the law. Now, gentlemen of the jury, will sound make you believe or disbelieve the evidence of your own ears and the testimony of Mr. Lothrop? Did Mr. Lothrop tell you, or would he tell you, or could he be brought to tell you—counsel of the Detroit, Lansing & Northern,
1474 formerly counsel for the Michigan Central, a railroad lawyer from the crown of his head to the sole of his feet, could be brought to tell you that you could not condemn that margin of the Michigan Central under that statute. Are you to be driven, not only to consider but to take the statements of Mr. Baker as to testimony that occurred when you were all here? Mr. George V. N. Lothrop, who took that witness-stand, would never I think have stated, railroad lawyer as he is and counsel of railroad companies' interests as he is, he never would have stated to you that that strip of land could not be condemned for depot purposes and for these terminal facilities, and he did not so state to you, but he did state that that question under the statute that I read to him, and which was called to his attention for the first time, would go to the jury, and you are to be driven and bulldozed by a powerful pair of lungs to disbelieve what Mr. Lothrop told you upon that witness-stand not one hour ago."

9. The counsel for the respondents in his closing argument to and before said jury, among other things said to them:

"And they come here to you and you do not say yes; you say, 'We will look into this matter and we will see if it is necessary, we will see if there is not a better way of doing this, a way which will interefere less with private property, that will take less of the public streets, and will achieve the same results.' Now, is there a way? I have already said to you that nobody denies that. Even their own witnesses accede that. Ellis, Joy, every one of them, say that the other way would be the best. Mr. Joy at first began saying that it could not be done anyhow under this statute, that it would
1475 require what is called a special act; but when his attention was called to the fact that there can be no special act in this State, but that there can be only general laws, he finally admits that under the statute we have brought to you and read to you, it could be done, provided anybody would swear in the petition to enough to start the proceedings. How can it be done? Can it be done? He makes one objection; he only gives one practical reason in all his testimony; he says you cannot do it, because if they put an elevated road on the Michigan Central grounds the posts would be an obstruction. Do you mark and understand that? Posts are no obstruction to poor Backus; they are no obstruction to business people who were there before the road came there; they do not interfere with the use of the street one single bit, and according to our brother Joy, they are a blessing in disguise, if you only try them long enough to find it out. But when you come to put them within the classic precincts, within the sacred domain of the railroad company, then all of a sudden they become a nuisance and an obstruction. They become so great an obstruction then, that no

jury should permit them to be put up there. There is an old saying that you cannot eat your cake and have it too. I do not for the life of me see how you can make these things a blessing to Backus in front of his premises, and a nuisance and an obstruction to the Michigan Central R. R. on their premises. They say that street cars could run under these tracks, carriages could run under them, that all the uses of a great public street could be carried on under them, locomotives and trains could run under them—here is the locomotive on the Central track that has to run under them. All this has to be done when you come to look at Backus' case; but the moment you put in the road on the other side of that
1476 fence, all these reasons are distorted and they become reasons against it instead of reasons for it.

"One juryman asked a question that was in my mind when they talked about these roads being an obstruction if put up in the air there; he asked a question, Why cannot they put buildings under them? Why not? Tell me why not? You will find buildings under other such obstructions. You will find buildings under approaches to bridges, buildings in which business is carried on; and you know and I know that the railroad buildings, freight sheds and buildings of that kind, are never run to any great height; 22 feet would be a great height for one of those sheds. They certainly would not interfere with their use for that purpose.

"Mr. DICKINSON: You may have forgotten Mr. Joy's testimony that the Ludgate Hill station in London had three stories of railroads running in over one another.

"Judge CHIPMAN: I have not forgotten that. But the question asked by the juror struck me as being entirely pertinent. We are not here to find a way for this company to do their work cheaply. You are not here for the purpose of saving their money; you are not here for the purpose of finding the necessity of using this street, and the moment you begin to talk among yourselves as to how much it will cost the company, more or less, that very moment you fail to do your duty under your oath, you become unfaithful to your duty to Backus, and utterly unfit for the great trust reposed in you by your presence here.

"Why not build the elevated road alongside there? Why not carry it right through? There is only one reason why—that the posts will interfere. But we say the posts will interfere with Backus; and the supreme court say that the business and interests of
1477 the respondent, in a case of this kind, are just as important and as sacred in the eyes of the law as the business and interests of the petitioner. Look at Backus, employing 150 men. How many will the union depot employ? And how many would he employ if their road goes in front there? Will they give you 150 new citizens? You know they won't. That great corporation, the Michigan Central railroad, has not such a number of men in its employ there at that depot as Mr. Backus employs. Which business is the largest, which is of the most real importance to our people, their business or Backus'? You know what Backus' business will do for the city; the merchant knows it, the manufacturer knows it,

every man who is engaged in any kind of business for the making of money knows that much, at least, is secure, and that that much ought to be preserved and held onto; and while we want to secure the other, and secure the improvements which the union depot company may bring, we do not want to throw away anything we have got, but we want to keep what we have got and get as much more as we can.

"They say that you could not make a petition to a court under this statute that has been read so often that I hate to repeat it; they say that no man could go into court and swear to a petition stating that the Michigan Central Railroad Company did not use that land and had no need of it. Would any of you find any difficulty about going and swearing that the Michigan Central Company was not using 30 or 40 feet in the air there, and that they have no need of it; and have you any idea that the Michigan Central Railroad Company could go in and defend against it? Have you any idea that they can prove that they have any need of it? You know they are not using it, and the only thing they would be reduced to would be as to the
1478 question whether putting those posts in the ground there was such obstruction to their business as would defeat the application. I do not believe that any jury would find it an obstruction. No jury would, if they believed the testimony given here, to put this road in front of Mr. Backus' place, because all the testimony brought by the petitioner is that it is not a nuisance and that it is not an obstruction. They could run their tracks under it; there would be no trouble about it; they could put sheds under it; it would be no interference really, or so small an interference that no jury would take it into consideration, provided you believe the testimony given in behalf of the petitioner in this case. Is there any practical difficulty about that? Answer me that. They say no man could do it without committing perjury. Would you commit perjury if you went into court and took oath that they did not use and did not need this space up there in the air? The fact is that they are not using these grounds in any such manner as they are trying to make out; some of those cars lay there month in and month out, as anybody can see who goes down there and looks; they lay there until they are begrimed with dust and age. They are not using it; and it was because the Michigan Central knew that under this statute a petition could be made and that the probabilities were that a jury would give a verdict and that that verdict would be sustained by the court, that they stopped fighting this project and let them have this corner there, let them have 19 feet from the viaduct, and they have come to terms, so that there is no longer any fight between the two companies. Now, my friends, there is no difficulty in this; I want to impress on your minds honestly and fairly that there is no difficulty. Would you hesitate to take that oath that
1479 they were not using it, for you know they are not using the height of that elevated road, and they do not need it. And the company would have to come in and prove that they were using and that they were needing it, and they could not prove that

the putting of the posts there was an obstruction and a nuisance, if you believe that they are not an obstruction and a nuisance to Backus.

"Somebody asked here whether the Michigan Central might want to use it for an elevated road. That came up yesterday. Of course they do not want to use it. Their whole system is a system at grade; they come in at grade, their buildings are all put at grade, and they have no plan on hand, and they have no necessity for an elevated road there—the Michigan Central has not; so you see that on that score there is no practical difficulty, and if you refuse to give that application to this statute, then I ask you, What use are you going to make of it? If it does not mean what we contend, tell me what it does mean? That is fair. If we are not right, then who is right? Nobody will tell us what it means. Mr. Joy undoubtedly had it passed when he had the union depot act passed. Nobody vouches any explanation about it. What does it mean? Evidently, in some way it means that one company may take the depot land of another company. That much everybody concedes. And yet they undertake to tell you practically that there are no circumstances under which that can be done. Now, my friends, the circumstance has arisen, the case is here, and if they can go over there it is the best route for them, it is the best route for the city. It leaves you the street, it saves Backus, it keeps the railroads altogether there over that fence, and the public generally will be better accommodated."

1480 10. The attorney for the respondents in his closing argument to and before said jury, among other things, said to them:

"And I shall convince you, under authority and by the law, that the union depot company can take that margin of the Michigan Central road, beyond the shadow of a doubt; and I am not here to urge any absurdity upon you; I am not here to urge any folly upon you, because to take an insincere position and to present one in which I have no confidence, or in which we have no confidence, after the consideration we have given to the subject, is not according to my methods or my habits. My friend on the other side has said that I wanted a jury because I thought I could carry the jury. Why, gentlemen of the jury, if I have ever had any successes before juries or elsewhere, my fellow-citizens will at least do me the justice to say that it is because I have been considered at least a sincere man, that although sometimes I may have been wrong, my worst enemy will not say that I have not acted from conviction, and I have not been guilty of the supreme folly of bringing into this court before a jury of twelve men any absurd doctrine as advocated by Mr. Baker, that in the first place there is no law that will permit you take that margin of the Michigan Central road for the elevated railroad."

"Then turn back to the statute passed at the same time, passed for the purpose, as suggested by Mr. Joy, to enable some railroad company at some time somewhere—he cannot remember to have drawn it—to enable some railroad company somewhere or at some time to con-

demn the depot grounds of some other company that is not using it. Whereabouts has it been done? And why did Mr. Joy
1481 draw the act; and why is it drawn in connection with the union depot act, at the same session, except to enable them to use the grounds of the Michigan Central? This is plain English. I think you can understand it, and will not take the statement that it cannot be done. This is a part of the general railroad law, which has heretofore provided that land may be taken under the constitution, for the use of railroad companies, on the verdict of 12 freeholders, or on the appointment of three commissioners, precisely the business you are doing here, and this is the end of a section added in 1881:

"'When any part of the land of any railroad company in this State, in or adjacent to its depot grounds, is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company, organized as aforesaid, needing such land for the purpose of a depot or terminal facilities, to acquire the same in the same manner as may now be done for such purpose from individuals. The question of actual use and of necessity for the aforesaid purposes by said railroad company owning and not using said land, shall be determined in addition to other questions, as provided by law in cases of condemnation of lands for the purpose aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose, as now provided by law, where land is acquired for such purpose from individuals.'

"Mr. FREUD: Provided it is not in actual use.

"Mr. DICKINSON: Yes, and provided it is not needed; but let me tell you, you provide by law that no man shall enter a house in the daytime, it shall be a crime to do it, if he does it secretly.
1482 You do not take that man right up and send him to prison if you find him doing it. You have to give him a trial before twelve men. Now, when you find a statute providing that the land may be taken if it is not used or needed, and it provides a tribunal to try it, would you forestall that tribunal by deciding at the outset that you cannot succeed before the jury?"

"Now, a word more as to the power to take it. Mr. Baker has laid some stress on that, and I will only add a few words to what my distinguished associate has said, and to what Mr. Lothrop has said. I call your attention to his testimony again. He swore on direct examination that he had some conversation with Mulliken at some time with regard to getting a right of way in from the junction. He said at that time that he was very positive there was no law which would permit them to acquire property of the Michigan Central road. He did so testify. But do you remember on the cross-examination I said to Mr. Lothrop: Do you remember the passage of the union depot act? Yes, sir, I aided, said Mr. Lothrop, in advising the judiciary committee of the legislature as to some parts of it. Now, said I, Mr. Lothrop, was your conversation with Mr. Mulliken before or after the passage of the union depot

act; in other words, was the time when you said there was no statute providing for the combination of the depot grounds of the Michigan Central, to give the Detroit, Lansing & Northern a passage, before or after the passage of the depot act by the legislature. He says, I am clearly of the opinion that it was before. So you see at the time he had the conversation with Mulliken, at which time he says he knew no law by which the grounds of the Michi-
gan Central could be taken, this act for the taking of
1483 union depot grounds was not passed, because that was passed
at the session when the union depot act was passed. What value is his testimony, when his attention had not been called to it; it was not called then because no such act was passed. But now he says, the proceeding provides—whether it is constitutional or not we will not say—but under it it is provided for the question of the need of the Michigan Central owning it, or its use of it, and that is a question of the use in good faith and the need in good faith, and it is to be tried by a jury like this. That is his testimony.

"Now, I want to know whether the jury are going to pass upon this question of necessity or are going to pass it by, because of the acts of the union depot company since, in getting ready for this trial by buying property since the first trial. I want to know, secondly, if there is a man on the jury that believes, in the face of the testimony, that any other jury of 12 of their fellow-citizens is going to say, in the face of the testimony of their own witness, Mulliken, that they need that space there. If you find that they do not use it—and Mulliken says they do not use it—because their system is at grade—how can you find that they do use, or any jury would find that they use it? How can you find that they need it, when Mulliken says that they use it for the storage of freight cars? I do not care anything about the Michigan Central employés they bring in here. They brought Mr. Sutherland here. I asked him on cross-examination about this. Let us see about this question of use and need. I remember what he testified: You accommodated the Grand Trunk up to the time it left? Yes. You have accommodated since the Detroit, Lansing & Northern? Yes. The Flint &
Pere Marquette? Yes. The Bay City road? Yes. You ac-
1484 commodated all these roads that are going out and have gone
out? Yes. You have just bought this immense area of 400 feet on River street clear through to the river, from the Detroit, Lansing & Northern? Yes. You have room enough on your grounds to put up two elevators; all these roads are going to leave you—the Detroit, Lansing & Northern did not leave because they were not fully accommodated. Mulliken says they did not. Mulliken says they were perfectly comfortable; had all the room to do their freight and passenger business that they desired, in the Central grounds, and that was not the difficulty, that the difficulty was that they had extended their line and had to carry on a competition with the Michigan Central Company. These are going out. What are they going to do with the room that is left after they go out? Cannot they give us these few feet, if it does not injure their track? Think of it, and take it home to yourselves, gentlemen of the jury."

11. The jury erred in refusing to receive the testimony of the witness Phillip C. Miller, offered by the respondents in rebuttal, to show that the dust-arrester used by the respondents is not as good as those generally in use, and that by a small outlay, the alleged fire risk resulting to the premises from said dust-arrester and the proposed elevated railroad in River street could be wholly done away with.

12. The jury erred in refusing to permit the following question to be put to the witness Phillip C. Miller: "Do you know of any instances where the Backus dust-collector has been put in and has been taken out and something else substituted?"

13. The jury erred in refusing to permit the following
1485 question to be put to the witness Phillip C. Miller: "Will you state whether the Backus dust-arrester is in general use at the present time?"

14. The jury erred in refusing to permit the following question to be put to the witness Phillip C. Miller: "State whether or not it would be practicable to close up the lattice-work that is on the Backus dust-arrester on the roof, and put in other openings so as to avoid the danger from sparks."

15. The jury erred in refusing to permit the witness, Frank H. Mackintosh, to testify to the amount of damages paid by the elevated railroad in New York for injuries to the fee to the Martine property.

16. The jury erred in refusing to permit the following question to be put to the witness, Jeremiah Pangborn: "What effect did the elevated railroad have upon the abutting property?"

17. The jury erred in refusing to receive the testimony of Col. Frank J. Hecker and William F. Dwight relative to dust-arresters and the handling of timber by tramways, offered by the petitioner in rebuttal.

18. The jury erred in refusing the testimony offered by petitioner in rebuttal, to show that a large number of people in Detroit are using the metallic dust-arresters, and that they are better and safer than the Backus dust-arrester.

1486 19. The damages awarded to respondents by the jury are grossly extravagant, exorbitant and excessive.

20. The damages awarded by the jury to the respondents are so excessive, unwarranted and unjust, as to show that the jury were actuated by passion or prejudice.

21. The damages awarded are unwarranted by and are against the weight of the evidence.

22. The jury retired to consider their verdict in charge of the officer appointed by the court to attend them, and while they were so considering their verdict they were, without the consent of the court or said officer, or the parties, supplied with and drank twelve pint bottles of intoxicating malt liquor, commonly known as lager beer, and the grossly extravagant and outrageous awards made were the result of the intoxication or exhilaration caused thereby.

23. The proceedings before said jury and the awards made are in many other respects irregular, illegal and unjust.

This motion is based on the files and records in this cause, and on the stenographer's report of the proceedings and testimony and arguments had before said jury, as returned by them, and on the affidavit of Ernest C. Owen, herewith filed and served.

F. A. BAKER,
Attorney for Petitioner.

Detroit, August 15, 1891.

To Dickinson, Thurber & Stevenson, attorneys for said respondents.

GENTS: Take notice that the above and foregoing is a copy of a motion this day filed in the above-entitled cause. Said motion will be brought on for argument before the Hon. George Gartner, circuit judge, at the opening of court on Monday, the 31st day of August, 1891, or as soon thereafter as counsel can be heard.

F. A. BAKER,
Attorney for Petitioner.

Detroit, August 15, 1891.

1487 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

COUNTY OF WAYNE, *ss:*

Ernest C. Owen, being duly sworn, deposes and says that he is one of the employés of Gies' European hotel, on Monroe avenue, in the city of Detroit; that on the evening of the 16th day of July, 1891, he assisted in serving refreshments to a jury then confined in charge of an officer in circuit court No. 1, in the city hall, in the city of Detroit; that by the direction of Hon. George Gartner, circuit judge, and under the supervision of the deputy sheriff in charge of said jury, there was first taken in to said jury a basket of sandwiches and articles of food; that at the request of the jury this deponent and his assistant went back to the hotel and got twelve pint bottles of beer, and under cover took the same in to said jury, and that said jury immediately and before deponent left the room began drinking said beer.

E. C. OWEN.

Subscribed and sworn to before me this 15th day of August, 1891.

GEO. F. ROBINSON,
Notary Public, Wayne County, Mich.

1488 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

And now come the respondents, Absalom Backus, Jr., and A. Backus, Jr., & Sons, and say as to the motion made in this court in the form of a motion for a new trial, that they respectfully object to and protest against any consideration of the said motion by the said court or any judge thereof, on the ground that the said court or judge, or either of them, have no jurisdiction or authority whatever to review, reverse, or to vacate the verdict, award and report of the jury in this cause.

And without waive, expressly reserving the said objection, the respondents state the further ground, that since the filing of the verdict, award and report of the said jury in this matter, the said petitioner has entered upon and possessed the said property and premises which were the subject of the proceedings in this matter.

ABSALOM BACKUS, JR.
A. BACKUS, JR., & SONS,
By A. B., JR., *President.*

Endorsed: Filed Sept. 12, 1891. Victor T. Lemke, d'p'y cl'k.

1489 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT CO., Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

And now come the said respondents, by Dickinson, Thurber & Stevenson, their attorneys, and move the court for a confirmation of the report of the jury in this matter. This motion is based on the files and records of the proceedings in this matter and upon the affidavits of Absalom Backus, Jr., and D. Farrand Henry, filed in the proceedings.

DICKINSON, THURBER & STEVENSON,
Solicitors for Respondents.

Endorsed: Filed Sep. 12, 1891. Victor T. Lemke, d'p'y cl'k.

1490 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

STATE OF MICHIGAN, *County of Wayne,* } *ss:*

D. Farrand Henry, being duly sworn, upon his oath saith that he is, and has been for a period of fifty years last past, a resident of the city of Detroit. That he is a civil engineer by profession, and has practiced as such for forty years. Affiant further saith that at the request of Absalom Backus, Jr., on the 5th day of September, A. D. 1891, he examined the work of the petitioner, The Fort Street Union Depot Company, in front of and adjacent to the property of the respondents, Absalom Backus, Jr., and A. Backus, Jr., & Sons, upon River street. The property referred to is two hundred and thirty-eight and a half (238½) feet front on the north side of River street and abutting thereon, and is occupied by the planing mill and yards of A. Backus, Jr., & Sons. That the structure of the petitioner, consisting of an elevated railway upon trestles with posts, cross-girders,
1491 longitudinal girders, ties and rails, and embracing two tracks at that point, and evidently constructed for three tracks beyond that point to the east, appears to be completed in the street up to near the west line of the Backus property aforesaid, and where so completed spans the highway known as River street. That the process of construction of the said work extends in front of and beyond the Backus property to the east and toward the center of the city, along and upon said street beyond the crossing of the Michigan Central railroad. That immediately in front of the Backus property aforesaid, upon said street, affiant finds the following structure, material, and conditions in connection with said construction: In front of the said Backus property upon said street, nine feet and six inches from the south line of said street, measured to the center of the excavation, there have been excavations for the foundation of seven stone piers, and in these excavations there have been already laid permanent stone piers with concrete extending, as affiant should judge, six feet below the surface, and surmounted by permanent iron bases for iron columns, which iron bases on all of said piers *is* above the grade of the street. That there are seven excavations in front of the said Backus property, and the depth of each is of the dimensions of about eight feet in length as the street runs, and five or six feet across, and extending into the street toward the Backus property about fifteen feet from the south line of said street. These excavations have been once filled, but the grade has not been restored, and the depression is such as to render the grade of the surface impassable for teams for the uses of a highway.

North of said stone piers, and over them, is a double trestle
1492 structure extending from the south line of said street twenty-four feet north toward the Backus property and along the entire front of said property. That upon each part of said double structure there are iron longitudinal girders with ties, and a portion of the same is iron with rails. At present this double structure is supported by wooden posts. Along the said street there is strewn material for the construction of said elevated railroad. All the longitudinal girders of the entire structure are three feet nine inches deep. West of the property, where the structure is completed, the cross-girders are four feet five inches in depth. Those laid out and ready to be laid opposite this property are five feet ten inches in depth, which would leave, when the structure is completed, about thirteen feet clear. Over the Michigan Central Railroad crossing the girders are halved or boxed in so as to give more head room.

Affiant further saith that also in front of the said property and between the said double structure and the north curb-line of said street immediately adjacent the Backus property, and within twelve or fifteen feet from the north line of the street, which is the Backus line, there is an excavation extending throughout the whole front of the Backus property, of the depth of about four or five feet, which has been loosely filled in but the grade not restored, and there is now a depression throughout its entire length, rendering the street impassable as a highway, so that with the said structure as above described and the said excavation, the entire front of the Backus property has been so appropriated as to be rendered useless as a highway from curb to curb.

And further affiant saith not.

D. FARRAND HENRY.

Subscribed and sworn to before me this 5th day of September, A. D. 1891.

PHILIP M. COFFIN,
Notary Public, Wayne Co., Mich.

1493 The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS *et al.*, Respondents.

STATE OF MICHIGAN, } *ss:*
County of Wayne, }

D. Farrand Henry, being duly sworn, upon his oath says that on Saturday last, the 19th inst., he visited and examined River street, in front of A. Backus, Jr., & Sons' mills; that he finds the Union Elevated Railroad structure is fully in place up to lines run across the street from the east and west line of the Backus property, and is permanently built and constructed, spanning the entire street up

to those lines. That, in addition to the conditions immediately in front of the Backus property described in his previous affidavit, affiant finds that the holes left around the foundations for the piers on the southeast line of the street have been loosely filled, but a wheel would easily sink into them, but the depressions in the pavement on the north half of the street, where the sewer was built, have not been changed, so that a portion of the street is very bad for heavy teaming; that he finds in addition that the south fence has been removed and part of the heavy iron girders have been placed along the wooden posts in the middle of the street, and that a lot of building stone has been corded up on the south half of the street, commencing at the post about thirty feet east of the west line of the Backus lot, and is being built out west, completely filling the space between the foundations for the south line of piers and the central line of posts, and thus blocking the south half of the street, and forcing all travel into the north half.

1494

And further deponent saith not.

D. FARRAND HENRY.

Subscribed and sworn to before me this 21st day of September, A. D. 1891.

JAMES H. CULLEN,
Notary Public, Wayne County, Mich.

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

STATE OF MICHIGAN, *County of Wayne,* } ss:

Absalom Backus, Jr., being duly sworn upon his oath, saith, that he is one of the above-named respondents. That the verdict of the jury in this matter was filed with the court on the 16th day of July, A. D. 1891. That on the 17th day of July, A. D. 1891, in the absence of the respondents and of their attorney and counsel, this court or a judge thereof, made an order granting a stay of proceedings in this matter for a period of thirty days, on the application of the petitioner, to enable the petitioner to move for a new trial which has been presented. That immediately after the granting of said stay of proceedings, and after the filing of the report of the jury in this matter, the petitioner entered upon the premises of the respondents, Absalom Backus, Jr., and A. Backus, Jr., & Sons, described in the petition in this matter, to wit, the property of the said respondents and their easement in River street, on which their planing-mill property, for a frontage of 238½ feet, abuts, and have proceeded to possess themselves of said property and to

1495

erect a structure for an elevated road, as proposed in their said petition, and now maintain the structure and obstruction in said street in front of the said premises, as stated in the affidavit of D. Farrand Henry, Esq., which affiant has read and which is herewith filed.

Affiant further saith that by its acts and doings in the premises, the petitioner has appropriated the said River street in front of the said premises and obstructed and destroyed the use of the same by the respondents, and has, by the erection of the said structure, so darkened the said planing mill as to materially interfere with the carrying on of its business, all of which acts and doings have been done by the said petitioner without the consent of said respondents, or any of them, and against their repeated protests expressed to the agents of the petitioner in charge of the work.

Affiant further saith that the excavation extending the en-
1496 tire length of the said premises, and which is referred to in the said affidavit of Mr. Henry, was made under the direction of and by the employés of the said petitioner.

ABSALOM BACKUS, JR.

Subscribed and sworn to before me this 5th day of September, A. D. 1891.

PHILIP M. COFFIN,
Notary Public, Wayne County, Mich.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, WILLIAM H. DAVISON, Respondents.

COUNTY OF WAYNE, *ss:*

Charles H. Ellis, being duly sworn, deposes and says that he resides in the city of Detroit. That his occupation is that of a civil engineer, and that he is the engineer of the Fort Street Union Depot Company, and has the supervision and charge of the work of constructing an elevated road, or viaduct, along River street, in the city of Detroit, for that company. That the contract for doing said work was let to the Detroit bridge and iron works, a corporation located in the city of Detroit. That said elevated
1497 railroad, or viaduct, has been constructed from Twelfth street to the west line of the property known as the Backus planing mill and box factory, and also from the east line of said property to a point nearly across the tracks of the Michigan Central Railroad Company. That said elevated railroad has not been constructed, and no attempt has been made to construct the same in front of the property of said respondents. That, on the contrary, the Fort Street Union Depot Company, at a large expense, made a contract with

the said bridge and iron works, in its progress along the street, to go around the Backus property. That on the 17th day of July, 1891, the day after the verdict was rendered in this case, this deponent was advised by F. A. Baker, the attorney for the Fort Street Union Depot Company, not to construct said elevated railroad in front of the Backus property until further orders, but to go by or around said property; and on or about the 23d day of July, 1891, this deponent received a letter from said Baker, dated Duluth, July 21, 1891, a copy of which is annexed as Exhibit A. That on the 20th day of July, 1891, this deponent, as the engineer of the Fort Street Union Depot Company, wrote a letter to J. W. Schaub, the engineer of the Detroit bridge and iron works, a copy of which letter is annexed as Exhibit B. That on or about the 23d day of July, 1891, this deponent received from said Schaub a reply, a copy of which is hereto annexed as Exhibit C. That this deponent accepted said proposition in a letter to said Schaub, dated July 23, 1891, a copy of which is annexed as Exhibit D. That upon the 6th day of August, 1891, the board of public works of the city of Detroit granted a permit to the Detroit bridge and iron works to occupy not more than half of River street, between the
1498 Michigan Central Railroad tracks and Twelfth street, sixty days, with building material under the ordinance of the city of Detroit on that subject, to which reference is hereby made, and a copy of said permit is hereto annexed as Exhibit E. That in pursuance of the contract so made and the permit so granted, the Detroit bridge and iron works built a temporary trestle, supported by wooden posts, with which to carry its traveling derrick and crane around and by the Backus property. That said trestle is located entirely on the south half of said River street, and not at all on the half of the street adjacent to the Backus property, and the same does not in any way interfere with the use of said street in front of said property. That the only work of a permanent nature that has been done in any part of the street in front of the Backus property is that of putting in the foundations along the south curb-line of said street for the posts of the proposed elevated railroad. That said foundations are wholly beneath the surface of the street, and no foundations have been put in on the north curb-line in front of said property; that in putting in said foundations on the south curb-line it was necessary to make an excavation for each post about ten feet square and eight feet deep, and to drive nine piles in the bottom for the support of a concrete foundation and stone cap, about six feet deep. That the work of making said excavations on the south curb-line opposite the Backus property, and driving the piles therein, was all done between the 26th day of June, 1891, and the 10th day of July, 1891, and before the verdict in this cause was rendered, so that the only work that has been done on said foundations since the verdict has been that of filling said excavations with concrete, putting on stone caps and putting in the castings and rods that are to receive and
1499 support the iron posts that are to be hereafter erected thereon. That the excavation on the north half of said street, referred

to in the affidavits of D. Farrand Henry and Absalom Backus, Jr., has no connection with the work or superstructure of the elevated railroad, and the facts in regard thereto are as follows: That the ordinance under which the elevated railroad is being constructed provides that the posts shall stand on the curb-lines. That in making the preliminary borings along the north curb-line of River street, it was found that a lateral sewer was located under said curb-line, and that it would be necessary to move said sewer further into the street. That on the 21st day of April, 1891, a resolution was introduced in the common council of the city of Detroit by Ald. Thompson, a copy of which resolution is hereto annexed as Exhibit F. That said resolution was referred to the board of public works, who made a favorable report thereon on the 28th day of April, 1891, and said resolution was thereupon unanimously adopted by the common council. That under the authority contained in said resolution, and subject to the supervision of the board of public works, the Fort Street Union Depot Company caused said new sewer to be constructed in said River street, and said sewer was completed and all connections therewith made before the first day of June, 1891. That the surface of the street was left in good order and repair, and there is no depression therein that in any way interferes with travel along said street. That it was necessary to change said sewer before any foundations could be put in on the north curb of River street, either in front of the Backus property or west thereof. That said sewer could not be built in sections, but was one continuous piece of work, that had to be completed before any portion of the old sewer could be disturbed.

1500 Deponent further says that the Fort Street Union Depot Company has not, either before or since the verdict in this case, taken possession of or attempted to take possession of the right of way sought to be condemned, but on the contrary has carefully abstained therefrom as aforesaid.

(Signed) CHARLES H. ELLIS.

Subscribed and sworn to before me, this 14th day of September, 1891.

WALTER BARLOW,
Notary Public, Wayne County, Mich.

EXHIBIT A.

DULUTH, MINN., *July* 21*st*, 1891.

Mr. C. H. Ellis, Detroit, Mich.

DEAR SIR: As I understand our conversation, you will go right on with your work going by or around the Backus property, so as to complete the superstructure on each side of that property as soon as the bridge Co. can do the work.

If any legal difficulties arise, by way of injunction or otherwise, wire me at length at Thornhill Farm, Steele, North Dakota.

Yours, F. A. BAKER.

EXHIBIT B.

JULY 20TH, 1891.

J. W. Schaub, Esq., engineer Detroit bridge and iron works.

DEAR SIR: Please give me an estimate of cost of construction of temporary trestle-work in River street in front of the Backus
1501 property, upon which to carry your derrick, and also the expense of bringing your derrick back in position to put in the permanent work when the way is clear to do so. I want it to include all the work and material which is not embraced in your contract for construction of viaduct.

If the amount is satisfactory I will accept it at once, and authorize you to proceed on the plan proposed, so as not to have any delay to your work.

Yours truly, CHAS. H. ELLIS, *Ch'f Eng'r.*

EXHIBIT C.

Office of Detroit bridge and iron works.

DETROIT, MICH., *July 22d*, 1891.

Mr. Chas. H. Ellis, ch'f eng'r union depot Co., 297 West Fort St., city.

DEAR SIR: Replying to your valued inquiry of the 20th inst., regarding temporary work to carry traveler:

We will be pleased to furnish all the material and labor to execute the same, in accordance with your requirements, for the sum of sixteen hundred and eighty ($1,680) dollars.

This tender is made with the understanding that you will furnish us a right of way to occupy the south half of River street, directly in front of the Backus property. This right to be in the form of a permit from the city council, to occupy the middle of the street and sidewalk with our temporary work, until the permanent work can be put in position.

Yours truly,

DETROIT BRIDGE AND IRON WORKS.
J. W. SCHAUB.

1502 EXHIBIT D.

JULY 23, 1891.

J. W. Schaub, Esq., engineer Detroit bridge and iron works.

DEAR SIR: I have your letter of 22d inst., inclosing proposal for temporary work for traveler, in answer to my request of the 20th.

The Fort Street Union Depot Company accepts your proposition to do such work for the sum of sixteen hundred and eighty ($1,680) dollars.

Yours truly, CHAS. H. ELLIS,
Ch'f Eng'r Fort St. Depot Co.

EXHIBIT E.

Office of board of public works.

DETROIT, *Aug.* 6, 1891.

Permit to Occupy Street with Building Material.

To whom it may concern:

Detroit bridge and iron works has permission to occupy not more than half of River St., bet. M. C. R. R. and 12th St., 60 days, with building material, under the ordinance.

JACOB GUTHARD, *President.*

Colored lights required, and gutters must be left open.

1503 EXHIBIT F.

By Ald. THOMPSON:

"Resolved, That the Fort Street Union Depot Company be and is hereby granted permission to construct a lateral sewer in River street, under the supervision of the board of public works, from a point fifty feet east of Twelfth street to a connection with the Eleventh Street sewer, said sewer to replace the one now in use, and which is directly under the line of the foundations to be built by said company under its ordinance, said company to make all connections with new sewer in place of present connections with old sewer."

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, *et al.*

STATE OF MICHIGAN, *County of Wayne,* } *ss:*

Eugene Charest, being duly sworn, upon his oath says, that he was one of the jurors that sat in this case and rendered a verdict assessing damages, on July 17, 1891, therein.

Deponent further says that the jury were out between six
1504 and seven hours, and that for most of that time at least ten of the jurors had agreed upon the amount of damages as subsequently rendered.

Affiant further says, that after luncheon was served, between 9 and 10 o'clock at night, twelve pint bottles of lager beer were brought into the jury-room.

Affiant further says, that the verdict as rendered had been agreed upon by every juror before the beer arrived, and before any part of

it was drank, and before it came to the room where the jury were, and that the verdict was not changed in any manner or form in the slightest degree after the beer arrived.

And further affiant saith not.

EUGENE CHAREST.

Subscribed and sworn to before me this 24th day of September, A. D. 1891.

PHIL. M. COFFIN,
Notary Public, Wayne County, Mich.

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, *et al.*

STATE OF MICHIGAN, } ss:
County of Wayne, }

Patrick H. Hickey, being duly sworn, upon his oath says that he was one of the jurors that sat in this case and rendered a verdict assessing damages on July 16, 1891, therein.

1505 Affiant further says that the jury were out between six and seven hours, and that for most of that time at least ten of the jurors had agreed upon the amount of damages as subsequently rendered.

Affiant further says that after luncheon was served, between nine and ten o'clock at night, twelve pint bottles of lager beer were brought into the jury-room.

Affiant further says that the verdict as rendered had been agreed upon by every juror before the beer arrived, and before any part of it was drank, and before it came to the room where the jury were, and that the verdict was not changed in any manner or form in the slightest degree after the beer arrived, except to write down the figures to present to the court.

This affiant further says that he drank none of said beer.

And further affiant saith not.

PATRICK H. HICKEY.

Subscribed and sworn to before me this 25th day of September, A. D. 1891.

BENJAMIN S. WARREN,
Notary Public, Wayne County, Mich.

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, *et al.*

STATE OF MICHIGAN, *County of Wayne,* } ss:

William M. Quinby, being duly sworn, upon his oath says that he was one of the jurors that sat in this case and rendered a verdict assessing damages on July 16, 1891, therein.

Affiant further says that the jury were out between six and seven hours, and that for most of that time at least ten of the jurors had agreed upon the amount of damages as subsequently rendered.

Affiant further says that after luncheon was served, between nine and ten o'clock at night, twelve bottles of lager beer were brought into the jury-room.

Affiant further says that the verdict as rendered had been agreed upon by every juror before the beer arrived, and before any part of it was drank, and before it came to the room where the jury were, and that the verdict was not changed in any manner or form in the slightest degree after the beer arrived, except to write down the figures to present to the court.

And further affiant saith not.

WM. M. QUINBY.

Subscribed and sworn to before me this 25th day of September, A. D. 1891.

BENJAMIN S. WARREN,
Notary Public for Wayne County, Mich.

1506 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, *et al.*

STATE OF MICHIGAN, *Wayne County,* } ss:

John Kelly, being duly sworn, deposes and says that he was one of the jurors that sat in this case, and rendered a verdict assessing damages, on July 16, 1891, therein.

Affiant further says that the jury were out between six and seven hours, and for most of that time at least ten of the jurors had agreed upon the amount of damages, as subsequently rendered.

Affiant further says that after luncheon was served, between nine

and ten o'clock at night, twelve pint bottles of lager beer were brought into the jury-room.

Affiant further says that the verdict as rendered had been agreed upon by every juror before the beer arrived, and before any part of it was drank and before it came to the room, to the best of his remembrance, where the jury were, and that the verdict was not changed in any manner or form in the slightest degree after the beer arrived, except to write down the figures to present to the court.

And further affiant saith not.

JOHN KELLY.

Subscribed and sworn to before me this 25th day of September, A. D. 1891.

BENJAMIN S. WARREN,
Notary Public for Wayne County, Mich.

1507 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, *et al.*

STATE OF MICHIGAN, *Wayne County,* } ss:

Patrick Spillane, being duly sworn, upon his oath says, that he was one of the jurors that sat in this case and rendered a verdict assessing damages, on July 16, 1891, therein.

Affiant further says that the jury were out between six and seven hours, and that for most of that time at least ten of the jurors had agreed upon the amount of damages as subsequently rendered.

Affiant further says that after luncheon was served, between nine and ten o'clock at night, twelve pint bottles of lager beer were brought into the jury-room.

Affiant further says that the verdict as rendered had been agreed upon by every juror before the beer arrived, and before any part of it was drank, and before it came to the room where the jury were, and that the verdict was not changed in any manner or form in the slightest degree after the beer arrived, except to write down the figures to present to the court.

Affiant further says that he drank none of said beer.

And further affiant saith not.

PATRICK SPILLANE.

Subscribed and sworn to before me this 25th day of September, A. D. 1891.

BENJAMIN S. WARREN,
Notary Public for Wayne County, Mich.

1508 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, *et al.*

STATE OF MICHIGAN, *County of Wayne,* } ss:

Joseph C. Wallich, being duly sworn, upon his oath says that he was one of the jurors that sat in this case and rendered a verdict assessing damages on July 16, 1891, therein.

Affiant further says, that the jury were out between six and seven hours, and that for most of that time at least ten of the jurors had agreed upon the amount of damages as subsequently rendered.

Affiant further says that after luncheon was served between nine and ten o'clock at night, twelve pint bottles of lager beer were brought into the jury-room.

Affiant further says, that the verdict as rendered had been agreed upon by every juror before the beer arrived, and before any part of it was drank, and before it came to the room where the jury were, and that the verdict was not changed in any manner or form in the slightest degree after the beer arrived, except to write down the figures to present to the court.

And further affiant saith not.

JOSEPH C. WALLICH.

Subscribed and sworn to before me this 25th day of September, A. D. 1891.

BENJAMIN S. WARREN,
Notary Public for Wayne County, Mich.

1509 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, *et al.*

STATE OF MICHIGAN, *County of Wayne,* } ss:

Christian M. Traub being duly sworn, deposes and says that he was one of the jurors that sat in this case and rendered a verdict assessing damages on July 16, 1891, therein.

Affiant further says that the jury were out between six and seven hours and for the most of that time at least ten of the jurors had agreed upon the amount of damages as subsequently rendered.

Affiant further says, that after luncheon was served between nine and ten o'clock at night, twelve pint bottles of lager beer were brought into the jury-room.

Affiant further says that the verdict as rendered had been practically agreed upon by every juror before the beer arrived, and before any part of it was drank, and before it came into the room where the jury were; it is this affiant's best remembrance, although he may be mistaken on this point, that the amount agreed upon as damages by the jury was changed from $101,000 to $96,000 after the beer was received into the jury-room, but affiant is positive that the amount of the verdict was not raised after the receipt of the beer, but if changed at all was lowered as aforesaid.

And further affiant saith not.

C. M. TRAUB.

Subscribed and sworn to before me this 25th day of September, A. D. 1891.

BENJAMIN S. WARREN,
Notary Public, Wayne County, Mich.

1510 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, *et al.*

STATE OF MICHIGAN, *County of Wayne,* } ss:

Maxime J. Rivard, being duly sworn, deposes and says that he was one of the jurors that sat in this case and rendered a verdict assessing damages on July 16, 1891, therein.

Affiant further says that the jury were out between six and seven hours, and for most of that time at least eight or ten of the jurors had agreed upon the amount of damages as subsequently rendered.

Affiant further says that after luncheon was served, between nine and ten o'clock at night, twelve pint bottles of lager beer were brought into the jury-room.

Affiant further says that the verdict as rendered had been agreed upon by every juror before the beer arrived, and before any part of it was drank, and before it came to the room where the jury were, and that the verdict was not changed in any manner or form in the slightest degree after the beer arrived, except to write down the figures to present to the court.

And further affiant saith not.

M. J. RIVARD.

Subscribed and sworn to before me this 26th day of September, A. D. 1891.

BENJAMIN S. WARREN,
Notary Public, Wayne County, Michigan.

1511 STATE OF MICHIGAN:

Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., & SONS and Others, Respondents.

Proceedings to condemn a right of way for an elevated railroad in and along River street, in the city of Detroit.

Mr. Fred. A. Baker appeared as counsel for petitioner, and Mr. Don M. Dickinson and Mr. J. Logan Chipman as counsel for respondents.

Opinion of Judge Geo. Gartner.

The petitioner is a corporation organized under the provisions of act No. 244, Laws of 1881.

For the purpose of acquiring certain rights of respondents
1512 in and along River street, in the city of Detroit, the petitioner filed its petition in this court, whereupon such proceedings were had resulting in the impaneling of a jury before whom the matter was presented, and who made and signed a report finding that a taking is necessary for public use, and awarding to respondents $96,144.00 compensation.

The report of the jury was on the 16th day of July, 1891, presented to this court and filed.

A motion was made by the petitioner to vacate and set aside the verdict, award and report of the jury, and to grant a new trial, alleging, substantially, the following reasons:

1. In that the jury were not attended by a judge of this court, or by a circuit court commissioner, to decide questions of law, and administer oaths to witnesses.

2. In that the attorney for the respondents did improperly, erroneously and falsely claim and pretend to and before said jury that the petitioner, The Fort Street Union Depot Company, has power under the statutes of this State to condemn a right of way for an elevated railroad along the margin of the property of the Michigan Central Railroad Company on the south side of River street, and for that reason the jury ought to find that there is no public necessity for taking a right of way in, upon and along said River street for the elevated railroad proposed by the petitioner, and thereby said attorney did, by repeated arguments and assertions, to and before said jury, convince a number of said jury that the property of the Michigan Central Railroad Company could be condemned by the petitioner under existing statutes, so that when said jurymen came to yield on the question of necessity, they were so biased and prejudiced against the petitioner that they insisted upon the most extravagant, exorbitant and grossly excessive damages, to the great wrong and injury of petitioner.

1513 3. In that the jury erroneously refused to receive certain testimony.

4. In that the damages awarded to respondents are (*a*) grossly extravagant, exorbitant and excessive; (*b*) are so excessive, unwarranted and unjust as to show that the jury were actuated by passion or prejudice, and (*c*) are unwarranted by and against the weight of evidence.

5. In that the jury, while deliberating upon their verdict, were, without the consent of the court, supplied with twelve quarts of beer.

6. In that the proceedings are in other respects irregular, illegal and unjust.

The respondents (*a*) entered a motion for the confirmation of the report of the jury, (*b*) object to and protest against any consideration of said motion of petitioner, either by the court or judge, on the ground of want of jurisdiction or authority to review, reverse or vacate the verdict, award and report of the jury, and (*c*) allege that since the filing of the verdict, award and report, the petitioner has entered upon and possessed the said property which was the subject-matter of the proceedings so begun and instituted by the petitioner.

I shall not consider these motions and the various allegations therein contained in the order here presented, as a consideration of one necessarily involves and disposes of others; and whether the allegations contained in the motion of petitioner be regarded as causes for a new trial, or treated merely as objections to the confirmation of the award and report of the jury, will make but little, if any difference.

The statute provides that after the jury are selected and have taken and subscribed an oath prescribed by article eighteen
1514 of the constitution, that they will justly and impartially ascertain and determine the necessity of taking and using the lands, franchises or other property sought to be condemned, and, if necessary, determine the just compensation to be made therefor, they may proceed to view the premises, issue subpœnas, administer oaths to witnesses, hear the proofs and allegations of the parties, if requested, reduce the testimony to writing, and at the close of which, without unreasonable delay, determine the questions of necessity, make and sign a report to the court or judge of the proceedings before them which may be filed. (See sections 8 and 9.) It is further provided that the judge before whom the proceedings are brought, or a circuit court commissioner to be designated by him, may attend said jury to decide questions of law and administer oaths to witnesses, and he may appoint the sheriff or other proper officer to attend and take charge of said jury while engaged in said proceedings.

"On such report being made by the jury, the court, on motion, shall confirm the same on the next or any subsequent day when in session, unless for good cause shown by either party. * * * Said court, as to the confirmation of such report, shall have the power usual in other cases." (Sec. 10.)

Under the constitution of 1835, art. 18, sec. 9, the State could not lawfully take and hold the property of a citizen without just com-

pensation. The mode of taking, however, the manner of inquiry and the kind of tribunal to determine the question, were all subjects of legislative action and control, and legislative action upon the subject was not restricted by any constitutional inhibition. (The People *ex rel. vs.* M. S. R. R., 3 Mich., 496.)

1515 The power of the legislature was, by the constitution of 1850, limited and restricted, art. 18, sec. 2, and which provides: "When private property is taken for the use and benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property," etc.

The questions of necessity and compensation are for the jury, and not in any way subject to legislative interference, and while the manner of procedure may be and is prescribed by statute, still any statute upon the subject, which fails to observe and provide for every constitutional safeguard, would be inoperative and void.

In Powers' appeal, 29 Mich., 510, the court say: "Where the constitution is so imperative, no legislation can be maintained which does not plainly require the question to be left to the jury. Their finding, without such requirement, is not within their oaths, and is extra-judicial. The oath is the measure and limit of their legal action, and it is impossible to say that property has been taken by due process of law unless the statutes provide expressly for every constitutional safeguard framed to govern such action."

See also The People *ex rel. vs.* Brighton, 20 Mich., 57.

In M. C. & L. M. R. R. Co. *vs.* Clark, 23 Mich., 524, the court, after referring to the constitutional provision, says: "Under the provision no use can be deemed public upon the mere assumption by interested parties that it is so; and a finding that the taking is needful to the proposed enterprise is not the same as a finding that it is for the use and benefit of the public. The report of the jury

1516 must distinctly cover this point in every case; and they cannot properly make one which will warrant the taking of land unless satisfied not only that the particular land is needed for the construction of the work, but also that the work itself is one of public importance."

See also G. R. N. & L. S. R. R. Co. *vs.* Van Driele, 24 Mich., 409.

In McClary *vs.* Hartwell, 25 Mich., 140, an act was held as coming within the constitutional prohibition, the court say: "The act of 1865 appears to have wholly misapprehended or overlooked this provision, for it contains no requirement that the necessity for the taking shall be passed upon, nor did the order of the court, appointing commissioners in this case, direct them to consider that subject, nor did they consider it in fact. It would seem, therefore, that the proceedings must be wholly ineffectual.

"The constitution contemplates the possibility that a disposition may at some time exist to seize property for public uses without any need whatever, and it has guarded against it by providing for an impartial tribunal, to whom the question of necessity shall in every case be submitted. The finding of necessity cannot in any in-

stance be dispensed with, nor can anything be accepted as a substitute for it."

Whatever may be said of necessity is equally applicable to compensation. Both are imperatively made by the constitution questions to be determined by a jury of freeholders. It is a function which neither the State nor any of its governmental departments can exercise, whether the provision of the constitution in this particular be regarded as a grant or a limitation of powers to be exercised by the State. This is a right granted to or reserved by the citizen whose property may be sought to be taken, and the
1517 right to demand and have a jury pass upon and determine these questions is as absolute as any right can be under a constitutional government. The consideration of this question became necessary, as it is incidentally applicable to questions arising and hereinafter considered. In a logical analysis of the statute, it is the principal and first question to be determined. That the legislation upon the subject of condemnation is capable of vast improvement, that the present system is not suitable to our system of jurisprudence in this State, and that it may in instances result in great injustice being done, is beyond controversy. These are, however, subjects not under judicial control or correction. We must deal with the condition of matters as we now find them, and apply and construe the law as the legislature in their great wisdom has seen fit to enact. In Tol., A. A. & G. T. R. R. *vs.* Dunlap, 47 Mich., 461, the court say: "The statute is evidently framed in accordance with the laws of some other States, where the judicial power is not parceled out as it is here, and some complications have been caused by this practice which introduce difficulties. * * * It is greatly to be regretted that this species of legislation has been so very carelessly framed."

See also G. R. L. & D. R. R. *vs.* Chesebro, 74 Mich., 471.

The procedure under the statute is special, and not strictly speaking a judicial proceeding. The rules governing proceedings judicial in their character are not to that extent applicable so as to govern and control the procedure before this so-called special tribunal which the constitution has created and the procedure before whom the statute is contemplated to regulate. Under our system the regular exercise of judicial power is vested in certain courts, and those functions which courts exercise, as well as the rules
1518 appertaining to and governing judicial procedure at *nisi prius*, are not applicable to proceedings before this special tribunal, which is governed by different considerations, and whatever power courts or judges can exercise in these matters is dependent upon statutory authority or enactment, and no authority or power is given to or can be exercised by a court or judge, unless expressly provided by statute. The proposition involves, first, the nature and functions of this special tribunal, and, secondly, the power or jurisdiction of the court or judge to review or set aside the action of the jury. These questions are so interchangeable that they may be properly considered together. Referring again in this connection to the statute, it is provided that failure or neglect to

pay the award shall be deemed as a waiver and abandonment to acquire any rights, and further, "within twenty days after the confirmation of the report of the commissioners or jury, as above provided for, either party may appeal, by notice in writing to the other, to the supreme court, from the appraisal or report of the commissioners or jury; such notice shall specify the objections to the proceedings had in the premises, and the supreme court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived; such appeal shall be heard by the supreme court at any general or special term thereof, on notice thereof being given according to the rules and practice of the court. On the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion. The second report shall be final and conclusive upon all parties interested. If the amount of the compensation to be allowed is increased by the second report, the difference shall be a lien on the land appraised, 1519 and shall be paid by the company to the parties entitled to the same, or shall be deposited as the court shall direct; and in such case all costs of the appeal shall be paid by the company; but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing. On the filing of the report, such appeal, when made by any claimant of damages, shall not affect the said report as to the right and interests of any party, except the party appealing; nor shall it affect any part of said report in any case, except the part appealed from; nor shall it affect the possession of such company of the land appraised; and when the same is made by others than the company it shall not be heard except on a stipulation of the party appealing not to disturb such possession during the pendency of such proceedings."

See Railroad Laws, 1890, p. 88.

The power of the court to amend defects or informalities in the proceedings is also specially provided for. (Sec. 13.)

In Peninsular R. R. Co. *vs.* Howard, 20 Mich., 18, the maxim "that no man shall be a judge in his own case," was held applicable in this proceeding; that the jury were, in effect, judges, in the absence and beyond the control of the court, and that there was no authority in the act for the judge to accompany or preside over the jury in their action.

In Mich. Air Line R. R. *vs.* Barnes, 44 Mich., 226, the court say: "When the law provided how the tribunal should be constituted for these cases, and prescribed the method to be observed, it obviously contemplated that the practice respecting the admission of testimony should be as simple as a due regard to substantial justice would permit. It 1520 was not intended to leave the fate of the determination had in view to any fine-spun theories, or to the refinements which are not uncommon in trials at the circuit. They were not supposed to be necessary to the fundamental purpose or beneficial

workings of inquests of this nature, and no provision was made for the certain attendance of any one presumptively qualified to deal with them. The statute plainly assumes that the jury may conduct the inquiry without the aid of any legal expert, and under circumstances in which it would be difficult, if not impracticable, to preserve technical or hair-drawn questions in a shape to be reviewed, and were the niceties of *nisi prius* to be insisted on, the proceedings would speedily break down under the perplexities and embarrassments due to its own methods. The conclusions to which these and other considerations had is that a very large discretion in admitting and rejecting testimony is left to the jury, or the attending officer, whenever there is one, and that when the case is brought here by appeal, the award cannot be disturbed on account of such decisions, unless it is fairly evident, in view of the facts and circumstances, that the ruling was not only inaccurate, but was a case of substantial injustice to the appellant in the matter of the result."

It is difficult to understand what is meant by the court in speaking of the rulings of "the attending officer." This reference is certainly inconsistent with what is said in discussing the power of the jury.

In Tol., A. A. R. R. *vs.* Dunlap, 47 Mich., 462–'6, the court say: "Under our constitution, such powers as are strictly judicial in their character, can only be vested in certain courts which are named in the constitution itself. The circuit courts, as 1521 courts, have such powers. The judges, as judges, out of court, do not possess them, and cannot be vested with them.

"The proceedings to condemn lands, although made under the railroad laws, subject to judicial review and supervision, for certain purposes, are not in themselves and never have been regarded as judicial proceedings. Our constitution allows them to be conducted by highway commissioners in some cases, and by specially appointed commissioners or juries of freeholders. The inquiry in this State, as elsewhere, is an appraisal or estimate of values, and not a contest on litigious rights, and includes what is not elsewhere included, an inquiry into the necessity of the proposed taking for public purposes, which was never made by courts, but always heretofore by the legislature, or some unjudicial body of its creation. Had it not been for the specific provisions in our constitution, the State could have provided for these inquiries to be made by any medium it might select. Our present system is better calculated than the old one, if fairly applied, to secure the rights of landowners. But the nature of the proceedings remains as before, a special proceeding by a temporary tribunal selected for the occasion, and not a judicial proceeding in the ordinary sense.

"As provided for under the railroad laws, there are certain proceedings in court to select a jury, and subsequent proceedings to determine whether the action of the jury should be sustained. Beyond this the courts have no part in the matter, * * * no difficulties should have arisen to confound these functions."

In this case the circuit judge attended the sittings of the jury,

admitted and excluded testimony, and charged the jury precisely as on a trial. In this connection the court say:

1522 "The judge formed no part of this special tribunal. The statute, indeed, allows the judge to 'attend said jury to decide questions of law and administer oaths to witnesses;' but the same statute which allows this allows him to designate a circuit court commissioner for the same purpose, and also allows the jury to proceed without either. Whatever the language of this statute literally construed may mean, it is very clear that any such functions must, at most, be advisory. The jury will undoubtedly be regarded as accepting and doing what they permit to be done. But in all such cases the constitution as well as the principles of the common law makes them judges of law and fact. Their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, quite as much as the testimony of witnesses to matters of opinion. And while an appellate court is bound, in such cases, to set aside proceedings which appear to be based on false principles, it cannot properly deal with rulings as if they were excepted to on a common-law trial, or dispose of the controversy on merely technical notions.

"While the language of the charge of the judge is certainly ambiguous and open to criticism, yet it appears distinctly that the jury regarded, not merely the necessity of the land if the road should be laid out, but also the importance of the road itself. We cannot say from an inspection of the record that there is any prevailing reason for holding that the jury were misled in their conclusions."

Where the jury are the judges of the law and fact, misdirection of the court to the jury cannot be assigned as error. (Chamberlain *vs.* Brown, 2 Doug., M., 120.) See also Det., West. Trans. &

1523 Junc. R. R. *vs.* Crane, 50 Mich., 182, where the principle of Mich. Air Line R. R. *vs.* Barnes, and Tol., A. A. R. R. *vs.* Dunlap, are cited and affirmed. All these cases were also cited and affirmed in P. H. & S. R. R. *vs.* Voorheis, 50 Mich., 510, and wherein the court say:

"The proceedings in this class of cases are special, and bear little resemblance to ordinary legal trials. The law contemplates simplicity, as far as possible, in regard to the practice. The jury, unaided by counsel or parties, may conduct the inquests, and a very large discretion must necessarily be left to the commissioners or officers accompanying them in receiving or rejecting testimony. The strictness of *nisi prius* practice is not in accordance with the spirit or policy of the law."

The same misapprehension in the language used by the court occurs in this case as in Peninsular R. R. Co. *vs.* Howard, *supra.*

In F. & P. M. R. R. *vs.* D. & B. C. R. R., 64 Mich., 363, the court, following the principle laid down in the cases above cited, held that it was not error in the court refusing to instruct the commissioners that while the court might have done so had it thought proper, still it is not a duty imposed by law, and that its instructions would not

have been binding upon the commissioners had it done so. The same must logically follow as to any ruling the court might make upon the receiving or rejecting of testimony.

In G. R. L. & D. R. R. *vs.* Chesebro, 74 Mich., 470, the judge acted as though he had been a *nisi prius* judge presiding over a common-law jury directing the testimony to go before them, and on what theories of damages. The court hold that it is a very serious question whether the constitution will suffer a jury of inquest to
1524 act as a court of common-law jurisdiction under the conditions applicable to other juries; but that such had not been attempted; that a jury of inquest forms no part of the machinery of and is not a court; that the jury cannot be made subject to any instruction, but must act in their own judgment, and that, "when the award comes up for confirmation, it may be attacked for irregularity or impeached on the merits in various ways, as it may be on appeal. But the award is and must be the jury's award, and reached in the jury's own way. If the jury see fit to accept the rulings which are wrong, and act on them, their action will be reviewed accordingly, but as their own and not as the attending magistrate's ruling."

See also—

T. S. & M. R. R., 83 Mich., 31, and
Fort Street Union Depot Co. *vs.* Jones, *id.*, 415.

From an analysis of the cases cited the rule succinctly stated is as follows:

The tribunal provided by the constitution and statute is special in its character. The proceeding before it is not a judicial proceeding. The jury is a jury of inquest, and as such, judges of the law and fact. The inquiry is confined to the questions of necessity and compensation, and is in no way a contest on litigious rights; the proceedings are under the absolute control of the jury, who are not bound to follow the advice or rulings of the court. The court has no power or authority except such as is expressly given by the statute, and that no power or authority is by the statute given the court after the jury have been impaneled and sworn, until after the presentation to the court of their report and the filing thereof. The judge, or a commis-
1525 sioner to be appointed by him, having no authority under the law, and his action, if in attendance before the jury, being merely advisory, it necessarily follows that there is no force in the objection now made based upon the non-attendance of a judge or commissioner to decide questions of law and administer oaths to witnesses. Besides, the petitioner having proceeded before the jury without objection, the same would have to be, if for no other reason than this, treated as waived. It is contended by respondents that this court has no jurisdiction or authority to review, reverse or vacate the verdict, award and report of the jury. This proposition brings up the question as to what authority, if any, is given the court by the statute. The statute provides that the court on motion shall confirm, "unless for good cause shown by

either party," and as to the confirmation of the report the court has the power usual in other cases. The setting aside of the report necessarily involves a new appraisal, and it is contended that this can only be done on appeal. There is considerable force in this objection especially in view of the provision of the statute to the effect that in case of a new appraisal the second report shall be final and conclusive upon all parties interested. The grounds stated in petitioner's motion are the same which on appeal would be treated as objections to the order of confirmation and should this court refuse to confirm upon the reason and grounds stated in the motion, it would be doing that which the appellate court could do for the same reasons on appeal, and I see no reason why this provision of the statute is not applicable to the action of this court, and that in case of a new trial being ordered by this court precisely the same results would follow. The various provisions of
1526 the statute upon the question of condemnation must be taken as a whole, and its scope and object gathered from its various parts in arriving at the legislative intent.

Washburn *vs.* People, 10 Mich., 384.

The question, however, as to the power of this court to set aside the report of the jury has been adjudicated in this State. In M., H. & O. R. R. *vs.* Probate Judge, 53 Mich., 217, a motion was made to set aside the finding and report of commissioners, alleging various grounds. The motion was denied and an order entered confirming the report. Upon an application for a mandamus the supreme court say: "The motion made by the petitioner to set aside the report was one proper to be made, and, if substantiated, would have furnished sufficient grounds for setting aside the report. The probate court has authority to set aside the report of commissioners for good cause shown."

In P. H. & N. W. R. R. *vs.* Callanan, 61 Mich., 14, the court say: "The confirmation of a report in these cases is not a matter of strict right upon a regular record. If substantial reasons are shown against it by facts not in the record itself, the court has power to do justice and refuse confirmation, and on appeal the same power exists." And if sufficient cause is shown against the confirmation the report or proceedings should be set aside. (Penn. R. R. *vs.* Howard, 20 Mich., 24.)

It is further contended that since the filing of the verdict, award and report of the jury, the petitioner has entered upon and possessed the property and premises, the subject-matter of the proceedings so instituted by the petitioner, and it is claimed by reason thereof petitioner has waived its right to object to the confirmation of the award.

1527 This claim is founded upon certain affidavits filed at the hearing, and which are as follows:

First, made Sept. 5, 1891.

"D. Farrand Henry, being duly sworn, upon his oath saith that he is, and has been for a period of fifty years last past, a resident of

the city of Detroit. That he is a civil engineer by profession, and has practiced as such for forty years. Affiant further saith that at the request of Absalom Backus, Jr., on the 5th day of September, A. D. 1891, he examined the work of the petitioner, The Fort Street Union Depot Company, in front of and adjacent to the property of the respondents, Absalom Backus, Jr., and A. Backus, Jr., & Sons, upon River street. The property referred to is two hundred thirty-eight and a half (238½) feet front on the north side of River street and abutting thereon, and is occupied by the planing mill and yards of A. Backus, Jr., & Sons. That the structure of the petitioner, consisting of an elevated railway upon trestles with posts, cross-girders, longitudinal girders, ties and rails, and embracing two tracks at that point, and evidently constructed for three tracks beyond that point to the east, appears to be completed in the street up to near the west line of the Backus property aforesaid, and where so completed spans the highway known as River street. That the process of construction of the said work extends in front of and beyond the Backus property to the east and toward the center of the city along and upon said street beyond the crossing of the Michigan Central railroad. That immediately in front of the Backus property aforesaid, upon said street, affiant finds the following structure, material and conditions in connection with said construction: In front of the said Backus property upon
1528 said street, nine feet and six inches from the south line of said street, measured to the center of the excavation, there have been excavations for the foundation of seven stone piers, and in these excavations there have been already laid permanent stone piers with concrete, extending, as affiant should judge, six feet below the surface and surmounted by a permanent iron base for iron columns, which iron base on all of said piers is above the grade of the street. That there are seven excavations in front of the said Backus property, and the depth of each is of the dimensions of about eight feet in length, as the street runs, and five or six feet across, and extending into the street toward the Backus property about fifteen feet from the south line of said street. These excavations have been once filled, but the grade has not been restored and the depression is such as to render the grade of the surface impassable for teams or the uses of a highway.

North of said stone piers and over them is a double-trestle structure extending from the south line of said street twenty-four feet north toward the Backus property and along the entire front of said property. That upon each part of said double structure there are iron longitudinal girders with ties, and a portion of the same is ironed with rails. At present this double structure is supported by wooden posts. Along the said street there is strewn material for the construction of said elevated railroad. All the longitudinal girders of the entire structure are three feet nine inches deep. West of the property where the structure is completed the cross-girders are four feet five inches in depth. Those laid out and ready to be laid opposite this property are five feet ten inches in depth, which

would leave, when the structure is completed, about thirteen
1529 feet clear. Over the Michigan Central Railroad crossing the girders are halved or boxed in so as to give more head room.

Affiant further saith that also in front of the said property and between the said double structure and the north curb-line of said street, immediately adjacent to the Backus property and within twelve or fifteen feet from the north line of the street, which is the Backus line, there is an excavation, extending throughout the whole front of the Backus property, of the depth of about four or five feet, which has been loosely filled in, but the grade not restored, and there is now a depression throughout its entire length, rendering the street impassable as a highway, so that with the said structure as above described and the said excavation the entire front of the Backus property has been so appropriated as to be rendered useless as a highway from curb to curb."

Second, made Sept. 5, 1891.

"Absalom Backus, Jr., being duly sworn, upon his oath saith that he is one of the above-named respondents. That the verdict of the jury in this matter was filed with the court on the 16th day of July, A. D. 1891. That on the 17th day of July, A. D. 1891, in the absence of the respondents and of their attorney and counsel, this court, or a judge thereof, made an order granting a stay of proceedings in this matter for a period of thirty days, on the application of the petitioner, to enable the petitioner to move for a new trial, which has been presented. That immediately after the granting of said stay of proceedings, and after the filing of the report of the jury in this matter, the petitioner entered upon the premises of the respondents, Absalom Backus, Jr., and A. Backus, Jr., & Sons,
1530 described in the petition in this matter, to wit, the property of the said respondents and their easement in River street, on which their planing-mill property for a frontage of 238½ feet abuts, and have proceeded to possess themselves of said property and to erect a structure for an elevated road, as proposed in their said petition, and now maintain the structure and obstruction in said street in front of the said premises, as stated in the affidavit of D. Farrand Henry, Esq., which affiant has read, and which is herewith filed.

Affiant further saith that by its acts and doings in the premises, the petitioner has appropriated the said River street in front of the said premises and obstructed and destroyed the use of the same by respondents, and has, by the erection of the said structure, so darkened the said planing mill as to materially interfere with the carrying on of its business, all of which acts and doings have been done by the said petitioner without the consent of said respondents or any of them, and against their repeated protests expressed to the agents of the petitioner in charge of the work.

Affiant further saith that the excavation extending the entire length of the said premises, and which is referred to in the said affidavit of Mr. Henry, was made under the direction of and by the employees of the said petitioner."

Third, made Sept. 21, 1891.

"D. Farrand Henry, being duly sworn, upon his oath says that on Saturday last, the 19th inst., he visited and examined River street in front of A. Backus, Jr., & Sons' mills; that he finds the Union Elevated Railroad structure is fully in place up to lines run across the street from the east to the west line of the Backus
1531 property, and is permanently built and constructed, spanning the entire street up to those lines. That in addition to the conditions immediately in front of the Backus property described in his previous affidavit, affiant finds that the holes left round the foundations for the piers on the southeast line of the street have been loosely filled, but a wheel would easily sink into them, but the depressions in the pavement on the north half of the street where the sewer was built have not been changed, so that part of the street is very bad for heavy teaming. That he finds in addition that the south fence has been removed and part of the heavy iron girders have been placed along the wooden posts in the middle of the street, and that a lot of building stone has been corded up on the south half of the street commencing at the post about thirty feet east of the west line of the Backus lot, and is being built out west, completely filling the space between the foundations for the south line of piers and the central line of posts, and thus blocking the south half of the street and forcing all travel into the north half."

Opposed to the showing so made, the petitioner filed the following affidavit, made Sept. 14, 1891, viz:

"Charles H. Ellis, being duly sworn, deposes and says that he resides in the city of Detroit. That his occupation is that of a civil engineer, and that he is the engineer of the Fort Street Union Depot Company, and has the supervision and charge of the work of constructing an elevated road, or viaduct, along River street, in the city of Detroit for that company. That the contract for doing said work was let to the Detroit bridge and iron works, a corporation located in the city of Detroit. That said elevated railroad, or viaduct, has been constructed from Twelfth
1532 street to the west line of the property known as the Backus planing mill and box factory, and also from the east line of said property to a point nearly across the tracks of the Michigan Central Railroad Company. That said elevated railroad has not been constructed, and no attempt has been made to construct the same in front of the property of said respondents. That, on the contrary, the Fort Street Union Depot Company, at a large expense, made a contract with the said bridge and iron works, in its progress along the street, to go around the Backus property. That on the 17th day of July, 1891, the day after the verdict was rendered in this case, this deponent was advised by F. A. Baker, the attorney for the Fort Street Union Depot Company, not to construct said elevated railroad in front of the Backus property until further orders, but to go by or around said property; and on or about the 23d day of July, 1891, this deponent received a letter from said

Baker, dated Duluth, July 21, 1891, a copy of which is annexed as Exhibit A. That on the 20th day of July, 1891, this deponent, as the engineer of the Fort Street Union Depot Company, wrote a letter to J. W. Schaub, the engineer of the Detroit bridge and iron works, a copy of which letter is annexed as Exhibit B. That on or about the 23d day of July, 1891, this deponent received from said Schaub a reply, a copy of which is hereto annexed as Exhibit C. That this deponent accepted said proposition in a letter to said Schaub, dated July 23, 1891, a copy of which is annexed as Exhibit D. That upon the 6th day of August, 1891, the board of public works of the city of Detroit granted a permit to the Detroit bridge and iron works to occupy not more than half of River street between the Michigan Central Railroad tracks and Twelfth street, sixty
1533 days with building material, under the ordinance of the city of Detroit on that subject, to which reference is hereby made, and a copy of said permit is hereto annexed as Exhibit E. That in pursuance of the contract so made and the permit so granted, the Detroit bridge and iron works built a temporary trestle, supported by wooden posts, with which to carry its traveling derrick and crane around and by the Backus property. That said trestle is located entirely on the south half of said River street, and not at all on the half of the street adjacent to the Backus property, and the same does not in any way interfere with the use of said street in front of said property. That the only work of a permanent nature that has been done in any part of the street in front of the Backus property is that of putting in the foundations along the south curb-line of said street for the posts of the proposed elevated railroad. That said foundations are wholly beneath the surface of the street, and no foundations have been put in on the north curb-line in front of said property; that in putting in said foundations on the south curb-line it was necessary to make an excavation for each post about ten feet square and eight feet deep, and to drive nine piles in the bottom for the support of a concrete foundation and stone cap, about six feet deep. That the work of making said excavations on the south curb-line opposite the Backus property, and driving the piles therein, was all done between the 26th day of June, 1891, and the 10th day of July, 1891, and before the verdict in this cause was rendered, so that the only work that has been done on said foundations since the verdict has been that of filling said excavations with concrete, putting on stone caps and putting in the castings and rods that are to receive and support the iron posts that are to be hereafter erected
1534 thereon. That the excavation on the north half of said street, referred to in the affidavits of D. Farrand Henry and Absalom Backus, Jr., has no connection with the work or superstructure of the elevated railroad, and the facts in regard thereto are as follows: That the ordinance under which the elevated railroad is being constructed provides that the posts shall stand on the curb-lines. That in making the preliminary borings along the north curb-line of River street, it was found that a lateral sewer was located under said curb-line, and that it would be necessary to move said sewer

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further into the street. That on the 21st day of April, 1891, a resolution was introduced in the common council of the city of Detroit by Ald. Thompson, a copy of which resolution is hereto annexed as Exhibit F. That said resolution was referred to the board of public works, who made a favorable report thereon on the 28th day of April, 1891, and said resolution was thereupon unanimously adopted by the common council. That under the authority contained in said resolution, and subject to the supervision of the board of public works, the Fort Street Union Depot Company caused said new sewer to be constructed in said River street, and said sewer was completed and all connections therewith made before the first day of June, 1891. That the surface of the street was left in good order and repair, and there is no depression therein that in any way interferes with travel along said street. That it was necessary to change said sewer before any foundation could be put in on the north curb of River street, either in front of the Backus property or west thereof. That said sewer could not be built in sections, but was one continuous piece of work, that had to be completed before any portion of the old sewer could be disturbed.

1535 "Deponent further says that the Fort Street Union Depot Company has not, either before or since the verdict in this case, taken possession of or attempted to take possession of the right of way sought to be condemned, but on the contrary has carefully abstained therefrom, as aforesaid."

EXHIBIT A.

DULUTH, MINN., *July* 21*st*, 1891.

Mr. C. H. Ellis, Detroit, Mich.

DEAR SIR: As I understand our conversation, you will go right on with your work going by or around the Backus property, so as to complete the superstructure on each side of that property as soon as the bridge Co. can do the work.

If any legal difficulties arise, by way of injunction or otherwise, wire me at length at Thornhill Farm, Steele, North Dakota.

Yours, F. A. BAKER.

EXHIBIT B.

JULY 20TH, 1891.

J. W. Schaub, Esq., engineer Detroit bridge and iron works.

DEAR SIR: Please give me an estimate of cost of construction of temporary trestle-work in River street in front of the Backus property, upon which to carry your derrick, and also the expense of bringing your derrick back in position to put in the permanent work when the way is clear to do so. I want it to include all the work and material which is not embraced in your contract for construction of viaduct.

1536 If the amount is satisfactory I will accept it at once, and authorize you to proceed on the plan proposed, so as not to have any delay to your work.

Yours truly, CHAS. H. ELLIS, *Ch'f Eng'r.*

EXHIBIT C.

Office of Detroit bridge and iron works.

DETROIT, MICH., *July 22d*, 1891.

Mr. Chas. H. Ellis, ch'f eng'r union depot Co., 297 West Fort St., city.

DEAR SIR: Replying to your valued inquiry of the 20th inst., regarding temporary work to carry traveler:

We will be pleased to furnish all the material and labor to execute the same, in accordance with your requirements, for the sum of sixteen hundred and eighty ($1,680) dollars.

This tender is made with the understanding that you will furnish us a right of way to occupy the south half of River street, directly in front of the Backus property. This right to be in the form of a permit from the city council, to occupy the middle of the street and sidewalk with our temporary work, until the permanent work can be put in position.

Yours truly,

DETROIT BRIDGE AND IRON WORKS.
J. W. SCHAUB.

1537

EXHIBIT D.

JULY 23D, 1891.

J. W Schaub, Esq., engineer Detroit bridge and iron works.

DEAR SIR: I have your letter of 22d inst., inclosing proposal for temporary work for traveler, in answer to my request of the 20th.

The Fort Street Union Depot Company accepts your proposition to do such work for the sum of sixteen hundred and eighty ($1,680) dollars.

Yours truly,

CHAS. H. ELLIS,
Ch'f Eng'r Fort St. Depot Co.

EXHIBIT E.

Office of board of public works.

DETROIT, *Aug. 6th*, 1891.

Permit to Occupy Street with Building Material.

To whom it may concern:

Detroit bridge and iron works has permission to occupy not more than half of River St., bet. M. C. R. R. and 12th St., 60 days, with building material, under the ordinance.

JACOB GUTHARD, *President.*

Colored lights required, and gutters must be left open.

1538 EXHIBIT F.

By Ald. THOMPSON:

"Resolved, That the Fort Street Union Depot Company be and is hereby granted permission to construct a lateral sewer in River street, under the supervision of the board of public works, from a point fifty feet east of Twelfth street to a connection with the Eleventh Street sewer, said sewer to replace the one now in use, and which is directly under the line of the foundations to be built by said company under its ordinance, said company to make all connections with new sewer in place of present connections with old sewer."

The petition contains the following averment, which was not only sustained by the proofs, but the matters so alleged are not disputed:

"That your petitioner has surveyed its depot grounds and the route of its proposed tracks, in the county of Wayne, and made a map and survey thereof, by which said depot grounds and route are designated, and it has located the same according to such survey, and filed a certificate thereof, indorsed on such map and survey, and signed by a majority of the directors of said company, in the register's office of said county of Wayne, to wit, on the 12th day of November, 1889; that before filing said map and survey, to wit, on the 22d day of October, 1889, your petitioner submitted the same to the State railroad crossing board, consisting of the commissioner of railroads, attorney general and secretary of state, for approval, in compliance with section seven of the general railroad law of this State, as amended by act No. 236 of the Public Acts of
1539 1887, p. 294; that thereupon such proceedings were had that afterwards, to wit, on the 8th day of November, 1889, said map and survey was duly approved by said board, and a certificate of such approval indorsed thereon, and said map and survey so certified and approved, now remains of record in the said register's office for the county of Wayne, and to which record reference is hereby made."

From the map and survey referred to and the proofs before the jury, it appears that the elevated railroad is to extend in and along River street from a point near Twelfth street to a point near Eighth street, and that the property of respondents is situated on the north side of River street and has a frontage on that street two hundred thirty-eight and one-half feet.

It further appears by the proofs that the petitioner has acquired from the abutting property-owners nearly all of the right of way along River street; that west of the property of respondents it has acquired all of the right of way, and that long before the verdict in this case was rendered the petitioner was engaged in constructing its elevated superstructure in River street, commencing at Twelfth street, and coming east towards Eighth street; that putting in the foundation for the posts along the north curb-line, west of the property of the respondents, it was found necessary to relocate the lateral

sewer in River street, but this work was done under a resolution of the common council authorizing it, and that it was all finished before the verdict in this case was rendered. When the west line of respondents' property was reached, the petitioner, at an expense of some $1,680, contracted with the Detroit bridge and iron works, who have the elevated railroad construction contract, to go by or around the property of the respondents.
1540 For this purpose a temporary trestle was built on the south half of the street, on which the traveling derrick was carried by the property of respondents, and the work of building the superstructure was resumed on the east line of that property, and it has been continued across the tracks of the Michigan Central railroad and up to the west line of the property of the Peninsular stove works. It also appears that before the verdict was rendered the excavations for the foundations were made in the south curb-line, opposite the property of the respondents, and that the concrete foundations and capstones and iron rods have been put in since then, but it does not appear that this was done for the purpose of taking possession, as the act itself was nothing more than a filling up of the holes that had been previously made. The temporary trestle was placed on the south half of the street, under and by virtue of the authority of a permit of the board of public works of the city of Detroit, authorizing the company to occupy half of River street with building material, under the city ordinance on that subject. The whole course of the petitioner shows, beyond serious question, that it had no desire to encroach upon the legal rights of the respondents, and that it has attempted to go as far as it had legal authority to go, and no further. The petitioner has not been guilty of any act that can be fairly construed as a taking of possession or an acceptance of the verdict and award, against which complaint is made.

That the respondents, as the owners of property abutting on River street, have rights in and to the street, and in the whole width thereof, is beyond question, and whether such right is to the fee or only an easement or right in the nature of an incorporeal hereditament, is not material, it is sufficient to say that such right
1541 exists. Upon this question counsel for respondents in his brief cites the following authorities: Lehr *vs.* Metropolitan Elevated R. R. Co., 104 N. Y., 268; Lamb *vs.* Chicago R. R., 47 N. W. Rep., 455; Pearsall *vs.* Board of Supervisors, 74 Mich., 561; Yates *vs.* Chicago R. R., 48 N. W. Rep., 1040; Adams *vs.* C. B. & N. R., 49 Minn., 286; S. C., 36 Am. & Eng. R. R. Cas., 7, and cases cited in note; Reidinger *vs.* M. & W. R. R., 62 Mich., 29.

The question is thoroughly considered and determined in this State in G. R. & I. R. R. *vs.* Heisel, 38 Mich., 62, and the principle enunciated in the New York elevated railroad cases is applicable to and is the law of this State. See also Taylor *vs.* Bay City Street R. R., 45 N. W. Rep., 335; Lamm *vs.* R. R., 47 N. W. Rep. (Minn.), 455; Detroit City R. R. *vs.* Mills, 48 N. W. Rep., 1007; Gales *vs.* R. R., 48 N. W. Rep., 1040. This question was quite extensively discussed at the hearing, and although not disputed it may not be

out of place to state the principle as laid down in the elevated railroad cases, as the same are applicable in the present proceedings:

(1.) An elevated railroad in the streets of the city, operated by steam power, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation, for the injury inflicted upon the property of abutting owners.

(2.) The easement covers the right of passage over the street and in the bed of the street for ingress and egress to and from the premises and also for the free and uninterrupted passage and circulation of air through and over such street for the benefit of the property situated thereon.

1542 (3.) The ownership of such easement is an interest in real estate, constituting property within the meaning of that term as used in the constitution and requires compensation to be made therefor before it can lawfully be taken from its owner for public use.

Applying such doctrine, it was contended that respondents having the right to the full width of the street, and also the right to the circulation of air, the acts of the petitioner constituted a taking of possession under the law. Upon the question as to what constitutes a taking of possession counsel for respondents in his brief cites, Pumpelly *vs.* Green Bay Co., 13 Wall., 166; U. S. *vs.* Russell, 13 Wall., 623; Dodson *vs.* City of Cincinnati, 34 Ohio St., 276; East. Penn. R. R. Co. *vs.* Schoellenberger, 54 Penn. St., 144; Bloodgood *vs.* M. & H. R. R., 18 Wend., 9. These cases and others which were referred to by counsel are all cases where the action was for trespass or actions on the case, or proceedings instituted to recover damages for encroachments made upon lands or rights or interests in lands, in other words, direct proceedings to recover damages and which bear little or no analogy to the question raised in this matter.

That the petitioner, in order to erect an aqueduct or elevated superstructure in River street upon and over which to run trains of cars, has to obtain, first, the consent of the city of Detroit, and secondly, the right to do so from the abutting property-owners is unquestioned. The first has been obtained by the passage of an ordinance by the common council of the city, and to obtain the second, so far as respondents are concerned, the present proceedings were instituted, and the claim here is that by reason of the acts done by petitioner, it has become estopped from objecting to

1543 the proceedings, and must be held to have acquiesced therein.

That there might be considerable force in this position had the petitioner taken possession under the proceedings or for the purposes for which the proceedings were instituted, may be admitted, though this has not only been questioned but held not to be the case by respectable legal authorities. There are instances when the act of a party may be a judicial affirmance or confirmation of the proceedings (Massie *vs.* Brady, 41 La. An., 553; Tooley *vs.* Gridley, 3 S. & M. (Miss.), 493; Henderson *vs.* Herrod, 23 Miss., 434), and if a

purchaser gets into possession of the estate without the sanction of the court. he will be compelled to pay the money into court, 2 Danl. Ch. Pr., 1277, and if the court refuses to confirm he is a trespasser and liable for mesne profits (Lapton *vs.* Almy, 4 Wis., 242), so to the voluntary acceptance of damages by the owner in the absence of fraud or mistake in fact operates as a waiver of whatever errors may have existed in the proceedings and estops the party from disputing them. (*In re* Woolsey, 95 N. Y., 135; 2 Dill. Mun. Corp., sec. 593.) In case of a sale, though not legally binding in the first instance, it may become so by ratification, either express or implied, of the party whose property is sold. (Rorer on Judicial Sales, sec. 161; Midicord *vs.* Girod, 4 How., 503, 561; Scott *vs.* Freeland, 7 S. & W., 409, 420; Tooley *vs.* Gridley, 3 S. & W., 493; Henderson *vs.* Herrod, 23 Miss., 434.) And acceptance may be such a ratification so that the validity cannot be contested. (Lee *vs.* Gardner, 26 Miss., 921; Jennings *vs.* Kee, 5 Ind., 257; Maple *vs.* Kussart, 53 Pa. St., 348.)

The general rule may be stated that in the absence of fraud or mistake the acceptance of the award is a ratification or confirmation of the proceedings, and the same follows where the award is
1544 paid, though under protest, and the land is actually appropriated. (M., H. & O. R. R. *vs.* Probate Judge, 53 Mich., 217.) Where there is an actual receipt of damages by a party entitled thereto, this constitutes and is a waiver of delay in depositing and paying the money and is a ratification of the proceedings (*id.*) And the owner is entitled to payment where, before the confirmation, possession has been taken and the actual use of the property retained. (2 Dill. Mun. Corp., sec. 614; Johnson *vs.* Almeda Co., 14 Cal., 106.)

It has been held that a petitioner may abandon the project and discontinue the proceedings, although it may have taken possession of the premises. By the taking of possession there is no implied agreement to purchase at the appraisement, though in such case the owner can demand the premises and damages for being deprived of them and for injuries thereto. (2 Dill. Mun. Corp., sec. 609; Hullin *vs.* Municipality, 11 Rob. (La.) 97; Feiten *vs.* Milwaukee, 47 Wis., 494; Norris *vs.* Baltimore, 44 Md., 606; Baltimore *vs.* Musgrave, 48 Md., 272; Brokaw *vs.* Terre Haute, 97 Ind., 176.)

In Poor *vs.* Blake, 123 Mass., 543, which was an action of trespass, it appeared that the city entered upon and took possession of all the parcels of land described in the order widening the street, for the purpose of widening, except the land of the plaintiff upon which no entry was made until some time after such original entry, and of which the possession was not taken until some time after the original entry. It was held that the original entry was an entry upon all the lands included in the petition, and that by agreement of the parties such original entry was sufficient to bind
1545 plaintiff's land under the proceedings. In this State the statute required an entry to be made within a certain time, and which time had expired before the actual entry upon the plain-

tiff's land. To the same effect, see Dougherty *vs.* W. S. L. & P. R. R., 19 Mo., App. 419; Commonwealth *vs.* Haverhill, 7 Allen, 523.

An entry has been defined as an act of possession by authority of the party condemning (Lewis on Em. Domain, sec. 583); and the taking of tools and wagons upon the property without the authority or consent of the party condemning is not an entry. (Standish *vs.* Liverpool, 1 Drewry, 1.) Nor is the stretching of a telegraph wire over the land an entry. (Dimmick *vs.* Council Bluffs R. R., 58 Ia., 637.) It is also stated by Lewis, sec. 531, upon the authority of the case of Wilmington & Susquehanna R. R. *vs.* Condon, 8 G. & J. (Md.), 443, that if the party condemning takes possession of the property under the proceedings it will be estopped from prosecuting objections to the report of the proceedings. In the case cited by the author it was admitted by the company that subsequent to the date of the inquisition the company had occupied the land therein condemned, and had been engaged in constructing their road over and upon it. The court refused to hear the objections and confirmed the report. An appeal was taken, and without passing upon the question so determined by the lower court, the appeal was dismissed for the reason that the proceedings by the statute *was* special and limited to the lower court, and from the decision of which no appeal would lie to any other tribunal.

I find no other case in which this question directly arose and was adjudicated. The principle upon which the rule is founded is that, by reason of an acquiescence in the proceedings and award,
1546 and the taking of possession being evidence of an acquiescence, an estoppel arises. Estoppels *in pais* are based upon equities, and are enforced for their protection. (Bell *vs.* Todd, 51 Mich., 28.) They must be mutual (Chope *vs.* Lorman, 20 Mich., 327), and cannot arise in favor of those who are not themselves estopped. (Baker *vs.* Johnston, 21 Mich., 319.) Nor can there be estoppel unless a party is misled to his prejudice by the one against whom it is set up, and does material acts relying upon conduct well calculated to mislead him. (Palmer *vs.* Williams, 24 Mich., 328; De Mill *vs.* Moffat, 45 Mich., 125.) There is nothing inequitable in the petitioner now insisting upon the objections to the award, as respondents have not in any way been misled by any act of the petitioner, nor have they in any manner been damnified by reason thereof, nor were the acts of petitioner such as could lead respondents to believe that petitioner had assented to the proceedings. (Peake *vs.* Thomas, 39 Mich., 585; Vanneter *vs.* Crossman, 42 Mich., 465.)

The occupancy by the petitioner of the half of the street has not been for any such purpose as contemplated by the proceedings, nor has such occupancy been under such proceedings. This, as is shown, petitioner has carefully endeavored to avoid. The entry, as well as the occupancy, was under the authority granted by the city of Detroit, for a temporary purpose only, and not for the purpose of erecting in front of respondents' lands the aqueduct, or superstructure, contemplated by the institution of the proceedings and the right to erect, which was sought to be obtained under and by virtue of such proceedings. The right of the city to give licenses

to occupy the streets is provided by ordinance, and which is as follows:

"The board of public works is hereby granted authority
1547 to issue permits to persons desiring the same to occupy any street, alley or public place temporarily with building materials. Provided, that such permit shall not include more than one-half the width of any street, alley or public place," etc. The authority of the city to pass such ordinance is not questioned. The respondents could not maintain either an action of trespass or an action on the case, by reason of such occupancy which is done under the permit given by the board of public works, and I find no authority which would give them a right of action or entitle them to an injunction for the erection of the elevated superstructure in the street, not in front of and adjacent to their property. While the construction of the superstructure in the street imposes an additional servitude not contemplated or designed in the purposes of the street originally, it is only by reason of the fact that respondents' property fronts or abuts on the street that they are entitled to compensation for such interference with the street. There were no acts done by petitioner which can be construed as an acquiescence in the award or verdict, nor to estop petitioner from making objections thereto.

I have discussed the relative power of the court and jury in proceedings of this nature under the statute, while the proceedings by and before the jury are not a judicial proceeding, still the proceeding by and before the court up to the time of swearing the jury, as well as all proceedings after the filing of the report, are judicial in their character and partake of the nature of ordinary proceedings in court, and are governed largely if not absolutely by the same rules and the same considerations applicable to judicial investigations and determinations. The one great difficulty attending
1548 the proceedings by and before the jury is in that it is not ordinarily evident or ascertainable what the ruling or determination of the jury was upon questions raised before them, and in all such instances the presumption of the law is that they followed correct legal principles, and that as judges of the law they applied and followed the law correctly and not erroneously. It cannot be contended that as they are made by the law, judges of the law, they have the right to disregard the law and all acknowledged and well-recognized legal principles. This was never contemplated by the constitution or the statute, and it is sufficient to say that no case can be found which holds or even recognized such a vicious and monstrous doctrine. When, however, the rulings of the jury are clearly apparent upon the face of the proceedings, then it may be found the duty of the court to consider and, if necessary, review such rulings, for it is the duty of the court to see that substantial justice has not been disregarded. (Mich. Air Line *vs.* Barnes, *supra;* Tol. A. A. & G. T. *vs.* Dunlap, *supra;* Det. West. Trans. & Junc. R. R. *vs.* Crane, *supra;* P. H. & S. W. R. R. *vs.* Voorheis, *supra.*) In M. H. & O. R. R. *vs.* Probate Judge, *supra*, it is held that if the amount awarded is unreasonable, and indicates that it was the result of prejudice or

partiality, or that the jury must have acted upon a wrong basis of estimating the damages, it is a good cause for setting aside the report, citing Chapman *vs.* Greves, 8 Blackf., 308. So, too, if the damages are grossly inadequate. (F. & P. M. R. R. *vs.* D. & B. C. R. R., *supra.*)

In G. R. & I. R. R. *vs.* Weiden, 70 Mich., 394, the court say: "The powers and duties laid upon us by the statute require us to see that substantial justice shall not be disregarded by the jury of
1549 inquest. We are not disposed to be governed by such technicalities as are not in the furtherance of justice. But we are bound to see that parties are not deprived of their property without necessity, or without full compensation for being compelled to relinquish it. And, while respect is due to the honest action of juries, it is not conclusive, and is subject to comparison with the facts in the record." In this case it was held that juries have no right to disregard facts and follow their own caprices, and that if the finding is clearly against the weight of evidence, and not based upon any following of the evidence, it is arbitrary and unjust. In G. R. & D. R. R. *vs.* Chesebro, *supra*, it was held that the court should consider the proceedings without technicality and on the substantial merits, not to take up the special exceptions to the reception or exclusion of testimony singly, but refer to the main points, bearing upon the tendency and effect of the rulings, which the jury evidently acted upon as binding upon them, as they had no right to do. In this case the court concludes as follows: "The verdict is such as to show very clearly that the result must be due to a departure from correct practice, and a false view of the law. In such cases it is better to receive than to exclude testimony which may enlighten the jury; and, unless it is evident that the jury has been misled to injustice, their action will not be disturbed for technical reasons."

In The Fort Street Union Depot Co. *vs.* Jones, *supra*, it is held that where the errors complained of are such as may fairly be said to have had a controlling influence in securing the result, it is the duty of the court to interfere.

The grounds upon which courts will interfere and set aside the award of juries in proceedings of this nature, *has* received the attention of and been adjudicated by courts of other
1550 and various States. Juries exercise important functions and pass upon valuable rights, and should be entirely free from prejudice and of all undue influence, and it has been held that reports are set aside for partiality, bias, prejudice or inattention, or unfaithfulness in the discharge of their duty, or for errors of such extraordinary character, or grossness, as furnishes a just inference of the existence of such influence. (Mills on Eminent Domain, sec. 234; Bryant *vs.* Glidden, 36 Me., 36; The State *vs.* Justice, 24 N. J. L., 413; Bennett *vs.* Camden R. R., 14 N. J. L., 145; Pa. R. R. *vs.* Lutheran Congregation, 53 Penn., 445; Inge *vs.* Police Jury, 14 La. An., 117.)

It is clear, under the authorities, that any improper conduct on the part of the jury materially affecting the merits is sufficient cause for setting aside the report. (Lewis Em. Dom., sec. 522.)

In the case of N. Y. C. & H. R. R., 64 N. Y., 60, it was held to be good cause for setting aside the report, if there was such carelessness or irregularity amounting to misconduct by which a party was harmed; and that the same reasons which would lead to the setting aside of a verdict of a jury, or a report of a referee for misconduct, palpable mistake or accident, would suffice for like interference with the report of a jury in such a proceeding. But it will be presumed that the jury performed their duty and that all things were rightly done unless the contrary be shown. (*In re* Road, etc., 109 Pa. St., 118.) In matter of N. Y. L. & W. R. R., 29 Hun., 604, it was held that the power and authority of the court to interfere was settled by Matter of N. Y. C. & H. R. R., *supra*, and that such power was not restricted in the exercise of its general jurisdiction, and that
1551 the court has power by virtue of its inherent jurisdiction to set aside the report for good and sufficient reasons; upon appeal, 93 N. Y., 385, this case was affirmed and held a matter for the exercise of the discretion of the lower court.

The jury have a large discretion, and when this has been grossly abused the court will interfere and prevent an injury (Bourgeois *vs.* Mills, 6 Tex., 76), and will set aside reports for accident or mistake. Matter of N. Y. L. & W. R. R., 63 How. Pr., 265, for acting on erroneous principles. Van Wickle *vs.* Camden & Amboy R. R., 14 N. J. L., 162; Williamson *vs.* East Amwell, 28 N. J. L., 270; Swayze *vs.* N. J. Midland R. R., 36 N. J. L., 295; Crater *vs.* Fritz, 44 N. J. L., 374; Matter of N. Y. L. & W. R. R., 33 Hun., 639; S. C., 98 N. Y., 447; S. C., 102 N. Y., 704; S. C., 2 How. Pr., N. S., 225; Beckett *vs.* Midland R. R., 1 L. R. C. P., 241, for proceeding in a careless, negligent or unintelligent manner. Walters *vs.* Houck, 7 Ia., 72, for being against the evidence or against the weight of evidence. Wilson *vs.* Rockford, etc., R. R., 5 Ill., 273; Fitchburg R. R. *vs.* Eastern R. R., 6 Allen, 98; Harding *vs.* Needway, 10 Met., 465; Commonwealth *vs.* Sessions, 5 Mass., 435, for receiving or rejecting testimony. Matter of N. Y. W. S. & B. R. R., 35 Hun., 260; but where illegal evidence was laid before the jury and at once withdrawn the court refuses to set aside the award. (Goodwin *vs.* Milton, 25 N. H., 458.)

In New Hampshire, under a statute providing that commissioners may admit or reject evidence, and their decision thereon to be final and conclusive upon such rulings, and that no report should be set aside because of such admission or rejection, the court, in Thompson *vs.* Conway, 53 N. H., 622, following Freeman *vs.* Plain-
1552 field, 52 N. H., 146, and Jones *vs.* Goffstown, 39 N. H., 254, held that the court would not set aside the report unless for cause other than the rejection or admission of testimony: But it is held in this case that verdicts are set aside when against the evidence, and when so decidedly against the weight of evidence as to make it apparent that the jury must have been misled or have failed to consider intelligently the evidence laid before them, citing Clark *vs.* Society, 45 N. H., 334, and also for misconduct or fraud, but not because the court would have found differently upon the same evidence (Palmer *vs.* Portsmouth, 43 N. H., 265; Wendell *vs.* Moulton,

26 N. H., 41), and concluding holds that there is no doubt of the power of the court to set aside the report for fraud or misconduct, and probably also for gross errors or mistakes.

There is no doubt under the authorities of this State above cited, that the court has the power of setting aside the report when the damages awarded are either inadequate or excessive, as this has been done in repeated instances. See also Chapman *vs.* Graves, 8 Blackf., 308; Kansas City R. R. *vs.* Campbell, 62 Mo., 585; Corporation *vs.* Manhattan Co., 1 Caines R., 507; Clarksville *vs.* Atkinson, 1 Sneed, 426; Van Wickle *vs.* C. & A. R. R., 14 N. J. L., 162. Matter of Central Park, 51 Barb., 277. While some cases appear to hold a contrary doctrine, the language used should be taken with reference to the propriety of the action rather than with reference to the power of the court. Matter of Boston Road, 27 Hun., 409. Matter of New Reservoir, 1 Sheldon (N. Y.), 408; Troy & Boston R. R. *vs.* Lee, 13 Barb., 169; Willing *vs.* Baltimore R. R., 5 Whart., 460; Allison *vs.* Delaware Canal Co., 5 Whart., 482. Inde-

1553 pendent of a statutory provision making the judgment of the jury final and conclusive, it seems to be the general and universal doctrine that the court has power to interfere.

In considering the question of damages and in setting aside the report for such reason, the court is governed by the same principles as obtained in the case of the verdicts of juries in common-law suits. (Rheimer *vs.* S. R. & T. Co., 29 Minn., 147; Matter of William Str., 19 Wend., 678.)

It has been held that where correct rules have been adopted, the award will not be set aside, unless the amount is palpably erroneous. (Matter of Thompson, 45 Hun., 261.) And where there is evidence to sustain a verdict, and the testimony is conflicting, the court will not interfere. (S. R. & D. R. R. *vs.* Gammage, 63 Ga., 604; I. & W. R. R. *vs.* Van Horn, 18 Ill., 257; Kyle *vs.* Miller, 108 Ind., 90; T. & St. L. R. R. *vs.* Eddy, 42 Ark., 527; Same *vs.* Cella, 42 Ark., 428; S. & M. R. R. *vs.* Rhea, 44 Ark., 258; L. R. J. R. R. *vs.* Woodruff, 4 Ark., 381; R. R. *vs.* Gesner, 20 Pa. St., 240; Colvill *vs.* St. P. & C. R. R., 19 Minn., 283; Sedalia *vs.* M. K. & T. R. R., 17 Mo. App., 105; City of Kansas *vs.* K. C. R. R., 84 Mo., 410; H. & G. I. R. R. *vs.* Ingalls, 15 Neb., 123; V. & T. R. R. *vs.* Elliott, 5 New, 358; Somerville R. R. *vs.* Doughty, 22 N. J. L., 495; State *vs.* Miller, 23 N. J. L., 383; Morgan's Appeal, 39 Mich., 675.) And this is especially the case where the jury have viewed the premises. (W. P. R. R. *vs.* Reed, 35 Cal., 621; McReynolds *vs.* Baltimore R. R., 106 Ill., 152; South Park Comm'rs *vs.* Trustees, etc., 107 Ill., 489; C. & E. R. R. *vs.* Blake, 116 Ill., 163; O. & R. V. R. R. *vs.* Walker, 17 Neb., 432; V. & T. R. R. *vs.* Henry, 8 New, 165; Matter of St., 60 How. Pr., 290; Supervisors, etc., *vs.* Stout, 9 W. Va., 703.)

1554 But when a verdict is grossly excessive it should be set aside. (Mutual Tel. Co. *vs.* Kalkamp, 103 Ill., 420.) But a verdict more than the amount testified to on one side and less than that testified to on the other should not be set aside upon the question of amount alone. (Matter of N. Y. R. R., 21 Hun., 250; Somerville R. R. *vs.* Doughty, 22 N. J. L., 495; Ill. R. R. *vs.* McClintock, 63 Ill.,

514.) But where there was a great discrepancy in two reports, and conflicting evidence as to value, a new trial was granted. (N. O. R. R. *vs.* Zerringue, 23 La. An., 521.)

The jury are by no means an independent and irresponsible body. Under the statute "they may view the premises described in the petition, and shall hear the proof and allegations of the parties." And while they act independent of and are not under the control of the court, and while the proceedings before them are absolutely under their own discretion and control, still all their acts as well as the proceedings had before them are subject to review by the court. The law upon the subject, succinctly stated, is as follows:

1. The court, by virtue of its general and inherent power and jurisdiction, has the same powers in proceedings of this nature to correct the action of the juries, and is governed by the same principles applicable to setting aside verdicts of common-law juries.

2. While proceedings of this nature are not to be reviewed from a technical standpoint, still it is the duty of the court to consider the proceedings upon their substantial merits, without technicality, and see that there has not been a miscarriage of substantial justice.

3. The presumption is that the jury acted rightly; but if it is apparent from the proceedings, or it be made to appear
1555 to the court that the action of the jury is due to a departure from correct practice and a false view of the law, so that there has been a miscarriage of justice, or that the result is due to inattention or unfaithfulness of the jury in the discharge of their duty, or to carelessness or irregularity amounting to misconduct, or any improper conduct materially affecting the merits, or if the jury proceeded in a careless, negligent or unintelligent manner, or if the jury have been misled or failed to consider intelligently the evidence before them—in all such cases the court may interfere.

4. The jury, in the admission or the rejection of testimony, is not governed by any technical rules, but such ruling must have a due regard to substantial justice; and when the general tendency and effect of the rulings upon which the jury acted, as binding upon them, as they had no right to do, and it is apparent that improper testimony was received or proper testimony rejected, such as would necessarily have a controlling influence in arriving at a verdict, then it may become the duty of the court to interfere.

5. When it is fairly evident that the rulings of the jury were inaccurate, and not fairly applied to secure rights, and resulted in substantial injustice being done, it being apparent that such errors had a controlling influence in securing the result, then the court should interfere.

6. If the amount awarded is unreasonable, is inadequate or excessive, and it is indicated by the proceedings to be the result of gross errors, bias, partiality, prejudice, accident, mistake, misconduct, fraud, gross abuse of discretion, or based upon erroneous principles, and the proceedings furnish a just inference of the existence of such influences, then in such case it becomes the duty of the court to interfere.

1556 Whatever may be said of the nature of proceedings of this character, and the large powers and discretion vested in the jury in conducting the same, it was never contemplated that such powers and such discretion could be exercised arbitrarily and without proper regard for substantial justice. Ordinarily, the greater the power, the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. The functions of juries in these classes of cases cannot be overestimated; to them is left the determination of great interests, and parties are not only entitled to, but have the right to demand of them the exercise of the most cool, careful, intelligent and unbiased judgment.

The two questions which it is for the jury to determine, viz., necessity, and if found affirmatively, then just compensation, are separate, distinct and independent of each other. The damages allowable must be actual and adequate in the full sense of those terms (G. R. & I. R. R. *vs.* Heisel, *supra*), and cannot be allowed on mere conjecture, speculation, fancy or imagination; they must be real, tangible and proximate. (F. & P. M. R. R. *vs.* D. & B. C. R. R., *supra.*) Vindictive damages are not admissible. (G. R. L. & D. R. R. *vs.* Chesebro, 74 Mich., 466.) The question for the jury is, Is the taking in the manner proposed a public necessity, and should the jury so find, they are to give all damages which have been made to appear and that the law allows; but they are not warranted or authorized to give any damages based upon the idea that another or a more advantageous route might or could have been selected and determined upon; this question is involved only in the question of necessity, and in no way applies to or should in any manner be considered in determining the amount of compensation.

1557 It was held in D. W. T. & J. R. R. *vs.* Crane, *supra*, that the supreme court cannot consider any reasons against the confirmation of the report of the jury except those which were presented to the lower court, and the statute provides that notice of the appeal shall specify the objections, and that all other objections shall be deemed to have been waived. It must therefore necessarily follow that this court is confined to the objections set forth by the petitioner in its motion.

In order to fully comprehend and understand the nature and scope of the second objection it is necessary to state the grounds upon which the same is based, and which are contained in the motion, as follows:

"The attorney for the respondents, in opening their case to the jury, among other things said to them:

"Now, for its application, gentlemen of the jury, I say to you that there is no necessity whatever for this elevated structure to come up River street; I say to you that I shall show you beyond the shadow of a doubt, by the statutes of this State, a provision in the statutes of the State, and in an act passed at the time of this union depot legislation, providing that this union depot must confine its routes to approach its union depot along the line of railroad property already acquired within the city limits. (Record, p. 41.)

I tell you this union depot company, if it does not make its agreements with the Michigan Central not to do it, and does not come into court with it, they can come up on the margin of the Michigan Central property on the south side of River street, and leave Backus' property untouched, without paying Backus a dollar. The Michigan Central do not want them to; they say, Use River street and leave us alone. Why don't they condemn Michigan
1558 Central property instead of condemning our property in the street and imperiling our business? They say they won't do us any damage. We say they will. We say they will ruin our business. We say, You will ruin our business, if you think you will not. We don't want a dollar of your money; this business that we have built up is worth more than all you can pay us—it is the business of this man's life; he has just settled it so that his boys can run it, and he can have some rest, after he has accumulated this property—if you don't want to pay us, and we don't want your money, go over there and condemn Michigan Central property; condemn your line along the line of the Michigan Central ground twenty-five or thirty feet up River street, and don't pay us a dollar; leave us our street free. And I tell you, gentlemen, to say that you cannot condemn Michigan Central property is the merest sophistry. I will show you the statute which says, You may take the property if it is not needed by the other road. But how shall the question of the need of the other road or company be passed upon? Precisely as these twelve men are passing upon this question. It goes before a jury of twelve for condemnation. The Michigan Central will say to the union depot company, 'It is not necessary to take our route,' just as we say it is not necessary to take this. They will say to the union depot company, 'We need all our property.' 'Very well,' says the union depot company, 'you need all your property; we will try that question before a jury of twelve men in the city of Detroit, whether you need thirty-eight acres of ground of the best business property on River street to carry on your business.'

"How are you going to get rid of it? Why, here is
1559 your statute which provides, the legislature having taken thought at last, that if any railroad company shall refuse to give terminal facilities to another, that other may take it under proceedings laid down in the statute. If any railroad company does not need any part of its property, it may be taken for the approach of any union depot railroad company, or any other railroad that desires to enter. Now, we will say that you, gentlemen, not in this case, but we will say you were a jury called in a case of the union depot company against the Michigan Central, and the Michigan Central say, 'I cannot let you go up this margin of mine up the River road, I cannot let you build your elevated road up this margin beyond thirty or forty feet there.' Why? 'Because I need it.' The union depot company replies, 'We will go to a jury upon the question of whether you need thirty-eight acres of land, when you bought nearly half of Grosse Isle down here just to keep your money invested, when you bought land all over here around the suburbs, we

will just go to a jury and see if you need thirty-eight acres of that land on the river front; we will go to a jury and show that jury that no other railroad on earth has such a holding of property near a business centre, and does not need such a holding of property, and never has to exceed ten acres; and how long do you think it would take us on a presentation of facts to get a verdict of the jury that the Michigan Central shall play dog in the manger no more, but shall give this land at a fair price to the union depot company.

"We shall urge upon you, with confidence, that your duty will not be done to Detroit, or to your fellow-citizens, the duty which you are expected to perform under the constitution of your
1560 State, as explained and fully illustrated by the highest court o your State, if you permit this route to come up there, when we shall show you, by such men as Mr. James B. Mulliken, that the best route for the union depot company itself is up this Michigan Central property.

"The attorney for the respondents on his cross-examination of the witness James B. Mulliken, put the following questions for the purpose of leading the jury to believe that the petitioner could condemn the property of the Michigan Central Railroad Company, and that Mr. G. V. N. Lothrop, the general counsel of the Detroit, Lansing & Northern Railroad Company had so advised that company:

"Q. Who is the general counsel of the D., L. & N.?
"A. Mr. Charles B. Lothrop.
"Q. Mr. G. V. N. Lothrop before that?
"A. He was formerly.
"Q. That being the best route, was there ever any talk about the power of the said railroad company, wanting terminal facilities, to condemn the Michigan Central ground?
"A. Mr. Lothrop told me at one time there was no difficulty in doing that.
"Q. Which Lothrop?
"A. G. V. N. Lothrop.

"Although it clearly appeared on the further examination of said witness James B. Mulliken, and by the testimony of said G. V. N. Lothrop, that the advice and opinion of said Lothrop was, that the property of the Michigan Central Railroad Company, or of any other railroad company, could not be condemned without additional legislation, the attorney for said respondents did claim and pretend to and before said jury that under the advice and opinion of said Lothrop the petitioner could condemn a right of way
1561 along the margin of the Michigan Central property on the south side of River street.

"Although it conclusively appeared by the testimony in the case that the property of the Michigan Central Railroad Company on the south side of River street was all in actual use by said company for depot or other purposes pertaining to the operation of a railroad, and the same was needed by said company for the purpose of a depot or other terminal facilities, the attorney for the respondents,

at the close of the testimony for the petitioner, made the following statements and assertions to and before said jury:

"I now read the section which I claim gives the power to condemn the right of way in this case over the grounds of the Michigan Central Railroad Company. The section is as follows:

"When any part of the land of any railroad company in this State, in or adjacent to its depot grounds, is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company, organized as aforesaid, needing such land for the purpose of a depot or terminal facilities, to acquire the same in the same manner as may now be done for such purpose from individuals. The question of actual use and of necessity for the aforesaid purpose by said railroad company, owning and not using said land, shall be determined, in addition to other questions, as provided by law, in cases of condemnation of lands for the purpose aforesaid, and the same proceedings, in all respects, as near as may be, shall be had for the aforesaid purpose, as now provided by law where land is acquired for such purpose from individuals.

1562 "It is very clear that this matter of the use and occupation of the grounds, and of the need of the railroad company for such grounds, are questions which must be determined by a jury, called as you are called. They must pass upon the question of whether this is the best route. They ask the Michigan Central for the privilege of occupying the grounds, and if they fail to agree they take it before a jury. How long do you suppose it would take a jury to determine it?"

The counsel for the respondents, who assisted the attorney on the trial before said jury, at the close of the testimony for the petitioner, made, among others, the following argument or statement to and before said jury:

"But it is a noteworthy fact that this very question, quoted here by my brother, Dickinson, was passed in 1881, the same year that the union depot act was passed, and also that the two acts were the product of the same mighty brain and the same strong hand, to wit, Mr. Joy, the head of the union depot project. Both acts passed by the same legislature, both coming from the same man, twins, my friends, born at the same birth, christened after the same father, both of them the progeny of this union depot scheme. What did Mr. Joy draw that act for? You know and I know that he is a man that does not act without a motive. What did he put senseless stuff, if the interpretation of my friend, Mr. Baker, is correct upon this statute book for? What was its purpose? Do you doubt for a single instant that he had in view the practicability and the possibility of using the Michigan Central grounds in connection with the grounds he acquired, touching them at Twelfth street, for the purpose of getting further up into the city? Have you

1563 any question about that? In what other cities, in the State of Michigan, is there any project of this kind on foot? Where else does any necessity arise for legislation on this point?

Can you tell me, can any one show me? It does arise here, and it was born here, came from the same source that the union depot act came from, the same session of the legislature, to wit, 1881. That is a fact worth considering. And that Mr. Joy was right, that you can take part of these grounds for other railroad purposes, was demonstrated by the history of this case.

"Almost the first departure from the union depot grounds at the foot of 12th street takes the elevated structure of this railroad within the sacred precincts of the Michigan Central Railroad grounds, their 20 acres, cuts off a corner of it, not only crosses their tracks, but goes within the holy of the holies, into the very temple itself, into this mystic and magic 38 acres of depot grounds, around which the mighty protection of the law, according to my friend Mr. Baker, is put. How does this happen? According to my friend's argument, you cannot get an inch of it. According to his argument the thing is so absurd as a matter of fact that no jury in the world would ever permit it to be taken."

"So, my friends, in view of the history of this matter, it is all, I was going to say nonsense, but it certainly is not law to say to you that this statute does not bear the meaning which my brother Dickinson puts upon it. Let us look at that statute. Tell me what it does mean. What can it mean? I have asked you already what was it drawn for? Why, it was a sort of Siamese twin to this union depot act. If the meaning that is contended for it is not the meaning of it, tell me what is the meaning. What case is it meant to fit?

1564 "When any part of the land of any railroad company in this State, in or adjacent to its depot grounds, is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by such railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company, organized as aforesaid, needing such land for depot or terminal facilities, to acquire the same in the manner as may now be done for such purpose from individuals.

"That is very plain, isn't it? Can anything be plainer? This act says in effect, it does not say in effect, it says positively, that where the land is in use or needed for depot purposes that it may be condemned like other land, needed now, needed today, needed this instant, not needed ten years from now. To think the gentleman was in error when he says this term needed referred to what might happen in the future. When it is in use now and needed now, that is the meaning of the law. But when the land is in actual use and needed it cannot be taken. When it is not in actual use and not needed, then, my friends, it may be condemned exactly in the same manner as your property or Mr. Backus' property, or anybody else's property may be condemned, but with this condition. There are two other facts to be submitted to the jury in this connection, added to the investigation to be made by the jury, to the fact to be inquired into in that case like the present one. In the present case you are to inquire into the necessity of using Mr. Backus' land, and if necessary to ascertain what compensation he

should receive for the condemnation; but in this case the question of actual use and of necessity for the aforesaid purposes by said railroad company owning and not using such land shall be
1565 determined, in addition to other questions, as provided by law, in case of condemnation of land for the purpose aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals.

"So that in a case of this nature you are to make the same inquiry which you made in the case of Mr. Backus, but in addition to that the jury is to answer whether the land is in actual use, and whether it is needed by the railroad company for depot purposes. Now, it seems to me that is very plain. It is as plain as words can make it, and yet my friend says it does not mean anything. He says you cannot do it and you must not do it, and he says if a jury should determine that the land was not in actual use, and by use is meant *bona fide* use, a real use, not a use for the purpose of preventing somebody from taking it, but a real *bona fide* use, and the need is meant a present need; and yet he says if the jury should find that it was not in such use, and that there was no such need, that there is no court in the world that would let the verdict stand. It will be a sad day for the people of the State of Michigan if the supreme court of that State ever carry out the threat made by my friend, Mr. Baker, and overturn the verdict of an honest jury, in their endeavors to protect the rights of the citizens and of the public in a matter of this kind. The supreme court, under such a state of facts, he says, would not sustain the verdict. Mr. Lincoln had a homely way of saying that you had better not cross the bridge until you get to it, and I do not think that you, gentlemen, had better bother with the supreme court until we get to that. One thing is certain, that a judge on the bench, when the case is being tried before him, will not tolerate the lawyer
1566 who threatens him with the supreme court. He gives his best judgment, uncaring and unapprehensive as to what the result will be. His only aim is to do justice, and so your aim must be to do justice and to act according to the lights which you have before you. I say to you, if it is worth anything to you, if it is worth as much as Mr. Baker's assertion, I say to you, that the supreme court would not do it; that there is no principle upon which they could do it; that this is a mere question of fact, in a matter which the constitution has given you supreme control over. Further than that, that the constitution has given you more control in a matter of this kind than even a subordinate court, that it gives a jury in a court of record, because you are judges both of the law and the facts, and your findings on the facts cannot be assailed. In what way can they be assailed? How can the supreme court, as a matter of law, determine the weight of testimony? How can the supreme court determine whether you believe Mr. Backus most or Mr. Joy most when their testimony *are* in conflict? And yet this matter of the use and the need of that road there would all be matter of testimony for you to weigh and determine, with such

lights as your experience had given you. How, I ask you, could the supreme court overturn your judgment?

"Now, take this statute and read it and see if it does not bear us out in the position we take. Tell me what it was made for, if it was not made for a case like this. Tell me if it would not be better for all concerned for this railroad to go up on the Central grounds, instead of going up River street. Tell me if Mr. Backus' interests are not at least on as important a level as the interests of this company in this proceeding. The law says they should not take
1567 this street unless it is necessary, and we say it is not necessary, and we invite you to that conclusion. We show you the route, which they themselves or at least their leading men agree would be a preferable route; but they say they will not take it, because under the law they cannot take it, because they know in advance that a jury if called will determine that the railroad are using their ground and have need to use their ground.

"Now, my friends, I have asked you already, would a jury determine that? What do they want with their grounds? What business have they at all with that immense quantity of ground? They are there as an enemy to civilization, they are a hostile foe within the limits of your city. No other city would tolerate such a state of things. They are standing in the way of progress in this city. Railroads come here to benefit us. The good they do us is incidental. They come here to benefit themselves, and above all, my friends, no improvement can benefit a community which overrides the right of the citizen, and which stands in the way of the proper advancement of that community. They have got the whole river front, and it is as much as we and our wives and our little ones can do to catch a glimpse of that beautiful river, the scene of the sports of our youth, to which we resorted for health and pleasure. Thirty-eight acres there and 48 acres just alongside of it, and yet we are told that a jury could never be got but would find that a strip of the width of this elevated structure could not be taken from the air of heaven 38 or 40 feet above the track of that road, because they were in actual use and needed for depot purposes by the railroad company. My friends, that is an insult to your intelligence;
1568 it is against the facts and it is against common sense. There is a moving out from that 38 acres of the Michigan Central. The Grand Trunk has gone out, the Detroit, Lansing & Northern is going out, the Flint & Pere Marquette is going out, three great railroad corporations have gone, and are going elsewhere to do their business. My friend, Baker, desires you to believe that any jury who will be called upon to pass that question would treat it as nonsense, and that if they did agree to it, the supreme court would overrule them. We take a different view."

After the testimony of Mr. G. V. N. Lothrop had been introduced, the attorney for the respondents made the following argument or statement to and before said jury relative to the testimony of said witness:

"For the first time in a somewhat long professional career, although a young man, counsel have seen fit to call upon the wit-

ness-stand lawyers to testify what the law is. Nothing was ever heard of it the time before, and for the first time in a long professional career we have been charged, or I have been charged, with not doing my duty, because I would not do such an unprofessional thing as to call a lawyer to testify as to the law. Now, gentlemen of the jury, will sound make you believe or disbelieve the evidence of your own ears and the testimony of Mr. Lothrop. Did Mr. Lothrop tell you, or would he tell you, or could he be brought to tell you—counsel of the Detroit, Lansing & Northern, formerly counsel for the Michigan Central, a railroad lawyer from the crown of his head to the sole of his feet, could he be brought to tell you that you could not condemn that margin of the Michigan Central under that statute? Are you to be driven, not only to consider, but to
1569 take the statements of Mr. Baker as to testimony that occurred when you were all here. Mr. George V. N. Lothrop, who took that witness-stand, would never, I think, have stated, railroad lawyer as he is, and counsel of railroad companies' interests as he is, he never would have stated to you that that strip of land could not be condemned for depot purposes and for these terminal facilities, and he did not so state to you, but he did state that that question under that statute that I read to him, and which was called to his attention for the first time, would go to the jury, and you are to be driven and bulldozed by a powerful pair of lungs to disbelieve what Mr. Lothrop told you upon that witness-stand and not one hour ago."

The counsel for respondents, in his closing argument to and before said jury, among other things, said to them:

"And they came here to you, and you do not say yes; you say, 'We will look into this matter and we will see if it is necessary, we will see if there is not a better way of doing this, a way which will interfere less with private property, that will take less of the public streets, and will achieve the same results.' Now, is there a way? I have already said to you that nobody denies that. Even their own witnesses accede that. Ellis, Joy, every one of them say that the other way would be the best. Mr. Joy at first began saying that it could not be done anyhow under this statute, that it would require what is called a special act; but when his attention was called to the fact that there can be no special act in this State, but that there can be only general laws, he finally admits that under the statute we have brought to you and read to you, it could be done pro-
vided anybody would swear in the petition to enough to
1570 start the proceeding. How can it be done? Can it be done?
He makes one objection; he only gives one practical reason in all his testimony; he says you cannot do it because if they put an elevated road on the Michigan Central grounds the posts would be an obstruction. Do you mark and understand that? Posts are no obstruction to poor Backus; they are no obstruction to business people who were there before the road came there; they do not interfere with the use of the street one single bit, and according to our brother Joy, they are a blessing in disguise, if you will only try them long enough to find it out. But when you come to put

them within the classic precincts, within the sacred domain of the railroad company, then all of a sudden they become a nuisance and an obstruction. They become so great an obstruction then that no jury should permit them to be put up there! There is an old saying that you cannot eat your cake and have it too. I do not for the life of me see how you can make these things a blessing to Backus in front of his premises, and a nuisance and obstruction to the Michigan Central R. R. on their premises. They say that street cars could run under these tracks, carriages could run under them, that all the uses of a great public street could be carried on under them, locomotives and trains could run under them,—here is the locomotive on the Central track that has to run under them. All this has to be done, when you come to look at Backus' case; but the moment you put in the road on the other side of that fence, all these reasons are distorted and they become reasons against it, instead of reasons for it.

"One juryman asked a ques u that was in my mind, when they talked about these roa being an obstruction if put up in
1571 the air there; he aske question: Why cannot they put buildings under them. Why not? Tell me why not? You will find buildings under other such obstructions. You will find buildings under approaches to bridges, buildings in which business is carried on; and you know and I know that the railroad buildings, freight sheds, and buildings of that kind, are never run to any great height; 22 feet would be a great height for one of those sheds. They certainly would not interfere with their use for that purpose.

"Mr. DICKINSON: You may have forgotten Mr. Joy's testimony, that the Ludgate Hill station in London had three stories of railroad running in over one another.

"Judge CHIPMAN: I have not forgotten that. But the question asked by the juror struck me as being entirely pertinent. We are not here to find a way for this company to do their work cheaply. You are not here for the purpose of saving their money; you are not here for the purpose of finding the necessity of using this street, and the moment you begin to talk among yourselves as to how much it will cost the company, more or less, that very moment you fail to do your duty under your oath, you become unfaithful to your duty to Backus, and utterly unfit for the great trust reposed in you by your presence here.

"Why not build the elevated road alongside there? Why not carry it right through? There is only one reason why—that the posts will interfere. But we say the posts will interfere with Backus; and the supreme court say that the business and interests of the respondents in a case of this kind are just as important and as sacred in the eyes of the law as the business and interests of the petitioner. Look at Backus, employing 150 men. How many will the union depot employ? And how many would he employ
1572 if their road goes in front there? Will they give you 150 new citizens? You know they won't. That great corporation, the Michigan Central railroad, has not such a number of men

in its employ there at that depot as Mr. Backus employs. Which business is the largest, which is of the most real importance to our people, their business or Backus'? You know what Backus' business will do for the city; the merchant knows it, the manufacturer knows it, every man who is engaged in any kind of business for the making of money knows that much at least is secure, and that such ought to be preserved and held onto; and while we want to secure the other, and secure the improvements which the union depot company may bring, we do not want to throw away anything we have got, but we want to keep what we have got and get as much more as we can.

"They say that you could not make a petition to a court under this statute that has been read so often that I hate to repeat it; they say no man could go into court and swear to a petition stating that the Michigan Central Railroad Company did not use that land and had no need of it. Would any of you find any difficulty about going and swearing that the Michigan Central Company are not using 30 or 40 feet in the air there, and that they have no need of it; and have you any idea that the Michigan Central Railroad Company could go in and defend against it? Have you any idea that they can prove that they have any need of it? You know that they are not using it, and the only thing they would be reduced to would be as to the question whether putting those posts in the ground there was such obstruction to their business as would defeat the application. I do not believe that any jury would find it any obstruction. No jury would if they believed the testimony given here, to put this 1573 road in front of Mr. Backus' place, because all the testimony brought by the petitioner is that it is not a nuisance and it is not an obstruction. They could run their tracks under it; there would be no trouble about it; they could put sheds under it; it would be no interference really, or so small an interference that no jury would take it into consideration, provided you believe the testimony given in behalf of the petitioner in this case. Is there any practical difficulty about that? Answer me that. They say no man could do it without committing perjury. Would you commit perjury if you went into court and took oath that they did not use and did not need this space up there in the air? The fact is that they are not using those grounds in any such manner as they are trying to make out; some of those cars lay there month in and month out, as anybody can see who goes down there and looks; they lay there until they are begrimed with dust and age. They are not using it; and it was because the Michigan Central knew that under this statute a petition could be made, and that the probabilities were that a jury would give a verdict and that that verdict would be sustained by the court, that they stopped fighting this project and let them have this corner there, let them have 19 feet for the viaduct, and they have come to terms, so that there is no longer any fight between the two companies. Now, my friends, there is no difficulty in this; I want to impress on your minds honestly and fairly that there is no difficulty. Would you hesitate to

take that oath that they were not using it, for you know they are not using the height of that elevated road, and they do not need it. And the company would have to come in and prove that they were using and that they were needing it, and they could not
1574 prove that the putting of the posts there was an obstruction and a nuisance, if you believe they are not an obstruction and a nuisance to Backus.

"Somebody asked here whether the Michigan Central might want to use it for an elevated road. That came up yesterday. Of course they do not want to use it. Their whole system is a system at grade; they come in at grade, their buildings are all put at grade, and they have no plan on hand and they have no necessity for an elevated road there—the Michigan Central has not; so you see that on that score there is no practical difficulty, and if you refuse to give that application to this statute, then I ask you, What use are you going to make of it? If it does not mean what we contend, tell me what it does mean. That is fair. If we are not right, then who is right? Nobody will tell us what it means. Mr. Joy undoubtedly had it passed when he had the union depot act passed. Nobody vouches any explanation about it. What does it mean? Evidently, in some way, it means that one company may take the depot land of another company. That much everybody concedes And yet they undertake to tell you practically that there are no circumstances under which that can be done. Now, my friends, the circumstance has arisen, the case is here, and if they can go over there it is the best route for them, it is the best route for the city. It saves you the street, it saves Backus, it keeps the railroads all together over that fence, and the public generally will be better accommodated."

The attorney for the respondents, in his closing argument to and before said jury, among other things said to them:

"And I shall convince you, under authority and by the law, that the union depot company can take that margin of the Mich-
1575 gan Central road, beyond the shadow of a doubt, and I am not here to urge any absurdity upon you, I am not here to urge any folly upon you, because to take an insincere position and to present one in which I have no confidence, or in which we have no confidence, after the consideration we have given to the subject, is not according to my methods or my habits. My friend on the other side has said that I wanted a jury because I thought I could carry the jury. Why, gentlemen of the jury, if I have ever had any successes before juries or elsewhere, my fellow-citizens will at least do me the justice to say that it is because I have been at least considered a sincere man, that although sometimes I may have been wrong, my worst enemy will not say that I have not acted from conviction, and I have not been guilty of the supreme folly of bringing into this court, before a jury of twelve men, any absurd doctrine, as advocated by Mr. Baker, that, in the first place, there is no law that will permit you to take that margin of the Michigan Central road for the elevated railroad.

"Then turn back to the statute at the same time passed for the

purpose, as suggested by Mr. Joy, to enable some railroad company at some time, somewhere—he cannot remember to have drawn it—to enable some railroad company, somewhere or at some time, to condemn the depot grounds of some other company that is not using it. Whereabouts has it been done? And why did Mr. Joy draw the act, and why is it drawn in connection with the union depot act, at the same session, except to enable them to use the grounds of the Michigan Central? This is plain English. I think you can understand it, and will not take the statement that it cannot be done. This is a part of the general railroad law, which has
1576 heretofore provided that land may be taken, under the constitution, for the use of railroad companies, on the verdict of twelve freeholders, or on the appointment of three commissioners, precisely the business you are doing here; and this is the end of a section added in 1881:

"'When any part of the land of any railroad company in this State, in or adjacent to its depot grounds, is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company organized as aforesaid, needing such land for the purpose of a depot or terminal facilities, to acquire the same in the same manner as may now be done for such purpose from individuals. The question of actual use and of necessity for the aforesaid purposes by said railroad company owning and not using said land, shall be determined in addition to other questions as provided by law in cases of condemnation of lands for the purpose aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals.'

"Mr. FREUDE: Provided it is not in actual use.

"Mr. DICKINSON: Yes, and provided it is not needed, but let me tell you, you provide by law that no man shall enter a house in the daytime, it shall be a crime to do it, if he does it secretly. If he does, certain things shall be done. You do not take that man right up and send him to prison, if you find him doing it. You have to give him a trial before twelve men. Now when you find a statute providing that the land may be taken if it is not used, or
1577 needed, and it provides a tribunal to try it, would you forestall that tribunal by deciding at the outset that you cannot succeed before the jury?

"Now a word more as to the power to take it. Mr. Baker has laid some stress on that, and I will only add a few words to what my distinguished associate has said, and to what Mr. Lothrop has said. I call your attention to his testimony again. He swore on direct examination that he had some conversation with Mulliken at some time with regard to getting a right of way in from the junction. He said at that time that he was very positive there was no law which would permit them to acquire property of the Michigan Central road. He did so testify. But do you remember on the cross-examination I said to Mr. Lothrop: Do you remember

the passage of the union depot act? Yes, sir; I aided, said Mr. Lothrop, in advising the judiciary committee of the legislature as to some parts of it. Now, said I, Mr. Lothrop, was your conversation with Mr. Mulliken before or after the passage of the union depot act; in other words, was the time when you said there was no statute providing for the combination of the depot grounds of the Michigan Central, to give the Detroit, Lansing & Northern a passage, before or after the passage of the depot act by the legislature? He says, I am clearly of the opinion that it was before. So that you see at the time he had the conversation with Mr. Mulliken, at which time he says he knew no law by which the grounds of the Michigan Central could be taken, this act for the taking of the union depot grounds was not passed, because that was passed at the session when the union depot act was passed. What value is his testimony, when his attention had not been called to it;
1578 it was not called then because no such act was passed. But now he says, the proceeding provides--whether it is constitutional or not he will not say—but under it, it is provided for the question of the need of the Michigan Central owning it, or its use of it, and that is a question of the use in good faith, and the need in good faith, and it is to be tried by a jury like this. That is his testimony.

"Now I want to know whether the jury are going to pass upon this question of necessity, or are going to pass it by, because of the acts of the union depot company since, in getting ready for this trial by buying property since the first trial. I want to know, secondly, if there is a man on the jury that believes, in the face of the testimony, that any other jury of 12 of their fellow-citizens, is going to say, in the face of the testimony of their own witness, Mulliken, that they need that space there. If you find that they do not use it—and Mulliken says they do not use it, because their system is at grade—how can you find that they do use, or any jury would find that they use it? How can you find that they need it, when Mulliken says that they use it for the storage of freight cars? I do not care anything about the Michigan Central employees they bring in here. They brought Mr. Sutherland here. I asked him, on cross-examination about this. Let us see about this question of use and need. I remember what he testified: You accommodated the Grand Trunk up to the time they left? Yes. You have accommodated since the Detroit, Lansing & Northern? Yes. The Flint & Pere Marquette? Yes. The Bay City road? Yes. You accommodated all these roads that are going out and have gone out? Yes. You have just bought this immense area of 400 feet on River street clear through to the river, from the Detroit, Lansing
1579 & Northern? Yes. You have room enough on your grounds to put up two elevators; all these roads are going to leave you; the Detroit, Lansing & Northern did not leave because they were not fully accommodated. Mulliken says they did not. Mulliken says they were perfectly comfortable; had all the room to do their freight and passenger business that they desired in the Central grounds, and that was not the difficulty; that the difficulty was that

they had extended their line and had to carry on a competition with the Michigan Central Company. These are going out. What are they going to do with the room that is left after they go out? Cannot they give us these few feet, if it does not injure their track? Think of it, and take it home to yourselves, gentlemen of the jury."

The objection based upon what took place at the hearing before the jury, as above set forth, involves the question, first, Has the petitioner power under the statutes of this State to condemn a right of way for an elevated railroad along the margin of the property of the Michigan Central Railroad Company—and if it has no such power, secondly, did such claim, made under the circumstances, and in the manner in which it was made, so bias and prejudice the jury against the petitioner, as to have caused them to award excessive compensation, and does the same furnish a just inference of the existence of such influences?

The power of eminent domain is in the State; and is a power delegated by the people to, and vested in the legislature, subject to certain constitutional limitations, and it can only be exercised by virtue of a legislative enactment, it is a power the exercise of which cannot be implied or inferred, but must be given in express terms, or by necessary implication. (Lewis on Em. Dom. sec. 240, and cases cited in note.)

1580 The statute which authorizes the petitioner to condemn property by virtue of the power of eminent domain, is, like all grants of power by the Government, to be strictly construed (Lewis, sec. 254), and only such construction will be given an enactment to carry into effect the chief and manifest purpose for which it was passed. (Commonwealth *vs.* F. R. R., 8 Cush., 240; Gray *vs.* L. & B. R. R., 9 Beav., 391; Martin *vs.* Rushton, 42 Ala., 289; Spofford *vs.* B. & B. R. R., 66 Me., 26; Binney's case, 2 Bland Ch. (Md.), 99; Lea *vs.* Johnson, 9 Iredell Law, 15; Belknap *vs.* Belknap, 2 Johns' Ch., 463; Watson *vs.* A. Water Co., 36 N. J. L., 195; Reynolds *vs.* Spears, 1 Stew., 34; A. G. S. R. R. *vs.* Gilbert, 71 Ga., 591; C. & E. I. R. R. *vs.* Wiltse, 116 Ill., 449; Belcher S. Co. *vs.* St. L. Grain Elevator, 82 Mo., 121; Cox *vs.* Tifton, 18 Mo. App., 450; Jersey City *vs.* Central R. R., 40 N. J. Eq., 417; Central R. R. *vs.* Hudsunder Co., 40 N. J. L., 289; Miami Coal Co. *vs.* Wigton, 19 Ohio St., 560; P. & L. E. R. R. *vs.* Brace, 102 Pa. St., 23; Simpson *vs.* S. S. Water Works, 24 L. J. Eq., 380.)

The general principles that property once taken for public use cannot be again taken, and the principles which govern in respect to the taking of property already taken and devoted to public use, are as follows:

1. All property held for public use is still subject to the eminent-domain power of the State, with this exception, that it cannot be taken to be used for the same purpose in the same manner.

2. The right to take property already devoted to public use must be given in express terms or by necessary implication.

3. Whether such authority has been given in any case, 1581 either in express terms or by implication, is necessarily a question for the courts.

4. Whether the power exists in any given case is a question of legislative intent, to be ascertained in the first place from the terms of the statute, and in the second place by the application of the statute to the subject-matter. If the language of the statute is explicit, the courts have nothing to do but to give effect to the express language of the statute. (Lewis on Em. Dom., sec. 276.)

The legislature cannot divest itself of its sovereign powers, and while it may grant to an individual, or to a corporation, the power to exercise the right of eminent domain, still, when so exercised, all property taken is still subject to the power of eminent domain in the State. The power is in the State. The exercise of the power may be granted, and when granted and exercised, the same power over the property is still in the State.

The right to take property already devoted to public use must be given in express terms or by necessary implication. This principle has become established by abundant authority. (Lewis on Em. Dom., sec. 226, and cases cited; Boston Water Co. *vs.* W. R. R., 23 Pick., 360; Springfield *vs.* Can. R. R. R., 4 Cush., 63; Proprietors, etc., *vs.* Lowell, 7 Gray, 223; H., etc., R. R. *vs.* L. & H. R. R., 118 Mass., 891; B. & M. R. R. *vs.* Lowell, 124 Mass., 368; P. & W. R. R. *vs.* N. & W. R. R., 138 Mass., 277; N. J. & S. R. R. *vs.* L. B. Comm'rs, 39 N. J. L., 28; Matter of B. & A. R. R., 53 N. Y., 574; People *ex rel. vs.* Thompson, 98 N. Y., 6.)

The principle being well established that property already devoted to one public use cannot be taken for another public use
1582 without express legislative authority, it remains to be seen whether the petitioner has express legislative authority to condemn the property of the Michigan Central Railroad Company.

The act under which the petitioner is incorporated gives general authority to condemn "any real estate, property or franchises," needed for the purposes of such corporation; but this general authority, as we have seen, does not apply to property that is already devoted to a public use. In addition to authorities above cited, see W. & N. R. R. *vs.* R. C. Comm'rs, 118 Mass., 561; A. & F. R. R. *vs.* A. & W. R. R., 75 Va., 780; O. C. R. R. *vs.* Bailey, 3 Or., 164; C. C. R. R. *vs.* Moss, 23 Cal., 323; C. P. R. R. *vs.* C. P. R. R., 47 Cal., 549; and as to such property, in order to make it subject to condemnation, we must find an express grant of authority.

The act expressly authorizes the petitioner "to lay out and construct its tracks upon or across any stream of water, * * * and across any plank road, railroad or canal, which may be necessary for the purpose," etc. (Sec. 4, sub. third.)

And in section 6, which confers general power to condemn the lands needed, there is contained an express limitation. It provides as follows: "In case any company is unable to agree for the purchase of any real estate, property or franchises required for the purposes of its incorporation, it shall have the right to acquire the title to the same in the manner and by the special proceedings prescribed in this act; but there shall be no power, except for crossing, to take the track or rights of way of any other railroad company, without the consent of said railroad company."

Without considering the effect to be given to the prohibition contained in this provision, it is sufficient to say that the ex-
1583 pression in this act of authority to condemn a right of way "across" another railroad, necessarily excludes the power to condemn a right of way "along" another railroad, as proposed, and as it was contended before the jury could be done in this case. The rule of interpretation was stated by the supreme court of Wisconsin as follows: "But it is a well-settled rule of construction that specific provisions relating to a particular subject must govern in respect to the subject as against general provisions in other parts of the law which might otherwise be broad enough to include it." (Felt *vs.* Felt, 19 Wis., 196.) And in New Jersey, the court, after citing several English cases, *and* then said, "When the intention of the law given, which is to be sought after in the interpretation of a statute is specifically declared in a prior section as to a particular matter, it must prevail over a subsequent clause in general terms, which might by construction conflict with it. The legislature must be presumed to have intended what it expressly stated, rather than that which might be inferred from the use of general terms." (State *vs.* Trenton, 38 N. J. L. 64–68.)

It follows that the petitioner, under the act under which it is incorporated, has no power to condemn property already devoted to the public use, and for that reason could not, under the statute, acquire the right along the margin of the Michigan Central railroad property.

The petitioner is expressly prohibited, except for the purpose of making a crossing, from taking "the track or rights of way of any other railroad company without the consent of said railroad company," sec. six, *supra*, and as we have seen the act does not contain any provision whatever which either expressly or impliedly authorizes such condemnation, and there is no attempt to confer any such power.

1584 It was further contended that the petitioner was a railroad company, and as such had power to condemn the property of the Michigan Central railroad, under and by virtue of an amendment to the general railroad law.

The general railroad act contains the same provisions, "that there shall be no power, except for crossing, to take the track or rights of way of any other railroad company, without the consent of said railroad company, except as hereinafter provided." (1 How. St., sec. 3331.)

As originally enacted, section 36 of the general railroad law, related to the manner of making crossings, with a proviso, "that no such crossing or connection shall be made within the depot limits of any such company, or acquiring the right thereto, as provided in this act, for the taking of land and other property." (1 How. St., sec. 3350.) This section was, however, amended in 1883, and again in 1887. Public Acts, 1883, p. 188; Public Acts, 1887, p. 294, and the amended section contains no provision authorizing the condemnation of the depot grounds or rights of way of another company.

The following amendment to the general railroad law was enacted in 1881 (1 How. St., sec. 3357):

"SEC. 44. When any part of the land of any railroad company in this State, in or adjacent to its depot grounds, is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company, organized as aforesaid, needing such land for the purpose of a depot or terminal facilities, to acquire the same in the same manner as may now be done for such purpose from individuals. The question of actual use and necessity
1585 for the aforesaid purposes by said railroad company owning and not using the land, shall be determined in addition to other questions, as provided by law in cases of condemnation of lands for the purpose aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals."

Except so far as the power is conferred by the above section, there is no authority under our laws to condemn the property of another railroad company.

The conclusion stated in the opinion in G. R. N. & L. S. R. R. & *vs.* G. R. & I. R. R., 35 Mich., 265, cited by counsel for respondents, has no application whatever to the principle here involved.

Waiving the question of the right of the petitioner to avail itself of the provisions of this statute and which is extremely doubtful, as it will bear the interpretation of being applicable only to companies organized under the provisions of the general railroad law, the principal difficulty of the contention of the respondents is, in not only assuming the right and the power, but also assuming the existence of all the conditions necessary for the exercise of the power.

In order that the power may be exercised under this statute, it is necessary that both conditions exist, viz., the land proposed to be taken, must be not in actual use and not needed, and these questions under the statute must be determined, in addition to other questions, as provided by law in cases of condemnation. These questions can only be determined in a direct proceeding, and it is not only impracticable, but impossible to have them determined in a proceeding when they are not necessarily involved. The power given is the exercise of the power to condemn, and it would
1586 be but sheer folly to attempt to exercise such power when the necessary conditions did not affirmatively appear, and it certainly was not the intent of the legislature that such questions could be made to arise in any other but a direct proceeding, and no issue of fact arises until such issue is framed.

The question is a question of power, not a question of expediency. The statute does not bear the construction contended for by the respondents, and the petitioner has not the power to condemn under the statute above cited. The statute does not go beyond the terms of some adjudications, as property not in use for railroad purposes,

and not necessary to the proper exercise of corporate franchises, may be taken by another company (B. & O. R. R. *vs.* P. W. & K. R. R., 17 W. Va., 812; P. P. & J. R. R. *vs.* P. & S. R. R., 66 Ill., 174), nor will the general rule apply when but a small and immaterial part is necessary for the right of way of another company, or other imperative use (C. & W. R. R. *vs.* C. & E. R. R., 112 Ill., 589; N. Y. H. & N. R. R. *vs.* B. H. & E. R. R., 36 Conn., 196); and where a company owned land abutting on a street, the fee extending to the middle of the street, it was held that another company having authority to occupy the street would not be prevented from doing so by the fee being in the first company (Phil., etc., R. R. *vs.* Penn., etc., R. R., 16 Phila., 636).

In Allegh. V. R. R. *vs.* Pittsb. Junc. R. R., 122 Pa. St., 511, an attempt was made to lay out a route through a railroad yard, etc. The master held the action justified under an act which provided that if "in the judgment of such court it is reasonably practicable to avoid a grade crossing they shall, by their process, prevent a crossing at grade." Upon exceptions to the master's report, the court
1587 below held that the act had no application, for the reason that it referred to railroad crossings alone, and that this was not a case of crossing at all in the proper sense of that term. This was held correct, and the court say: "The act of 1871 relates 'to crossings of lines of railroads by other railroads.'" There was no attempt here to cross the line of plaintiff's road. It was an attempt to run through plaintiff's yard, and the crossing of some of its yard tracks and switches which were merely incident to the use of its main line, as was well observed by the court below, "the attempt is not simply to cross the yard and tracks with a common use, but absolutely to take from plaintiff a portion of *their* yard for the sole use of the defendant. The issue is not in what mode the defendant should cross plaintiff's property, but solely whether it can cross at all." In this case it is also held that while the franchises of a corporation are property, subject to the power of eminent domain, yet when property has been already taken for one public use, by a corporation, it cannot be taken by another corporation for another use, except by express grant or by necessary implication, and holds "the principle well settled that the lands or right of way occupied by one railroad company, for its corporate purposes, cannot be taken by another railroad company, except for new crossings, and then only for crossing purposes, and not for exclusive occupancy." Cases cited.

It was claimed that the yard of plaintiff was larger than necessary for its then present use, and that it could be so rearranged as to accommodate defendant's track without serious detriment to the plaintiff, either in the present or the future. Upon this question the court say: "We are of the opinion that a railroad company has a
1588 right to consider the needs of the future, and to construct its road and make its plans with reference to those future needs." And "every reasonable intendment must be taken in favor of the primary rights, etc.; no actual encroachment upon these rights can be santioned or allowed, and in measuring their extent there must be a liberal construction for the future, as well as the existing ne-

cessities of the complainant, the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of all its business."

It was further said by the court that as the location claimed was a matter of economy, not of necessity, and upon this quoting from another case, say: "This plea of necessity is so frequently used to cover infractions of both public and private rights that, *prima facie*, it is suspicious and must be closely scrutinized, especially when it is used to carry corporate privileges beyond charter limits;" also, "that all acts of incorporation and all acts extending corporate privileges are to be construed most strongly against the companies setting them up, and that whatever is not unequivocally granted must be taken as withheld."

Important legislative grants cannot be interfered with or destroyed upon a mere pretense, in fact at the will of the holder of the latest franchise.

In H. R. R. *vs.* Lee, 118 Mass., 391, it is held that it cannot be presumed that the legislature intended to allow land devoted to public use to be subjected to another, unless the authority is given in express words or by necessary implication, and such implication can only be found in the language of the act, or from the application of the act to the subject-matter, so that the railroad cannot be laid, in whole or in part, by reasonable intendment on any
1589 other line. A well-considered case and one in point is that of B. & M. R. R. *vs.* L. & L. R. R., 124 Mass., 368.

In P. P. & C. I. R. R. *vs.* Williamson, 91 N. Y., 552, the court, after stating the proposition as above, say: "But we do not rest our decision upon that point, but upon the fact that these lands having already been lawfully appropriated, under the right of eminent domain, to a public purpose, express and direct legislative authority is necessary to justify their appropriation by proceedings *in invitum* to a different purpose."

In I. C. R. R. *vs.* C. B. & N. R. R., 122 Ill., 484, the court, after discussing the subject with reference to a statute, among other things, say: "It is no part of the duty of courts to provide a remedy in any case, much less in one where the legislature has purposely, as it would seem here, declined to provide one. We say purposely declined, because it would be unreasonable to suppose that the legislature did not consider the question whether, under special circumstances, it might not sometimes become necessary for one railroad company to take, longitudinally, the whole or any part of the right of way of another company, to be used for its main tracks; and the fact that no provision was made for a case of that kind affords the strongest evidence that the non-action of the legislature was intentional." (See also St. P. Union Depot Co. *vs.* St. Paul, 30 Minn., 359; M. & St. P. R. R. *vs.* Fairbault, 23 Minn., 167; Atlanta *vs.* C. R. R., 53 Ga., 120.)

It may also be remarked that the evidence is conclusive and uncontradicted that the Michigan Central Railroad Company is in the actual occupancy of all the property between River street and the

Detroit river, from Third street to Twelfth street, and that it
1590 is necessary to use all that property to properly transact its business. The question, as it appears, which was suggested during the hearing as to whether an elevated road would interfere with the use by the Michigan Central, needs no consideration; there being no power to condemn for a surface road, it follows that there is no power to condemn for an elevated road, for, as said, the question is not one of expediency nor of feasibility, but of power, and there is no distinction, as to property, between an elevated and a surface road.

Had this matter been before a jury at a common-law trial, the charge of the court would have had to be that, under the law and evidence, the property of the Michigan Central railroad could not be condemned, and this being the case, the subject was not a proper one for contention and argument before the jury in this matter.

The next question which arises is, considering the claim so made and the manner in which it was made, and there being no authority for making it, did it have a tendency to bias and prejudice the jury against the petitioner, and thus influence them to award unjust damages?

It is a fact not to be disguised that an appeal to the passions and prejudices of an ordinary jury necessarily has its effect, and that this is especially true when a railroad corporation is involved. Juries in these cases are ofttimes led to do things which they would not do in controversies between individuals, and when, as was done in this case, an appeal is made to a jury that one company has a large quantity of land, more acreage than other companies doing more business, and supplementing this statement with an argument based upon a false view of the law, that certain of the property of such company can be taken, no illustration is
1591 needed to demonstrate its effect upon an ordinary jury. The argument, as we have seen, which was made to the jury carries with it its own commentary; it was an appeal to their passions and to their prejudices, based upon an unwarranted assumption of alleged facts, of which there was no proof, and of a power under a law which is in no way applicable to the case. That this not only had a tendency to prejudice the jury against the petitioner and influence their award, but that as a matter of fact did, is clearly apparent from the record, and shown by their verdict in this case.

It is not sufficient to say that the jury found with petitioner upon the question of necessity; this does not in any way meet the question. The petitioner was entitled to just consideration upon the question of compensation or damages to be awarded, and was also entitled to have the jury act upon this question without bias, without passion and without prejudice. The natural and inevitable effect of the arguments made, is manifest; it would be difficult to conceive of an argument more effective, the certain and inevitable tendency and effect of which would be to influence the jury and cause them to award the most extravagant and ex*h*orbitant damages.

While a jury in a matter of this kind should be liberal in their

estimate and award of damages, still they should be just and any amount awarded beyond full and adequate compensation is unauthorized, unwarranted, arbitrary and unjust.

As we have seen, the jury, although judges of the law and facts, have no right to disregard well-recognized legal principles, and counsel who appear before them are governed by the same rules and subject to the same responsibility which govern their
1592 conduct in court. In fact, a greater responsibility attaches to counsel when appearing before a jury of inquest, while having the same latitude in argument, still it is not greater, and errors which might otherwise be corrected are here not subject to correction until brought before the court. It therefore behooves counsel in conducting such proceedings to be more circumspect in what they say or do. That it is not only within the power of the court, but that it is also its duty to interfere, where matters foreign to the issue are placed before the jury, or matters prejudicial are rehearsed before them, is a well-established legal principle. This power is not confined to the lower court on motions for a new trial, but is frequently exercised by appellate courts on error or appeal.

In Rickabus *vs.* Gott, 51 Mich., 227, counsel in his opening stated matters foreign to the issue before the jury, and upon error the verdict was set aside. And where a party's rights were prejudiced by remarks of the court, the judgment was reversed. (Cronkhite *vs.* Dickerson, 51 Mich., 178.)

A party is entitled to the unbiased judgment of the jury on the facts. (Wheeler *vs.* Wallace, 53 Mich., 856; People *vs.* Horn, 57 Mich., 505.)

In Bond *vs.* Pontiac R. R., 62 Mich., 646, the court say, "It was early objected that plaintiff and his witnesses were allowed to refer repeatedly to defendant as the party dealing or dealt with, where the question of authority was mooted, and it was essential to know with what particular person the dealing was had. We think the objection should have been regarded, and the court, by allowing witnesses to persist in such references, placed the jury in a position where they were not only liable to be misled, but were also likely to overlook the necessity of proof of authority."

1593 In Sullivan *vs.* Deiter, 49 N. W. Rep., 261, the judgment of the lower court was reversed, based solely upon the manner in which the cause was tried, and this consisted of questions asked and statements made by counsel before the jury.

Statements of counsel before a jury in criminal cases have frequently been held error in this State. (People *vs.* Quick, 58 Mich., 321; People *vs.* Dane, 59 Mich., 550; People *vs.* Carr, 64 Mich., 702.)

In Koch *vs.* Hebel, 32 Mo. App., 103, a statute provided that certain affidavits of claims against estates should not be received as any evidence of the claim, but in the face of this statute, counsel for plaintiff, in his argument, alluded to the statutory affidavit. Held sufficient ground for reversal.

In a trial before a common-law jury counsel have no right to elaborate and argue upon matters not in the case, nor upon law not applicable thereto, and it is the duty of the court to see to it, and

allow no matters to occur which may tend in any way to mislead the jury, or divert their minds from the strict line of inquiry in which they are engaged; and comments upon matters irrelevant are never permitted. The instances in, and the cause for which courts have interfered and set aside verdicts of juries because of occurrences at the hearing before them are very numerous, and it would be unprofitable to go into any extended review of the cases at this time, as the error here is evident, and that it had a decided effect on the jury is beyond question.

The good faith of counsel in presenting and arguing before the jury a matter foreign to the inquiry and irrelevant to the
1594 issue, was palpably prejudicial, and no amount of good faith can cure the error. The placing of such matter before the jury and the raising of questions which could not under the law be properly brought before them, and in no way involved under the issue raised, and the questions which they were to determine cannot be excused upon a plea that the motive in doing so rested upon honest judgment, and that the matters were thus urged in absolute good faith.

Under the statute, as we have seen, the jury "shall hear the proof and allegations of the parties," and an objection is made upon the ground that proper testimony was offered and rejected, and that such testimony so rejected is of that character as would necessarily have a controlling influence in arriving at a verdict upon the question of the amount of just and adequate compensation.

In order to fully comprehend and understand the nature and effect of this objection, it will be necessary to quote somewhat at length from the record.

It appeared from the testimony of Absalom Backus, Jr., that the property of the respondents consisted of a large planing mill and box factory, and that the shavings and sawdust are forced by fans through pipes into a shavings-room and a sawdust-room; that these rooms are each 40 or 50 feet long, 20 feet wide, and 30 feet high. These rooms are surrounded with solid walls with openings at the bottom to take out the shavings and sawdust, and on top of these rooms there is an arrangement known as the Backus dust-arrester. This dust-arrester consists of a large amount, some 2,700 yards, of burlap, and is so arranged that all the air that is forced by the fans into the shavings and sawdust room passes through this burlap,
causing the shavings and sawdust to collect on the inside of
1595 the burlap, and fall down into the rooms or reservoir below. The frames carrying the burlap are covered with a roof, and the side consists of open lattice-work through which the air escapes to the outside. The fine dust will come through the burlap and accumulate around the frame. In answer to questions put to him by his counsel, Mr. Backus testified as follows:

"Q. I wish you would go on and tell the jury in your own way what sort of a plant you have there, why you think it is the best, what you think are the dangers to which that machine gives rise, and generally give an account of it? Give us the shape and pur-

poses of that dust-bin and its liability to fire, according to the way the wind blows, and which way the wind blows down there, and all that?

"A. In order to run a planing machine and make your room available, it is necessary to get rid of the shavings and sawdust as fast as it is made, and the most practical way to do that is to use a large fan and exhaust fan that draws the stuff from the machine and throws it into a large reservoir, wherever it is; in order to have it work properly it has got to be a large place that will have three fans. If you undertook to throw it into this room it would not come in there, it would work against itself. You have to give it free vent. If you do not, the shavings and dust goes out, and that makes it a nuisance every way. It has been a great study with everybody in this business for a great many years. I have been very much exercised over it myself. I tried a great many schemes. Away back in 1873 I got a kind of an idea of blowing it in at the opening, but I never got relief until I got onto this idea gradually of burlaps, and gradually it developed into a perfect success. I took out a patent, and I have built probably a hundred of them for some of the largest institutions in the land; and without exception they all say it is superior to anything else. Many of them have been exchanged for other appliances, but they come back and say, 'Backus, yours is the best.' This runs automatically, requiring no power. The others require a good deal of power, and this gives us perfect relief and free from dust, leaves the shavings and sawdust in the room where you want it, so I have adopted that. Hand me that little model there. (The model was handed to witness.)

1596

"Q. Just explain how that Burlap acts, and the necessity for ventilators on the top and the dangers you are trying to counteract.

"A. Our room over there is very lengthy, it takes in two rooms as much as 70 or 80 feet long. This is 6-inch board and 6-inch crap all along, and 20 to 26 feet wide, and I put perhaps 12 feet high on that place, and in all I have got 2,700 yards of burlap. The way it goes in here through these open cracks and comes out here, the wind comes out free because there is no pressure on it, and there is so much surface that it is like a man putting his head in a woolen sack, he can breathe free, if he put it in a flour sack he could not. The wind raises it and these things puff out, swell out, and when you shut down your mill they collapse, that breaks the dust loose and they fall down, consequently it is automatic. Mitchell & Rowland of Toledo use one; Sanger & Rockwell of Milwaukee also; Anson Eldred of Port Howard; and the big men of Chicago, Palmer & Fuller. These large carriagemen of Fort Wayne, Studebaker, put in a large one. I put in 100 of them in different places;—the pencil-makers in New York and the car works.

"Q. Have you a patent on it?

"A. Yes, sir.

"Q. Well, go on with your statement.

1597

"A. Of all the devices that have ever been put up that is the most substantial and reliable one. It is bulky and costs

money; but when you get it in you can go to sleep nights and think it is all right, because it will do the work. Crampton & Bolton said, when one was put in there, 'When I start my fan it will crack my fan all to pieces.' My man who was putting it up said, 'No, it won't.' He told him to wait until he started the engine and to be very careful. He started up the engine and this thing didn't even flutter and he says, 'All right, go ahead.' That was Crampton & Bolton."

Mr. Backus further testified that the prevailing winds are up and down the Detroit river, and that locomotives passing up and down the elevated railroad on River street would throw out sparks which would be drawn through the lattice-work and onto the burlaps and fine dust that comes through the same, and in that way there would be a very great increase in the fire risk.

Among other things he testified as follows:

"Q. What do you consider the precise danger and the precise detriment to your plant there by this structure being put up in front of it?

"A. I consider it as an absolute ruin to our business.

"Q. Go on and tell the jury in your own way why.

"A. I do not think it would be a practical thing for us to run it, for the reason, in the first place, that it would not be but a little while before we would be burned up. It is inevitable, because you must remember that works like powder. It is a thing that is very combustible and they are exposing me every few minutes. Sometimes when you least expect it. It is not necessary that all the sparks should go there, but one spark would set me on fire.
1598 If there is not much wind this dust collects, it lays inside, a little dust lays there. It is stuff that will burn like powder, and if this spark finds us it will destroy us before we know it. And even if our property is insured it is going to cost us a good deal of money. In my candid opinion, as I have looked it over, it will cost about $6,000 a year to pay the extra insurance."

On cross-examination Mr. Backus, among other things, testified as follows:

"Q. Do you not know that a dust-arrester like this is a very dangerous dust arrester so far as fire is concerned, and that a number of mills have been burned up by them?

"A. No, sir; I do not.

"Q. Do you not know that it is the most dangerous dust-arrester known to the trade?

"A. I don't know that.

"Q. Do you not know that this dust-arrester does not work satisfactorily or safely, and that other dust-arresters are being put in generally all over the country?

"A. No, I don't know any such thing. I know this, that that dust-arrester is the most practical dust-arrester on the face of the continent today."

In answer to a question by Mr. Charest, one of the jurors, Mr. Backus testified that he had received letters stating that his dust-arrester was a good one, and upon further cross-examination by counsel for petitioner, he testified:

"Q. You received those when your dust-arrester first came out?
"A. I have had letters lately.
"Q. Do you not know that if any one approved of your dust-arrester lately it is because they did not know about the others?
1599 "A. I don't know any such thing.
"Q. Do you not know as a man of experience in this sort of thing that your dust-arrester is absolutely worthless?
"A. I do not."

Mr. Backus gave a great deal of other testimony in support of the burlap dust-arrester.

The respondents also called James A. Jones, as an insurance expert, who testified that the elevated railroad in River street with the dust-arrester so near it, would make the dust and shavings building almost uninsurable, and that the rate on the other buildings would be increased from 25 to 50 per cent.

To rebut the testimony of Mr. Backus and Mr. Jones, above referred to, and other similar testimony, the petitioner called Philip C. Miller as a witness, and showed by him that he was an expert in the business of putting in fanning and blowing pipes and dust-arresters.

Counsel for the company then offered to show by the witness that the Backus dust-arrester is not a proper one, and that another kind could be put in that would be fireproof and a great deal better, and do away with the alleged fire risk entirely.

He offered to show that the Backus dust-arrester is an exceedingly dangerous one, and that it has been discarded generally throughout the United States and Canada, and that the dust-arresters now in use are small metallic dust-arresters that are absolutely fireproof as far as any outside exposure is concerned and that without changing the pipes, flues or fans, in the Backus mill, the dust and shavings rooms could be rendered fireproof at an expense of about $1,300. This testimony was formally ruled out and
1600 excluded by the jury as entirely immaterial. No reason was given for this ruling except a suggestion by Mr. Julien, one of the jurors, that the jury had no power to compel Mr. Backus to change his dust-arrester.

It appears, therefore, that the case was submitted to, and considered by the jury, upon the uncontradicted testimony offered by the respondents tending to show that the Backus planing mill and box factory were sure to be consumed by fire if the elevated railroad was operated in front of the property. All the testimony offered by the company to rebut this proof was rejected by the jury.

The reason stated by the juror is not worthy of any consideration, but it was claimed on the argument of this motion that as the jury had had the matter before them for nearly two months when this offer was made and being desirous of bringing the matter to a close,

that this justified their conduct and ruling. If the proofs offered were competent and relevant to the issue, they should have been received, and the jury had no right to exclude them; the reason given by counsel does not answer the purposes of the law. That such proof was both competent and relevant cannot be seriously questioned, and that it would have had a very important bearing upon the issue, and a controlling influence in arriving at a just verdict upon the question of the amount to be awarded is equally clear. A case directly in point is that of the [illegible] St. L. R. R. *vs.* Sweitzer, 117 Ill., 399.

I do not deem it necessary to consider the other objections to the rulings of the jury, as what has been said disposes of the principal one relied upon at the hearing of this motion, and to show the bearings of the others on the case would require extended quotations or review of a large part of the proceedings; counsel ought not to have any difficulty in agreeing upon that which is competent and relevant, and where there is doubt the safest and best plan is to receive instead of rejecting testimony.

1601

The damages awarded are most remarkable. The right of way sought to be acquired is the right of way for an elevated railroad along River street in front of the property of respondents. They have a frontage on the street of some 238 feet, and on Fort street of about 75 feet. At $150 a foot, which is a large estimate, the land itself is worth $46,950. The testimony of respondent, Absalom Backus, Jr., is to the effect that the buildings and improvements had cost $150,000, and are worth that now. But, deducting 25 per cent. for depreciation, which is usual on buildings and improvements of some years' standing, we have a valuation of $112,500, or a total valuation for the entire property of $159,450.

And yet for simply going in front of this property a jury makes a total award of $96,144.

Comparing this award with what has been voluntarily accepted or awarded in other cases on River street, we have some striking contrasts:

Geo. H. Hammond, 45 feet frontage, $2,500, or $55.55 per foot.
Diamond Match Co., 210 feet frontage, $1,600, or $76.18 per foot.
Union mills, 140 feet frontage, $21,250, or $157.78 per foot.
Geo. Kunze, 25 feet frontage, $1,000, or $40 per foot.
Geo. C. Wetherbee, 25 feet frontage, $1,500, or $60 per foot.
Hylet Barker, 25 feet frontage, $1,000, or $40 per foot.
Frank Hildebrand, 25 feet frontage, $1,500, or $60 per foot.
Mich. Cent., 166 feet frontage, $1,660, or $10 per foot.
Mich. Cent., 47 feet frontage, $470, or $10 per foot.
Barbara Steadley, 65 feet frontage, $2,615.20, or $42.30 per foot.
Louis J. Specht, 27½ feet frontage, $1,100, or $40 per foot.
Mary Specht, 27½ feet frontage, $1,100, or $40 per foot.
Barbara Baxter, 23 feet frontage, $690, or $30 per foot.
Margaret Specht, 23 feet frontage, $713, or $31 per foot.
John Winister, 51 feet frontage, $1,530, or $30 per foot.
Jacques Ruhlman, 20 feet frontage, $1,000, or $50 per foot.
Rachel Ruhlman, 20 feet frontage, $1,000, or $50 per foot.

1602

Catherine Harpfer, 40 feet frontage, $1,600, or $40 per foot.
Boynton & Boutell, 45.87 feet frontage, $917.40, or $20 per foot.

It is impossible to review the record in this case without coming to the conclusion that upon no possible theory is the amount awarded justified. The proceedings not only furnish a just inference, but the conclusion is unavoidable, that the verdict is the result of bias and prejudice and based upon erroneous principles. To review the proceedings in detail would be impracticable. That the amount awarded is not only exorbitant, but grossly so, would, after a review of the proceedings, be the inevitable conclusion of any impartial or disinterested person; and to allow such a finding to stand would be a travesty upon justice.

That the jury felt and acted that whatever they did was
1603 justifiable, that they were the law unto themselves, and were at liberty to do and act according to their own caprices, is apparent throughout the entire proceedings. They regarded themselves, as was stated before them "masters of the situation." To refer to one matter as an illustration: The court was asked by them as to who, under the law, had the right to open and close the argument before them. After being advised that the petitioner, holding the affirmative, had the right to begin and reply in the argument to the jury, which is the law (1 Thompson on Trials, sec. 247; South Park Comm'rs *vs.* Trustees, 107 Ill., 489; McReynolds *vs.* B., etc., R. R., 106 Ill., 152; Neff *vs.* Cincinnati, 32 Oh. St., 215), yet notwithstanding such instruction, and being given upon their request, a statement was made by counsel, in effect, that they were the judges of the law. The jury then retired, and after considering the matter for some time, returned, and finally concluded that they would follow the law. This illustration is but characteristic of the proceedings throughout. The jury seem to have forgotten that they were dealing with important interests, and concluded that they were justified in all they did, regardless of the law.

The final objection is based upon the fact that the jury, while deliberating upon their verdict, surreptitiously obtained twelve quarts of beer. Without considering this matter or the legal effect thereof, it may properly be said that it is surprising that there was not some one upon the jury to recognize, to say the least, the impropriety of such action and have prevented it. This was undoubtedly due to a mistaken notion or an overestimated idea of irresponsibility and independence, and which the jury seem to have entertained regarding their action.

The award must be set aside and a new jury sworn.

GEO. GARTNER,
Circuit Judge.

1604 *Order Vacating Award.*

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., *et al.*
} Before Judge Gartner.

OCTOBER 26, 1891.

In this cause the motion of said complainant for an order of the court setting aside the award heretofore made by the jury in said cause, and for the impaneling of another jury in said cause having been heretofore argued and submitted after due consideration thereon, it is ordered that the award heretofore made by the jury impaneled in said cause and entered therein be and the same hereby is set aside and held for naught. And it is further ordered that a new jury be impaneled in said cause in accordance with the statute governing said proceedings.

(Signed) GEO. S. HOSMER,
Presiding Judge.

The respondents in the condemnation proceedings then applied to the supreme court for a writ of mandamus to compel Judge Gartner to set aside his order vacating the award or verdict of the jury and granting a new trial in such condemnation proceedings. The following order was made by the supreme court upon such application.

1605 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the nineteenth day of November, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable John W. Champlin, chief justice; Allen B. Morse, John W. McGrath, Charles D. Long, Claudius B. Grant, associate justices.

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS, Relators,
vs.
GEORGE GARTNER, One of the Judges of the Circuit Court for the County of Wayne, Respondent.
} #12341.

This matter having heretofore been heard upon the petition of the relator and the answer of the respondent, and having been argued by counsel for the respective parties, and due consideration thereof having been had, and no sufficient cause being shown to the contrary, thereupon it is ordered that a peremptory writ of mandamus issue out of and under the seal of this court to compel him, the said circuit judge, respondent as aforesaid, to forthwith vacate and set aside the order heretofore made by him setting aside the award or verdict of the jury and granting a new trial in the proceedings of The Fort Street Union Depot Company, petitioner, against Absalom Backus, Jr., A. Backus, Jr., & Sons, James N. Dean,

and William A. Davison, respondents, pending in said circuit court, and to forthwith enter an order confirming said award or verdict.

And it is further ordered that the relators recover of and from the said Fort Street Union Depot Company their costs of this proceeding.

1606 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, WILLIAM H. DAVISON, Respondents.

And now comes the said petitioner, by F. A. Baker, its attorney, and shows cause why the verdict and award of the jury in this cause should not be confirmed, but ought to be vacated and set aside, and submits the following additional reasons:

24. The supreme court erred in granting a writ of mandamus in this case, having misapprehended and misunderstood the facts of the case, and the law applicable thereto, and unwittingly deprived the circuit courts of this State of a wise and wholesome power and jurisdiction vested in them by the constitution and laws of this State, and upon the unwarrantable assumption that the circuit courts have no more power and jurisdiction in condemnation cases than the supreme court has under its appellate jurisdiction.

25. Said writ of mandamus was improvidently granted.

26. To confirm said verdict against the deliberate judgment of the circuit court for the county of Wayne is in and by itself a violation of the constitution and laws of this State.

1607 27. During the trial before the said jury, to wit, on the 20th day of June, 1891, Henry N. Backus, a stockholder and officer of the corporation respondent known as A. Backus, Jr., & Sons, knowingly, willfully and corruptly paid to Felix Julien, one of the jurors in said case, a large sum of money, to wit, one hundred and thirty dollars, for the purpose and with the intent of corruptly influencing the said Felix Julien as a juror in said case, and to the great wrong and injury of petitioner. Said payment was made under the pretense that the said Henry N. Backus was indebted to the said Felix Julien in the amount so paid, whereas in truth and in fact the indebtedness paid was the debt of the National Herb Medicine Company, and the said Henry N. Backus was not liable thereon, and he had previously denied that he was liable thereon and had refused to pay the said Felix Julien the said debt or any part thereof.

The affidavits of Samuel F. George and Gilbert C. McCullough are filed in support of the foregoing accusation, and the petitioner offers to maintain and prove the same with the testimony of witnesses at such time and in such manner as the court may direct.

The above objections are based upon the files and records in this

case, the affidavits mentioned above, and the affidavits of F. A. Baker and Geo. F. Robison herewith filed.

F. A. BAKER,
Attorney for Petitioner.

Detroit, November 27, 1891.

1608 STATE OF MICHIGAN :

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, WILLIAM H. DAVISON, Respondents.

COUNTY OF WAYNE, *ss:*

Samuel F. George, a resident of Detroit, in the State of Michigan, being duly sworn, upon his oath deposes and says that the National Herb Medicine Company is a corporation organized under the laws of the State of Michigan, and is located in the city of Detroit, in said State; that from the 10th day of March, 1891, to the first day of July, 1891, the board of directors of said company consisted of Henry N. Backus, of Detroit, Mich., Horace C. George, of Detroit, Mich., and this deponent; that said Henry N. Backus is the son of Absalom Backus, Jr., of Detroit, and is one of the stockholders in the corporation known as A. Backus, Jr., & Sons, and that said Absalom Backus, Jr., and said A. Backus, Jr,. & Sons are two of the respondents in the above-entitled condemnation suit; that in the month of March, 1891, this deponent, as the president of the National Herb Medicine Company, employed Felix Julien, a carpenter and contractor, to do some work fitting up the
1609 store, 305 Woodward avenue, in the city of Detroit, then about to be occupied by said National Herb Medicine Company; that said Felix Julien did said work for the said National Herb Medicine Company, and said company became indebted to him therefor in about the sum of one hundred and twenty-six dollars; that deponent is sure said indebtedness was over one hundred dollars, but is unable to state the exact amount; that said Henry N. Backus had nothing to do with the employment of said Felix Julien, except this, that he gave the name of said Felix Julien to this deponent as that of a suitable person to employ, and this deponent, in employing said Felix Julien, informed him that Henry N. Backus was one of the members of the National Herb Medicine Company, and had sent him to him, said Julien; that after said work had been done by said Felix Julien, he presented a bill therefor to said National Herb Medicine Company, but made the bill out against "the Backus & George Medicine Company;" that the said National Herb Medicine Company was unable to pay said bill, and it remained past due and wholly unpaid from and after about the 15th day of April, 1891, or thereabouts; that at one time the said Felix Julien came to this deponent, at 305 Woodward avenue, and asked for his pay,

and claimed that he would hold said Henry N. Backus for it; that deponent is unable to state whether this conversation was before or after it was publicly announced that said Felix Julien had been selected to serve as one of the jurors in the above-entitled cause, but it was about that time; that after said Felix Julien had been selected as one of said jurors, the said Henry N. Backus came to this deponent and requested that the National Herb Medicine Company pay the said Felix Julien the amount of his said bill; that this
1610 deponent told said Henry N. Backus that the company was unable to pay said bill; that said Henry N. Backus replied that he would see Julien and have him hold on; that a few days afterwards the said Henry N. Backus again came to 305 Woodward avenue, and informed this deponent that he, the said Henry N. Backus, had paid to said Felix Julien the amount of his said bill against the National Herb Medicine Company, and the company would not be bothered any more with it; that the said Felix Julien has made no further claim *claim* against the said company therefor; that said National Herb Medicine Company was indebted at the same time to a number of other persons or firms, but this deponent is not informed whether said Henry N. Backus has paid any of them or not.

SAMUEL F. GEORGE.

Subscribed and sworn to before me this 28th day of September, 1891.

WALTER BARLOW,
Notary Public, Wayne County, Mich.

1611 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, WILLIAM H. DAVISON, Respondents.

COUNTY OF WAYNE, *ss:*

Gilbert C. McCullough, being duly sworn, deposes and says that his occupation is that of a painter and decorator, and he is located at the store No. 307 Woodward avenue, in the city of Detroit, in said county; that in March and April, 1891, this deponent, at the request of Felix Julien, the carpenter, did some work in fitting up the store No. 305 Woodward avenue, then about to be occupied by the National Herb Medicine Company, in which Henry N. Backus was represented to be a copartner or member; that the work performed by deponent came to and was of the value of eighty-six and seventy one-hundredths dollars; that said Felix Julien did the carpenter work in fitting up said store, and his bill, as deponent was informed by said Felix Julien, was about one hundred and thirty dollars; that after said work was done the said Felix Julien and this

deponent requested the said Henry N. Backus to pay their said bills; that at one time they made this request to him together;
1612 that Henry N. Backus, in reply to said request, denied all liability on said claims, and positively and peremptorily declined to pay the same or any part thereof; that deponent is not able to fix the exact date that this conversation occurred, but according to his best recollection, it was in the fore part of June, 1891, and before the second trial of the above-entitled condemnation suit was commenced, if said trial was not commenced until June 10, 1891; that subsequently this deponent was informed by the said Felix Julien that while he, the said Felix Julien, was serving as a juror in said condemnation suit, the said Henry N. Backus came to him and paid him the amount of his said bill, and that said Felix Julien informed him that he was so paid on or about the 20th day of June, 1891; that said Henry N. Backus has never paid this deponent; that deponent recently sued said Henry N. Backus before John Patton, justice of the peace of the city of Detroit, for the amount of said claim; that said Henry N. Backus defended said suit on the ground that he was not liable on said claim, and said justice of the peace so decided, and entered a judgment for said Henry N. Backus, the defendant in said suit; that the liability of the said Henry N. Backus to this deponent depends upon exactly the same state of facts as his liability to said Felix Julien; that said Felix Julien was called as a witness for deponent in said suit, who testified that the Drs. George requested him to do said work and represented that Henry N. Backus sent them to him; that Henry N. Backus was a witness in his own behalf and testified that he simply recommended Felix Julien to said The National Herb Medicine Company, and did not authorize the said Drs. George, or either of them, to bind him, the said Henry N. Backus, personally;
1613 that said suit was tried before the said John Patton, justice of the peace, on the 18th day of November, 1891, and was decided by him on the 23d day of November, 1891.

GILBERT C. McCULLOUGH.

Subscribed and sworn to before me this 24th day of November, 1891.

WALTER BARLOW,
Notary Public, Wayne County, Michigan.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT CO., Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, WILLIAM H. DAVISON, Respondents.

COUNTY OF WAYNE, *ss*:

Fred. A. Baker, being duly sworn, deposes and says that he is the attorney for the above-named petitioner; that at the time he pre-

pared and filed the motion made by him to vacate the verdict of the jury in this cause, he had not learned that, during the trial of the case, Henry N. Backus had paid any money to Felix Julien, one of the jurors; that deponent became aware of the facts set forth in the affidavit of Samuel F. George, on the 28th day of September, 1891, but did not become aware of all the facts set forth in the affidavit of Gilbert C. McCullough, until a short time after
1614 the trial of the case of McCullough against Backus, before Justice Patton, on the 18th day of November, 1891; that deponent waited for the trial of such case before said justice before bringing the matter to the attention of the court, in order to learn the testimony and the attitude of said Henry N. Backus with reference to the claim of said Gilbert C. McCullough, and his explanation of the fact that he paid the claim of said Felix Julien.

Deponent further says that he is informed that said Henry N. Backus claims that there is a difference between the claim of said McCullough and the claim of said Julien, and that he was at least morally bound to pay the claim of said Julien, but deponent believes and submits that the facts show that said Henry N. Backus paid the said Felix Julien corruptly, and for the purpose of influencing him as one of said jurors.

Deponent therefore submits the matter to the court as one that demands a full investigation.

F. A. BAKER.

Subscribed and sworn to before me, this 25th day of November, 1891.

WALTER BARLOW,
Notary Public, Wayne County, Michigan.

1615 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, WILLIAM H. DAVISON, Respondents.

COUNTY OF WAYNE, *ss:*

George F. Robison, being duly sworn, deposes and says that on the 25th day of November, 1891, he had a conversation with Mr. Joseph H. Lesher, the foreman of the second jury in the above-entitled condemnation suit; that among other things, the said Joseph H. Lesher stated to deponent the facts set forth in the unsigned affidavit hereto annexed, as Exhibit A; that, at first, said Joseph H. Lesher promised to sign and swear to said affidavit, but, before doing so, changed his mind and refused to sign and swear to the same stating to deponent that the only way he would be willing to fur-

nish any proof, would be as a witness, served with a subpœna to testify in court.

(Signed) GEO. F. ROBISON.

Subscribed and sworn to before me, this 27th day of November, 1891.

EDGAR S. WHEELER,
Notary Public, Wayne County, Michigan.

1616 EXHIBIT A (ROBISON'S AFFIDAVIT).

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, WILLIAM H. DAVISON, Respondents.

COUNTY OF WAYNE, *ss:*

Joseph H. Lesher, being duly sworn, deposes and says that he was the foreman of the jury on the second trial of the above-entitled condemnation suit; that when the jury retired to consider their verdict, they first took up the question of public necessity; that a majority of the eleven men on said jury steadily voted against the public necessity on the ground that the route of the elevated railroad should have been located on the property of the Michigan Central Railroad Company; that the jury, being unable to agree on that question, they put it aside, and took up the question of damages; that it was not until a majority of the jurors had agreed upon the sum of $96,144 as the amount of the damages, that all of said jury would consent to a verdict in favor of the public necessity; that Felix Julien was one of the jurors who voted against the public necessity, and upon the question of damages he was one of the highest.

1617 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

And now come said respondents, by Dickinson, Thurber & Stevenson, their solicitors, and move the court to strike from the files the following paper-writings, to wit:

1. Additional objections to confirmation of verdict.
2. The affidavit of Samuel F. George, dated September 28, 1891.
3. The affidavit of George F. Robison, dated November 27, 1891.

4. The affidavit of Gilbert C. McCullough, dated November 24, 1891.

5. The affidavit of Frederick A. Baker, dated November 25, 1891.

Because it appears that said first three grounds of objection are impertinent, and improper to be placed upon the files of this court, and that the last ground, entitled "27th," is based upon information which was in the hands of the petitioner before the submission of the motion to confirm to the circuit judge, and nearly a month before the decision of the circuit judge on the motion.

Because the said ground is frivolous.

Because the said ground is unsupported by proof.

This motion is based on the files and records of this cause and the affidavit of Henry N. Backus herewith filed.

DICKINSON, THURBER & STEVENSON,
Solicitors for Respondents.

Dated November 30, 1891.

1618 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

WAYNE COUNTY, *ss:*

Henry N. Backus, being duly sworn, saith that he is a stockholder in the company of the respondents, A. Backus, Jr., & Sons, and has been since its organization, and that his stockholding in said company is about one-quarter of its capitalization; that the management of the defense in this proceeding has been largely conducted by the president of the company, Absalom Backus, Jr., from the impaneling of the jury until the present time; that affiant, during the proceedings, attended more especially to the business of the concern, and was not a witness in the case.

Affiant further saith, that the National Herb Medicine Company was formed in September, 1890, and this affiant had nothing to do with the organization; but that in the month of March, 1891, Doctor Samuel F. George applied to affiant to permit his name to be used as a stockholder in the said last-named company, saying that the use of affiant's name would give the concern standing in Detroit, and that was all that was needed to make it a success, as it was an honest and very profitable enterprise; that affiant accepted

1619 two hundred and fifty shares of stock of said herb company from the said Samuel F. George, and he believes, though he does not know, that he was afterwards in some way made a director, though he believes without any legal election; that soon after he was made a stockholder he found that the concern seemed to have no credit, and the fact of his connection with it was being used with merchants and others with whom his personal financial standing

was good, to obtain credit for the said herb company. On discovering this, affiant protested against such use of his name; but before this, and soon after affiant became connected with the company, about March 23d, 1891, the said George came to affiant with regard to fitting up No. 305 Woodward avenue, and asked affiant if he could get some one near the place to do the work. F. Julien & Co. were carpenters near there, at No. 12 Wilcox street, and had been to some extent cash customers of A. Backus, Jr., & Sons, but affiant had no more acquaintance with said F. Julien & Co., or any of them, than he had with a thousand or more customers who purchased material of affiant's company; that affiant gave said Doctor George a note to said F. Julien & Co., with the latter's address. Said note was written upon a piece of wrapping paper, unsealed and uninclosed, simply saying the herb company wanted some work done and to treat them well. All this was before April 1st, 1891. After the work was finished the herb company failed to pay F. Julien & Co., and Julien & Co. so telephoned this affiant before April 24, 1891. Affiant left for New York on April 25, 1891, and returned to Detroit on May 9, 1891. On May 11, 1891, the said Julien, of Julien & Co., telephoned affiant at affiant's office on Fort street, asking affiant to call at Julien & Co.'s place of business when affiant came uptown. This affiant did so on that day, when he met the said
1620 Julien at his place of business and was introduced by him to Mr. McCullough, who makes an affidavit in this matter, whom affiant had never seen or met before. Julien claimed that he could not get his pay from the herb company for the work done, and that it had been understood distinctly that he was to have cash upon the completion of the work, and immediately. He said that he would not have trusted the company but for affiant's connection with it and the fact that affiant had sent the herb company to him to get the work done. Both McCullough and Julien wanted to know if he could not help them to collect their accounts. In the presence of McCullough (affiant being under no possible moral or legal obligation to McCullough for the credit he had given the herb company, as he believed), affiant did state that he was under no obligation, and could not undertake to pay or collect accounts against the herb company, though affiant said to both of them, that they ought to have their pay. Affiant remained until McCullough retired, wishing to see Julien privately, and did see said Julien privately, and feeling morally bound because of having sent the herb company to Julien, a customer of affiant's concern, affiant then and there stated to Julien that while he felt no obligation to any one with whom affiant's name had not been used, that yet as Julien had doubtless given the credit to strangers at affiant's request, he, affiant, would see that he got his money and that he might rely upon it, but in the meantime to try and get it out of the herb company; but he then expressly promised to take care of the debt, and considered himself from that time in honor bound to do so. That at that time the said Julien was, so far as affiant knows, not thought of in connection with the jury in this case, as he

finds from the record that the jury were not even struck
1621 until June 4th, 1891. That on the next day Doctor Samuel F. George met affiant at the post-office as affiant was going to the United States court-room, where a hearing was to be held before Judge Jackson, affecting the use by the railroad company of the dock front of affiant's company, A. Backus, Jr., & Sons, and informed affiant that Julien was pressing his bill for collection, and threatened to close the herb company up, and at that time the said Doctor George borrowed forty dollars of affiant with which to pay the rent of the store. That the said Julien from time to time telephoned affiant, at affiant's house and office, reporting as to his efforts and failure to get any money out of the herb company, and urging affiant to attend to it The matter ran until June 12th, 1891, when affiant received a note through the mail, a copy of which, with words and marks on the outside, is as follows:

"F. Julien & Co., contractors and builders, 12 Wilcox St.

DETROIT, MICH., *June* 11, 1891.

FRIEND BACKUS: Please to send me check for Dr. George's bill, as I need the money very much, and it is old.

F. JULIEN & CO."

And the envelope inclosing which is as follows:

"If not delivered in ten days, return to
F. Julien & Co.,
Carpenters and builders,
12 Wilcox St.,
Detroit, Mich.

Postmarked Detroit,
June 12,
10.30 a. m.,
'91.
With two-cent stamp cancelled.

Mr. HENRY N. BACKUS,
35 *Trumbull Ave., City.*"

1622 That hereto annexed marked Exhibit A is the original bill for the said Julien & Co.'s work which was handed to affiant by Dr. S. F. George. That afterwards the said Julien sent affiant the bill hereto annexed marked Exhibit B; that afterwards, as soon as it was convenient for affiant to pay the money, on June 19, 1891, while out driving with affiant's wife he drove to Julien's place and paid him the bill and got it receipted. That affiant said nothing whatever to said Julien about the case pending or about any other subject than the payment of the bill, and that he had come to keep his word and was sorry that he, Julien, had not got his money sooner; he replied that he needed the money to pay his men the next day, which was Saturday.

Affiant further says that in every case where, with affiant's knowledge and consent, his name was used to obtain credit for the said National Herb Medicine Company, affiant has in like manner assumed and paid the bills although he was not legally obliged to pay, until he put an effectual end to the use of his name in any manner by going out of the company, which he did on June 27,

1891. That among the bills he has so paid where there was no written guarantee by him is a list attached showing the amount and date of payment or assumption, marked Exhibit C; that hereto annexed, marked Exhibit D, is a fair sample of the letters received by affiant regarding said bills since his connection with the said herb company; that the bill referred to in the last exhibit went to the herb medicine company at affiant's request without any written guaranty, and the only reason affiant has not paid it is that the goods were not satisfactory and were tendered back and refused by M. H. Chamberlain & Co.

Affiant further says, that in the transaction with Julien he
1623 was actuated by no other motive but to do what in honor he was bound to do in accordance with his promise, and would have paid it precisely in the same way that he did others if Julien had not been on the jury; that so much was it his own personal matter in carrying out his policy as to those who had given credit at his request, that he never even mentioned the subject of this or any of the bills to his father or brother, or any or either of his counsel in this proceeding, until October 8, 1891, after the argument of the motion for a new trial in the circuit court, when counsel for respondents in this case informed affiant that he had been told that he, affiant, had paid one of the jurors some money during the hearing, and asking the facts, which affiant there detailed as above.

Affiant further says that he is informed, and believes and charges the truth to be, that the representative of the petitioner in this case in the State of Michigan, Hon. James F. Joy, knew of the said transaction of this affiant with said Juror Julien before the last verdict was rendered in this cause; that when affiant's father, Absalom Backus, Jr., was upon the stand in this trial, and affiant was sitting with his brother listening to his testimony, one James A. Robison, a brother of one of the attorneys for the said petitioner, George F. Robison, whose office is with Mr. Baker, the counsel for petitioner in this case, and who, the said James A. Robison, had been at all times active against the respondents in this matter from its commencement, approached affiant, in the hearing of his brother, and stated to him that he, the said James A. Robison, had just been admitted to the bar, and stated that he had the said McCullough claim
for collection, and wanted to know if affiant had any objec-
1624 tion to his suing the National Herb Medicine Co., or whether affiant would pay the McCullough claim. Affiant told him that he was under no obligation to pay the McCullough claim, whereupon the said Robison stated, You have already paid during this trial one of the jurors for a similar claim.

Affiant further says that he is informed, and believes and charges to be true, that before any objections were filed to the confirmation of the verdict in this case, the petitioner had been advised fully of the transaction with said Julien, and that the said James F. Joy had directed an attorney of this court to investigate the matter, and he had investigated it and knew everything that can now be shown in the matter, and had discovered that it was a business transaction,

out of which nothing could be made adverse to respondents; that the investigation had been pursued up to September 28, 1891, two days before the motion for confirmation was submitted to this court, and nearly a month before this court had rendered any decision upon said motion to confirm, and the petitioner then had in the form of an affidavit the substantial facts as embodied in the affidavit made by one Samuel F. George, of the date September 28, 1891, and these allegations he is ready to verify.

And further affiant saith not.

HENRY N. BACKUS.

Subscribed and sworn to before me this 30th day of November, A. D. 1891.

PHILIP M. COFFIN,
Notary Public for Wayne County, Mich.

1625 EXHIBIT A (AFFIDAVIT OF HENRY N. BACKUS).

F. Julien & Co., contractors and builders, 12 Wilcox street.

Telephone 1769.

DETROIT, 4/10, 1891.

Dr. George & Co.

3/25	2 doors	$3 00
	112 ft. barn boards	2 24
	Express twice	50
27	48 ft. boards	96
	2–2 x 4–16	64
	70 ft. flooring	1 95
	2 pairs 4 x 4 bronze butts	1 00
	32 ft. bed mould	48
	30 ft. screen mould	30
28	35 ft. flooring	88
	Partition and railing	24 00
	380 ft. lumber, shelves, tables and partitions	7 60
	54 ft. 2 x 4 dres.	1 08
	4 brackets and S	60
	1 pair butts	12
	2 rim locks and knobs	60
	Office trimmings	1 25
4/8	50 ft. strips	25
	4 brackets and S	60
	6 nails	30
	½ gross screws	25
	12 ft. moulding	12
	Express 3 times	75
	56 ft. good lumber	2 24
	338 ft. common lumber	6 76
	7 days, 2½ hours' time	20 13
		$112 53

1626 EXHIBIT B (AFFIDAVIT OF HENRY N. BACKUS).

Telephone 1769.

DETROIT, MICH., 6/5, 1891.

Messrs. A. Backus, Jr., & Sons, to F. Julien & Co., Dr., contractors and builders, 12 Wilcox street.

To fitting up store for Dr. George as per bill rend..... $112 81

EXHIBIT C (AFFIDAVIT OF HENRY N. BACKUS).

Wm. T. Ockford, printing, March 25, '91	Paid March 25, '91.	$1 00
Standart Bros., hardware, March 29, '91, $15.38; April 9, '91 $4.92; April 18, '91, $1.24	Assumed	21 64
John Blessed, May 18, '91	Paid July 6, '91	5 00
R. Echlin, June 1, '91	Assumed	15 00
Cash, broom, 20c.; mop, 50c.; hammer, 50c.; hatchet, 80c.; coal hod, 75c.; barrels, 80c	Paid March 26, '91	9 55
Cash Chas. A. Strellinger & Co., drawpull	Paid April 9, '91	40
F. Julien & Co., carpenters, April 10, '91	Paid June 19, '91	113 00
Detroit Gaslight Co., written guarantee	Paid Sept. 21, '91	3 40
Rudolph Knapp, order	Paid by acc't	11 80
O. W. Shipman & Co., coal, April 6, '91	Paid April 6, '91	1 45
M. H. Chamberlain & Co., April 13, '91, assumed if anything due	In dispute	16 60
Peninsular Stove Co., March 25, '91	Paid March 25, '91.	1 05
Keenan & Jahn, April 8, '91	Assumed	62 50
Hunt Chair Co. April 9, '91	Assumed	31 25
Chas. Klein, hardware, March and April, '91	Assumed	8 85
A. Backus, Jr., & Sons, May 9, '91, $8; May 16, '91, $6; June 4, '91, $7.75	Assumed	21 75

1627 EXHIBIT D (AFFIDAVIT OF HENRY N. BACKUS).

DETROIT, MICH., *July* 16, 1891.

H. N. Backus, Esq., care of A. Backus & Son-, city:

DEAR SIR: We inclose you herewith statement of account against National Herb Medicine Co., being amount due for barrel of wine vinegar ordered by you on the 13th April last. We have called on this firm some eight or ten times with statement, and have been put off for one reason or another.

Will you kindly send us check to balance, and oblige

Yours respectfully,

M. H. CHAMBERLAIN & CO.,
Per HASTINGS.

1628 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, WILLIAM H. DAVISON, Respondents.

To Dickinson, Thurber & Stevenson, attorneys for said respondents:

Protesting against the injustice of the writ of mandamus granted by the supreme court in this cause, and for the purpose of enabling the petitioner to perfect an appeal herein to the supreme court, you are hereby notified that on Monday the 30th day of November, 1891, or as soon thereafter as counsel can be heard, the petitioner will apply to the circuit court for the county of Wayne, before the Honorable George Gartner, circuit judge, to settle and sign an order of confirmation in this cause. You are herewith served with a copy of an order which is submitted as a proper one to make under the circumstances of this case.

F. A. BAKER,
Attorney for Petitioner.

Detroit, November 27, 1891.

(Attached to this notice is a copy of the proposed order of confirmation as found on pages 1633, 1634, and 1635 of this Record.)

1629 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

And now come the said respondents, by Dickinson, Thurber & Stevenson, their attorneys, and object to the form and substance of the order of confirmation proposed, and insist that if any order of confirmation is entered, that it shall be entered in the usual form of orders of confirmation in similar cases, and expressly object to the provisions of said proposed order as to deposit of money in bank, and in connection with that portion of said order that provides that upon said deposit the said Fort Street Union Depot Company shall be entitled to enter upon and take possession of the property of the respondents sought to be condemned, as such an order would be unwarranted by the constitution and laws of the State.

DICKINSON, THURBER & STEVENSON,
Attorneys for Respondents.

Dated November 30, 1891.

1630 STATE OF MICHIGAN:

The Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY }
vs.
ABSALOM BACKUS, JR., & SONS *et al.* }

Memorandum.

On October 26, 1891, this court caused to be entered in the above-entitled matter an order that the award of the jury be set aside and a new jury sworn for reasons fully set forth in an opinion then filed. Since then the supreme court of Michigan have ordered that a writ of mandamus issue to this court to set aside the order so made by this court and to enter an order confirming the report of the jury.

Additional objections to the confirmation of the award have been filed by the petitioner, and which respondents now move be stricken from the files, together with the affidavits filed in support thereof. It is claimed that such objections are impertinent, improper, frivolous, and unsupported by proof; but, as this court has no jurisdiction under the ruling of the supreme court to pass upon objections made and filed, it necessarily follows that the motion to strike from the files must be denied.

The motion to confirm heretofore made and urged by the respondents has not been renewed, and petitioner, protesting against the order of the supreme court, now asks that such order be entered for the purpose of enabling the petitioner to perfect an appeal to the supreme court and place such matter in a position so that the same can be reviewed.

The form of the order proposed is objected to. It contains a brief recital of the proceedings and provides for the deposit of $96,144.00 and costs and the time within which such deposit
1631 shall be made. In this it conforms strictly with the language of the statute, secs. 10 and 11. It also provides that upon such deposit being made that petitioner may enter upon the possession and use the right of way for the purposes of its incorporation. This is objected to upon the ground that this would be taking the respondents' property without first having made compensation therefor. As soon as the deposit is made the petitioner waives all its rights to the control of the same and it becomes subject to the order of this court or of the supreme court, to be paid in whole or in part to the respondents, as the court may finally determine, and the deposit becomes and is the real subject-matter of contention. That respondents are fully protected and can suffer no possible harm is beyond controversy. While the law upon the subject is somewhat ambiguous, it certainly was never contemplated that the rights and interests of all parties should not at all times and under any and all circumstances be fully protected. In case a new appraisal should be ordered by the supreme court, if the award is increased the amount of the increase is a lien upon the property taken; if,

however, the amount is diminished, the difference shall be refunded to the company. The order as proposed protects the rights and interests of all concerned, and neither party can or will thereby be placed in a position to suffer any possible loss or injury.

This court will not order the payment to respondents of an award grossly exhorbitant, extravagant, excessive, and unjust and leave petitioner without security in the event the award be diminished, nor will it do any act to further delay or refrain from the doing of an act which would operate to further delay the accomplishment of an important public improvement, and this especially where the question of public necessity has been determined affirmatively and where the only question open for contention is the question of the amount of just compensation.

Should I have again, in the opinion of the supreme court, fallen into error in this matter, it may speedily be corrected. The delay of one month cannot possibly operate as an injustice under
1632 the law and the facts in this case to any of the parties.

The order as prepared will be entered. This is done in obedience to the writ of mandamus granted by the supreme court, but not otherwise, and against the deliberate judgment of this court. Notwithstanding the objections made and filed to the confirmation of the award, this order is made in pursuance of, and the same being the legal operation and effect of, the writ of mandamus granted as aforesaid.

GEORGE GARTNER,
Circuit Judge.

1633 At a session of the circuit court for the county of Wayne, held at the court-house, in the city hall, in the city of Detroit, on the 30th day of November, 1891.

Present: Hon. Geo. Gartner, circuit judge.

THE FORT STREET UNION DEPOT CO., Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, WILLIAM H. DAVISON, Respondents.

Order of Confirmation.

In obedience to the writ of mandamus granted by the supreme court of this State in the above-entitled condemnation suit, but not otherwise, and against the deliberate judgment of this court, it is ordered, that notwithstanding the objections made to the confirmation of the verdict and award of the jury in this case as set forth in the motion made by the petitioner to vacate and set aside said verdict and award, and notwithstanding the further objections and the affidavits in support thereof this day read and filed, the said verdict and award is hereby in and by virtue of the legal operation and effect of said writ of mandamus, in all things confirmed.

The petition in this case was filed by the Fort Street Union Depot Company, against the above-named respondents, to condemn to the

public use the right of way for the construction and opera-
1634 tion of an elevated railroad in, upon and along River street, in the city of Detroit, in said county of Wayne, in front of the property hereinafter described, in which the respondents are interested as owners, or otherwise, in accordance with the ordinance agreed upon between the Fort Street Union Depot Company and the common council of the city of Detroit, the orders of the State railroad crossing board, and of the commissioner of railroads, the plan approved by the commissioner of railroads and the general plan adopted by said company, all of which are set forth or were mentioned in, and were filed and served with the petition in this case.

The respondents demanded a jury to determine the questions of necessity and compensation.

A jury was impaneled and sworn, who reported to the court that they were unable to agree on a verdict.

A second jury was then impaneled. and they reported the verdict and award confirmed by this order.

The following is a description of the real estate and property in which the respondents are interested, and in front of which the said elevated railroad is to be constructed and operated, viz:

All those certain pieces or parcels of land situated on the north side of River street, in the city of Detroit, in said county, known as the Backus planing mill and box factory. Said property is situated on the Lognon farm, so called, and the River Street frontage of said property is 238.06 feet, and it is bounded on the east by a strip of land, the property of the Michigan Central Railroad Company, and on the west by a lot, the property of Barbara Steadley.

It is further ordered that within sixty days from the date of this order, the Fort Street Union Depot Company is required to
1635 deposit under the supervision of the clerk of this court, in the Detroit National bank, and to the credit of this cause, the sum of ninety-six thousand one hundred and forty-five dollars, and also the costs and expenses of the respondents, including an attorney fee of twenty-five dollars, as they may have been taxed, provided that if said costs and expenses have not been taxed within said sixty days, that the same be so deposited within five days after they are taxed.

Said moneys shall remain on deposit in said bank, but at the risk of petitioner, subject to be drawn therefrom, and to be paid to the parties entitled to the same, on orders signed by one of the judges of this court and countersigned by the clerk.

It is further ordered that upon the deposit of the said sum of ninety-six thousand one hundred and forty-five dollars, and of the said costs, expenses and counsel fees, as aforesaid, the said The Fort Street Union Depot Company shall be entitled to enter upon and take possession of and use the right of way above described for the purpose of its incorporation, under its articles of association and the constitution and laws of this State, and that said respondents shall be divested and barred of all right, estate and interest in such right of way, until such right or title shall be again legally vested

in them, and said right of way shall be deemed to have been acquired by said company for public use.

GEORGE GARTNER,
Circuit Judge.

1636 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

Notice of Appeal.

To said respondents:

You will take notice that the said petitioner, by F. A. Baker, its attorney, appeals to the supreme court from the verdict, award and report of the jury in this cause, and from the confirmation thereof.

The petitioner does hereby specify the following objections to the proceedings had in the premises, that is to say: (Here follow objections one to twenty-three, as set forth in the motion to vacate said verdict and award dated August 15, 1891.)

24. The supreme court erred in granting a writ of mandamus in this case, having misapprehended and misunderstood the facts of the case, and the law applicable thereto, and unwittingly deprived the circuit courts of this State of a wise and wholesome power
1637 of jurisdiction vested in them by the constitution and laws of this State, and upon the unwarrantable assumption that the circuit courts have no more power and jurisdiction in condemnation cases than the supreme court has under its appellate jurisdiction.

25. Said writ of mandamus was improvidently granted.

26. To confirm said verdict against the deliberate judgment of the circuit court for the county of Wayne is in and by itself a violation of the constitution and laws of this State.

27. During the trial before the said jury, to wit, on the 20th day of June, 1891, Henry N. Backus, a stockholder and officer of the corporation respondent known as A. Backus, Jr., & Sons, knowingly, willfully and corruptly paid to Felix Julien, one of the jurors in said case, a large sum of money, to wit, one hundred and thirty dollars, for the purpose and with the intent of corruptly influencing the said Felix Julien as a juror in said case, and to the great wrong and injury of petitioner. Said payment was made under the pretense that the said Henry N. Backus was indebted to the said Felix Julien in the amount so paid, whereas in truth and in fact the indebtedness paid was the debt of the National Herb Medicine Company, and the said Henry N. Backus was not liable thereon, and he had previously denied that he was liable thereon, and had refused to pay the said Felix Julien the said debt or any part thereof.

28. The circuit judge erred in disregarding and overruling the above objections and in entering an order confirming said verdict and award.

F. A. BAKER,
Attorney for Petitioner and Appellant.

Detroit, Dec. 2, 1891.

1638 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the third day of March, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Allen B. Morse, chief justice; John W. McGrath, Charles D. Long, Claudius B. Grant, Robert M. Montgomery, associate justices.

THE FORT STREET UNION DEPOT COMPANY, Appellant,
vs.
ABSALOM BACKUS, JR., and Others, Appellees. } # 12421.

This cause, coming on to be heard, is argued by F. A. Baker in part for appellant.

1639 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the fourth day of March, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Allen B. Morse, chief justice; John W. McGrath, Charles D. Long, Claudius B. Grant, Robert M. Montgomery, associate justices.

THE FORT STREET UNION DEPOT COMPANY, Appellant,
vs.
ABSALOM BACKUS, JR., *et al.*, Appellees. } # 12421.

The argument heretofore commenced herein is concluded by Mr. Baker, for appellant; Mr. Don M. Dickinson is heard for the appellees, and the cause is duly submitted.

1640 Supreme Court of the State of Michigan.

THE FORT STREET UNION DEPOT CO.
vs.
ABSALOM BACKUS, JR., *et al.*

Opinion.

Filed June 10, 1892.

LONG, *J.:*

This cause was before this court at the October term, 1891, and an opinion filed December 21, which is reported in 89 Mich., 209. That proceeding was for mandamus to compel the court below to set aside the order made by it granting a new trial, and to compel

that court to confirm the award made by the jury. The case is entitled "Backus *v.* Gartner, circuit judge."

It appeared in that proceeding that a motion was made in that court by the petitioner in the present case to vacate and set aside the verdict of the jury. The circuit court set the verdict and award of the jury aside, and the mandamus was asked by the respondents to vacate that order and to confirm the verdict. This writ was granted by this court, and an order confirming the verdict and award by the jury entered in the court below. Twenty-three specific reasons were urged before the court below why this motion for a new trial should be granted, and those reasons are substantially set out in the opinion by this court in that case, and need not be restated here, as those reasons, with others now set out in this appeal, are the objections to the proceedings upon which we are now asked to pass. In addition to the objections then made to the verdict and order of confirmation, objections Nos. 24 to 28, inclusive, are now added, as follows:

24. The supreme court erred in granting a writ of mandamus in this case, having misapprehended and misunderstood the facts of the case and the law applicable thereto, and deprived the circuit courts of this State of a wise and wholesome power of jurisdiction vested in them by the constitution and laws of this State.

25. Said writ of mandamus was improvidently granted.

1641 26. To confirm said verdict against the deliberate judgment of the circuit court for the county of Wayne is in and by itself a violation of the constitution and laws of this State.

27. During the trial before the said jury one of the stockholders of A. Backus, Jr., & Sons knowingly, willfully, and corruptly paid to one of the jurors the sum of $130 for the purpose and with the intent of corruptly influencing him as a juror in said case. Said payment was made under the pretense that said stockholder was indebted to said juror in said amount, whereas in truth and in fact the indebtedness paid was the debt of another and not a debt upon which said stockholder was liable, and was one upon which he had previously denied liability and refused to pay.

28. The circuit court erred in disregarding and overruling the above objections and in entering an order confirming said award.

The only point decided in the mandamus case was whether, under the statute, the circuit court had authority to set aside the award and report of the jury, and to order a new trial or inquisition before a new jury, where the objections to the confirmation of the report are not based upon jurisdictional defects. The decision turned upon the construction of section 10, chap. 93, How. Stat.

The language of this section is: "On such report being made by the commissioners or jury the court, on motion, shall confirm the same on the next or any subsequent day when in session, unless for good cause shown by either party. * * * Said court, as to the confirmation of such report, shall have the powers usual in other cases."

This court gave construction to the language of that section and held that "there is nothing in this section which states that the

court shall have power to set aside the panel of jurors or commissioners appointed by the court and direct that proceedings *de novo* shall be had upon the petition, and that the term 'powers usual in other cases' refers to 'the powers of courts in the confirmation of reports made to such courts by some bodies or persons authorized by law to make them in accordance with the known practice of the court.'"

1642 We need not refer here to the reasons given by this court for that ruling, as they are fully set out in the former opinion, to which reference is made.

We permitted in the present appeal a reargument of that question for the reason that should we find we were then in error neither party will have lost any substantial right, as all the questions then presented are now before us for review, and this court, under the statute, possesses ample power to correct any errors which may be found in the record and proceedings. The motion for mandamus was argued before us at the October term last, and such consideration was not given it then as the interests now involved in the controversy demand. We have now listened to a reargument of the question then passed upon and our attention has been called to several decisions, from which we conclude that the powers of the circuit courts in this class of cases were too much restricted by the former opinion.

Section 10 of the act under which the proceedings were had *proceedings were had* provides that, the report of the jury being made, the court, on motion, shall confirm the same, unless for good cause shown by either party. The statute does not point out for what particular cause or causes the court may refuse to confirm the award. While the jury in such cases are judges of the law and fact, yet if it be made to appear to the court before confirmation of the award that the jury have based their verdict and award upon false principles and substantial justice has not been done in the premises the court ought to refuse to confirm the findings. Toledo, etc., R'y Co. *v.* Dunlap, 47 Mich., 466.

This question has been settled by this court by former adjudications, which were overlooked in the mandamus case.

In Marquette, etc., R. R. Co. *v.* Probate Judge, 53 Mich., 217, commissioners were appointed to condemn certain lands for railroad purposes. They made their report and filed it in the probate court. The petitioner filed a motion in that court to set aside the finding and report of the commissioners for the reasons:

1643 1. That the damages and compensation were excessive and exorbitant.

2. That the commissioners included in the compensation a large amount of money for loss of profits in the fuse business during the interruption of the same, and for loss of wages while the factory should be stopped, and for loss of business to arise from the removal of the factory to another site, without any evidence on which to found the same.

3. That the- allowed a sum of money to one of the owners of the property for the cost of removing therefrom.

4. That they grossly overestimated the value of the land and the structures thereon.

5. That they allowed greater damages for the real estate than its whole value.

6. That they overestimated the value of the garden, trees, and shrubs.

7. That one of the commissioners, after being appointed and before the finding, received privately from one of the respondents a written paper containing a list of the structures and other property upon the land, which stated the valuation of the same and of the damages thereto at the sum of $11,000, and that he was influenced thereby in his deliberations.

The motion was founded upon affidavits and other testimony produced in the probate court. This was met by a counter-motion from the attorneys of the respondents to strike the affidavits from the files, and to refuse to hear testimony in opposition to the commissioners' report, on the ground that such affidavits and oral testimony of witnesses were incompetent and inadmissible on the hearing of the motion to set aside the report. The probate court denied the motion of petitioner and granted that of the respondents. Before any motion was made for the confirmation of the report, the petitioner applied to this court for an order on the probate judge to show cause why he should not receive and consider, upon the motion to set aside the report, the affidavits and oral testimony offered, and why (should said report be confirmed) he should not set aside such confirmation for the purpose of such hearing. An
1644 order to show cause was granted in the case, and the return showed that the facts upon these points were correctly stated in the petition. It was said by this court: "The motion made by the petitioner to set aside the report was one proper to be made, and, if substantiated, would have furnished sufficient grounds for setting aside the report. The probate court has authority to set aside the report of commissioners for good cause shown. If the amount awarded is unreasonable and indicates that it was the result of prejudice or partiality, or that the commissioners must have acted upon a wrong basis of estimating the damages, it is a good cause for setting aside the report." Citing Chapman *v.* Groves, 8 Blackf., 308.

This question came before this court again in Port Huron, etc., R'y Co. *v.* Callanan, 61 Mich., 12. In that case it was claimed that the commissioners' award was grossly inadequate and did not indicate whether it included past as well as future damages. It was said, "If the proceedings complained of are in most respects technically regular—which we shall not decide—we have no doubt that substantial wrong has been done. The confirmation of a report in these cases is not a matter of strict right upon a regular record. If substantial reasons are shown against it by facts not in the record itself, the court has power to do justice and refuse confirmation, and on appeal the same power exists."

The learned circuit judge before whom the proceedings for confirmation of the report of the jury in the present case were had, and

who, by the mandate of this court, confirmed the findings and award, filed an opinion in the case before us, in which he says:

"While the proceedings by and before the jury are not judicial, still the proceedings by and before the court up to the time of swearing the jury, as well as all proceedings after the filing of the report, are judicial in their character and partake of the nature of ordinary proceedings in court, and are governed largely, if not absolutely, by the same rules and the same considerations applicable to judicial investigations and determinations. The one great difficulty
1645 attending the proceedings by and before the jury is that it is not ordinarily evident or ascertainable what the ruling or determination of the jury was upon questions raised before them, and in all such instances the presumption of the law is that they followed correct legal principles, and that as judges of the law they applied and followed the law correctly and not erroneously. It cannot be contended that, as they are made by the law judges of the law, they have the right to disregard the law and all acknowledged and well-recognized legal principles. This was never contemplated by the constitution or the statute, and it is sufficient to say that no case can be found which holds, or even recognizes, such a vicious and monstrous doctrine. When, however, the rulings of the jury are clearly apparent upon the face of the proceedings, then it may be found the duty of the court to consider and, if necessary, to review such rulings, for it is the duty of the court to see that substantial justice has not been disregarded."

In support of this proposition the circuit judge cites the following cases: Mich. Air Line R'y *v.* Barnes, 44 Mich., 226; Toledo, etc., R'y Co. *v.* Dunlap, 47 *id.*, 461; Detroit West., etc., R. R. Co. *v.* Crane, 50 *id.*, 182; Port Huron, etc., R'y Co. *v.* Voorheis, *id.*, 510. We are satisfied that the cases referred to support the doctrine stated by the circuit judge.

This question has received consideration in the courts of other States. It is laid down as a rule by Lewis on Eminent Domain (section 522) that, under the authorities, any improper conduct on the part of the jury materially affecting the merits is sufficient cause for setting aside the report.

In re New York Cent., etc., R. R. Co., 64 N. Y., 60, it was held to be good cause for setting aside the report if there was any such carelessness or irregularity amounting to misconduct by which a party was harmed.

In re New York, etc., R'y Co., 29 Hun., 604, it was held that the power and authority of the court to interfere was settled by *In re* New York Cent., etc., R. R. Co., 64 N. Y., 60, and that such
1646 power is not restricted in the exercise of its general jurisdiction, and that the court has power, by virtue of its inherent jurisdiction, to set aside the report for good and sufficient reasons. Upon appeal this case was affirmed (reported in 93 N. Y., 385), and it was held a matter for the exercise of the discretion of the lower court.

The jury have large discretion, and when this has been abused

the court will interfere and prevent an injury, and will set aside the report for accident or mistake. Bourgeois *v.* Mills, 60 Tex., 76.

The report will also be set aside for acting on erroneous principles. *In re* New York, etc., R'y Co., 63 How. Pr., 265.

In Iowa it is held that the report will be set aside for being against the evidence or against the weight of evidence. Walters *v.* Houck, 7 Iowa, 72.

It is also settled by numerous decisions that the court, upon the motion for confirmation of the report, may look into the matter of the action of the jury in receiving or rejecting testimony, and if wrong rulings are made, substantially affecting the rights of the parties, the report will be set aside. Wilson *v.* Railroad Co., 59 Ill., 273; Fitchburg R. R. Co. *v.* Eastern R. R. Co., 6 Allen, 98; Harding *v.* Inhabitants of Medway, 10 Metc. (Mass.), 465; Com. *v.* Court of Sessions, 6 Mass., 435.

It is undoubtedly true that where correct rules have been adopted by the jury the award will not be set aside unless the amount of the verdict is palpably erroneous; but it cannot be doubted that under the authorities above cited and the repeated rulings of this court the court before which proceedings are had upon the question of the confirmation or the setting aside of the findings and award of the jury may set the award aside:

1. If it is found by the court that there has been fraud or misconduct upon the part of the jury affecting the rights of the parties.

2. For gross errors or mistakes of the jury.

3. For the erroneous rejection or admission of testimony
1647 affecting the rights of the parties.

4. For errors of such extraordinary character or grossness as furnish a just inference of the existence of undue influence, partiality, bias, and prejudice, or unfaithfulness in the discharge of the duty imposed.

5. When it is apparent to the court that the damages awarded are either inadequate or excessive.

The method of proceeding by which these facts are brought to the attention of the court must be left very largely to the discretion of the court which is to hear and decide the motion for confirmation or to set aside the findings. The facts may be presented to the court by affidavits or by oral testimony, and upon which the court is bound to act in determining the questions raised. Marquette, etc., R. R. Co. *v.* Probate Judge, 53 Mich., 217.

The court below, acting in the present case upon the motion before it, undoubtedly had the power to pass upon the question presented to it by the affidavits, and to vacate and set aside the award of the jury. No substantial injustice has been done, however, by the mandate of this court compelling the court below to confirm the findings and award of the jury, for the reason that under the statute this court, under its appellate power, may consider all of the questions there involved and determine the rights of the parties thereunder.

The statute provides: "Within twenty days after the confirmation of the report of the commissioners or jury, as above provided

for, either party may appeal, by notice in writing to the other, to the supreme court from the appraisal or report of the commissioners or jury. Such notice shall specify the objections to the proceedings had in the premises, and the supreme court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived. Such appeal shall be heard by the supreme court at any general or special term thereof, on notice thereof being given according to the rules and practice of the court.

On the hearing of such appeals the court may direct a new
1648 appraisal before the same or new commissioners or jury, in its discretion."

Before proceeding to a discussion of the objections to the confirmation of the report of the jury it becomes necessary to state the situation and surroundings of the property sought to be taken and the manner in which the petitioner proposes to erect its road along the street in front of respondents' property.

The proposed Fort Street union depot will front upon Third and Fort streets, and, with the proposes local freight-house, will cover about six acres of ground. The approach of the track to the depot extends along the river side of River street up to about Twelfth street, when it curves to the northeast, and there enters entirely into and passes upon River street, upon which the Backus property is situated. The railroad track pursues River street, towards the center of the city, to about Seventh street and then again curves to the northeast to take its course to the new depot. Before reaching Twelfth street the track begins an elevated grade, and where it passes respondents' property, on the northerly side of River street, is at an ascending grade of 22 feet to the mile. This elevated structure is to span the street from curb to curb, upon iron posts or pillars 35 feet apart on each side, above, in front of, and below the Backus property. In front of that property there are three broad-guage tracks. Solid pans and shields are to be under every track. The tracks are to carry three trains with double locomotives. There is to be a switch in front of this property. Added onto the width of the railroad viaduct itself, in the street and continguous to it, there is to be an elevated viaduct for trams, solidly made, of the width of 24 feet, making a total width in front of the Backus property of 64 feet. Every track is laid upon ties, and the space between the ties is 6 inches. The cars, in passing, will project over the elevated structure from one to two feet. The weight of the standard locomotives will be from 50 to 60 tons. The top of the rails on the structure in River street, in front of the property, will be 25 feet above the roadway.

The Backus plant consists of a planing-mill property, and is in the first block towards the city from Twelfth street, on the
1649 northerly side of River street. It covers 1¾ acres of land, with a front on River street of 238.40 feet, and extends through the block to Fort street. The buildings front on River street, on a level with that street, which is 15 feet lower than Fort street. These buildings are of brick, 45 to 48 feet high. The building is erected and arranged with reference to its relative situa-

tion to the Michigan Central railroad, which passes under Fort street and approaches River street obliquely, passing the northeasterly side of the Backus property, contiguous to it, with its main tracks at the extreme end, 80 feet away, and continually receding until it is 300 feet from the Backus property as it passes into River street at grade. It furnishes switch facilities for the planing mill. The value of the mill property is variously estimated at from $150,000 to $200,000. The plant consists of the planing-mill property, the lower mill, dust-room, shavings-room, four dry kilns, boiler-house, engine-room, and sheds on the side next to the Michigan Central Railroad tracks 200 feet in length, with room to store 15 car-loads of material. Mr. Backus himself puts the value of all this property at $150,000, and says that includes everything outside of the real estate. It is claimed, also, that the returns from this mill net from $25,000 to $70,000 per year. Mr. Backus says, in reference to the dust-room and the appliances therein, that, in order to run the planing mill and make the room available, it is necessary to get rid of the shavings and sawdust as fast as it is made, and the most practical way to do that is to use a large exhaust fan that draws the stuff from the machine and throws it into a large reservoir; that in order to have it work properly it must be in a large place that will have free vent; that arrangements for taking care of the dust and shavings have been a great study for many years; that he finally conceived an idea of arranging his dust-room with burlaps, which is a perfect success; that he took out a patent for the arrangement of the dust-room with burlaps, and has probably built 100 of them for some of the largest institutions in the land, and, without exception, it is superior to anything else. It runs automatically, requiring no power; 2,700 yards of burlaps
1650 are used. The mill itself has 4 boilers and a 250-horse-power engine, together with 19 planing machines and other machinery of the best quality.

The claim was made upon the part of the respondents before the jury that the building of this track in River street by the petitioner for the purpose of carrying its railroad trains not only excluded the respondents from the free use of the street and the approaches to the mill and the light and air necessary to the proper conduct of their business, but also greatly endangered their property to fire from the engines of the petitioner in passing and repassing over this structure, especially on an upgrade, and by the switch in front of the premises. Testimony was also given showing that by reason of this increased hazard of fire from the engines it would be difficult to procure insurance, which, if it could be procured, would be at greatly increased rates by reason of the danger of sparks from the engines falling upon the building and communicating to this dust-room, which is described to be of such inflammable character that it would be ignited from the smallest spark. It was also contended before the jury by the respondents that, by reason of the structure thus cutting off the free approach to the mill which the respondents have heretofore had from River street and the *bo*structing of light and air and the endangering of the property by sparks from th

engines, practically the whole mill property was ruined, and that the planing-mill business could not be profitably conducted there. It was also contended by the respondents that there was no necessity for the taking of River street, as the petitioner could lawfully have taken a strip of land belonging to the Michigan Central Railroad Company and used by it as yards upon the opposite side of River street from respondents' property.

Two trials of the case have been had in the court below. One was commenced February 25, 1891, and terminated March 18 in a disagreement of the jury. A new jury was impaneled on June 10 following, and that jury rendered a verdict July 16 in favor of the petition- on the question of the necessity of taking the property in River street for public uses, and assessed the damages of the
1651 respondents as follows: To Absalom Backus, Jr., as the owner of the fee, $17,850; to the corporation, A. Backus, Jr., & Sons, $78,293.

All of the objections to the proceedings before the jury except the first relate to the question of damages. The first objection is that the jury were not attended by a judge of the circuit court or by a circuit court commissioner to decide questions of law and to administer oaths to witnesses.

We think the first objection cannot be insisted upon in the present case, for the reason that the petitioner's proceedings before the jury were without objection and without request that the jury be attended by the court or commissioner, and the petitioner must therefore be treated as having waived that point. We have listened to a very learned argument upon the part of counsel for petitioner upon the cases heretofore decided by this court, in which counsel contends that the court has always been wrong in holding that the presence of the judge or commissioner was not necessary in condemnation proceedings, inasmuch as the contest was not on litigious rights, and the jury were judges of the law and facts. We shall not enter upon a discussion of that question here or review those cases, from the fact that the question was waived by petitioner in the court below.

The second objection urged by petitioner's counsel is that "the attorney for the respondents, taking advantage of the absence of the judge, did improperly, erroneously, and falsely claim and pretend to and before said jury that the said petitioner has the power, under the statutes of this State, to condemn a right of way for an elevated railroad along the margin of the property of the Michigan Central Railroad Company on the south side of River street, and for that reason the jury ought to find that there is no public necessity for taking a right of way in, upon, and along said River street for the elevated railroad proposed by the petitioner; and thereby said attorney did, by repeated arguments and assertions to and before said jury, convince a number of said jury that the property of the Michigan Central Railroad Company could be condemned by the petitioner under existing statutes, so that when said
1652 jurymen came to yield on the question of necessity they were so biased and prejudiced against the petitioner that they in-

sisted upon the most extravagant, exorbitant, and grossly excessive damages."

The third objection sets out substantially the argument of counsel for respondents before the jury upon the question of necessity and his efforts to make it appear that such necessity for using the street did not exist, for the reason that petitioner could condemn the property of the Michigan Central Railroad Company adjoining the street.

The fourth objection is that the attorney for respondents, on his cross-examination of the witness James B. Mulliken, put the following questions for the purpose of leading said jury to believe that the petitioner could condemn the property of the Michigan Central Railroad Company, and that Mr. G. V. N. Lothrop, general counsel for the Detroit, Lansing & Northern Railroad Company, had so advised that company:

Q. Who is the general counsel of the Detroit, Lansing & Northern?
A. Mr. Charles B. Lothrop.
Q. Before that, Mr. G. V. N. Lothrop?
A. He was formerly.
Q. That being the best route, was there ever any talk about the power of the said railroad company wanting terminal facilities to condemn the Michigan Central ground? (The Detroit, Lansing & Northern is one of the routes interested in the union depot company.)
A. Mr. Lothrop said to me at one time that there was no difficulty in doing that.
Q. Which Lothrop?
A. G. V. N. Lothrop.

The fifth objection is that, although it clearly appeared on the further examination of said witness, James B. Mulliken, and by the testimony of said G. V. N. Lothrop that the advice and opinion of said Lothrop was that the property of the Michigan Central Railroad Company could not be condemned without additional legislation, yet counsel for respondents claimed and pretended before the jury that under advice and opinion of Mr. Lothrop the petitioner could condemn a right of way along the margin of the lands of the Michigan Central Railroad Company.

1653 The sixth objection is that this argument was used before the jury, although it appeared by the testimony that the property of the Michigan Central Railroad Company on the south side of River street was all in actual use by said company for depot and other purposes pertaining to the operation of the railroad, and that the same was needed by the said company for the purposes of the depot and other terminal facilities.

The seventh, eight, ninth, and tenth objections all relate to the statements of counsel and claim made by them in behalf of respondents, that the Michigan Central Railroad property could be taken by the petitioner; that the statutes authorized the taking, and the appeal by counsel to the jury not to take respondents' property, for the reason that it was the duty of the petitioner to go over the grounds of the Michigan Central Railroad Company.

All these objections may be considered together. The union depot act (No. 244, Laws of 1881, chap. 93, How. Stat.) does not contain any provisions authorizing the taking by the union depot company of the lands of the railroad company except for crossings. Section 6 of the act provides: "In case any such company is unable to agree for the purchase of any real estate, property, or franchises required for the purpose of its incorporation, it shall have the right to acquire the title to the same in the manner and by the special proceeding prescribed in this act; but there shall be no power, except for crossing, to take the track or rights of way of any other railroad company without the consent of said railroad company."

It is contended, however, upon the part of counsel for respondents that it may be taken by virtue of the general railroad law. The general railroad law provides that there shall be no power, except for crossing, to take the track or rights of way of any other railroad company without the consent of said railroad company, except as is thereinafter provided, being substantially the same provisions as in the union depot act. How. Stat., sec. 3331. As originally enacted, section 36 of article 2 of the general railroad
1654 law related to the manner of making crossings, with a proviso: "No such crossing or connection shall be made within the depot limits of any such company without the consent of such company or acquiring the right thereto, as provided in this act for the taking of land and other property." How. Stat., sec. 3350.

This section was amended, however, in 1883 and 1887. The amended section contains no provision authorizing the condemnation of the depot grounds or rights of way of any other company. 3 How. Stat., p. 3285, sec. 3350.

By the amendment to the general railroad law enacted in 1881 (How. Stat., sec. 3357) it is provided: "When any part of the land of any railroad company in this State in or adjacent to its depot grounds is not in actual use for depot or other purposes pertaining to the operation of a railroad, and such land is not needed by said railroad company for the purpose of a depot or other terminal facilities, it shall be lawful for any other railroad company, organized as aforesaid, needing such land for the purpose of a depot or terminal facilities, to acquire the same in the same manner as may now be done for such purpose from individuals. The question of actual use and of necessity for the aforesaid purposes by said railroad company owning and not using said land shall be determined, in addition to other questions, as provided by law in cases of condemnation of lands for the purpose aforesaid, and the same proceedings in all respects, as near as may be, shall be had for the aforesaid purpose as now provided by law where land is acquired for such purpose from individuals."

It is under this statute that counsel for respondents contended before the jury, and contends here, that the union depot company had the power, and that it was its duty, to have taken the lands of the Michigan Central Railroad Company rather than occupy the public street, to the injury of respondents. Except in so far as the

power is conferred by this section, there is no authority under either act to condemn the property of another railroad company except for a crossing.

The testimony shows that the Michigan Central Railroad Company is in the actual occupancy of all the property between
1655 River street and the Detroit river from Third to Twelfth streets, and that it is necessary to use all that property to transact business properly. The proposition does not relate simply to the right of petitioner to make a crossing of the Michigan Central tracks or right of way, but to the taking of a strip longitudinally from the side of lands used by that company as yards and depot grounds. The union depot act does not in express terms or by implication authorize this taking, and whether the petitioner can avail itself of the provisions of the general railroad law above quoted is questionable; but, admitting that the provisions of the general railroad law have application to the petitioning company, so that it could invoke the aid of that statute, certain conditions must exist before it could condemn for its own uses:

1. That the lands are not in actual use for depot or other purposes pertaining to the operation of the railroad of the Michigan Central Company and not needed for depot or other terminal facilities.

2. That the railroad company seeking to condemn needs the land for depot or terminal facilities.

3. That a public necessity exists for the taking for the purpose for which the land is sought to be acquired.

The last two questions would be involved in the ordinary condemnation proceedings under the statute. The first question could be determined only in a direct proceeding for that purpose, and it would be not only impracticable, but impossible, in a condemnation proceeding, to try that question. There is no power given by the union depot act to try such a question in a proceeding for condemnation, and the general railroad law does not, in express terms, confer the power upon commissioners or a jury to enter upon such an inquiry. No forum is pointed out by the railroad law where this question may be litigated, and there arises no implication that it was the intent of the legislature to permit the jury of inquest to enter upon such an inquiry. The form of the oath to be administered to the jury is to determine the public necessity and just compensation, and not to enter upon an inquiry as to whether
1656 property which has been set to one public use is not necessary to that use and may be devoted to another.

In Allegheny, etc., R. R. Co. *v.* Pittsburgh, etc., R. R. Co., 122 Penn. St., 511 (6 Atl. Rep., 564), it was claimed that the yard of the plaintiff was larger than was necessary for its present use, and that it could be so arranged as to accom-odate defendant's tracks without serious detriment to the plaintiff either in the present or future.

The court said: "We are of opinion that a railroad company has a right to consider the needs of the future and to construct its road and make its plans with reference to those future needs. * * * Every reasonable intendment must be taken in favor of

the primary rights. No actual encroachment upon these rights can be sanctioned or allowed, and in measuring their extent there must be a liberal consideration for the future, as well as the existing, necessities of the complainant, the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of all its business."

See also Housatonic R. R. Co. *v.* Lee & H. R. R. Co., 118 Mass., 391; Boston & M. R. R. Co. *v.* Lowell & L. R. Co., 124 *id.*, 368; Railroad Co. *v.* Williamson, 91 N. Y., 522; Illinois Cent. R. R. Co. *v.* Chicago, etc., R. R. Co, 122 Ill., 484 (13 N. E. Rep., 140); Union Depot Co. *v.* St. Paul, 30 Minn., 359 (15 N. W. Rep., 684); Railway Co. *v.* Faribault, 23 *id.*, 167; Atlanta *v.* Railway Co., 53 Ga., 120.

Under the form of proceedure established in the State by prior decisions, when the jury are not attended by a court to determine the admissibility of evidence and correct principles upon which litigious rights are to be determined, it would be a novel proceeding to permit the jury to be judges of the law and facts in a contest where the question involved was whether a railroad company was in actual use of property for depot purposes or facilities. The section of the constitution which authorizes a jury in condemnation proceedings does not contemplate that they may enter upon such a question as is here presented, and the general railroad law
1657 does not bear that construction. The present case, however, is freed from that question by testimony, which is uncontradicted, that the Michigan Central Railroad Company is in actual occupancy of all that property, which is necessary to transact its business properly.

It is contended, however, by counsel for respondents that the presentation of the question by argument of counsel could not have influenced the jury, as they found the question of necessity in favor of the petitioner. I think that question is well answered by the learned circuit judge

He says: "It is no sufficient to say that the jury found with petitioner upon the question of necessity. This does not in any way meet the question. The petitioner was entitled to just consideration upon the question of compensation or damages to be awarded. * * * The natural and inevitable effect of the arguments made is manifest. It would be difficult to conceive of an argument more effective, the certain and inevitable tendency and effect of which would be to influence the jury and cause them to award the most extravagant and exorbitant damages."

The court again remarks: "As we have seen, the jury, although judges of the law and facts, have no right to disregard well-recognized legal principles, and counsel who appear before them are governed by the same rules and subject to the same responsibility which govern their conduct in court."

It is the duty of the court to interfere where matters foreign to the issue are rehearsed before the jury prejudicial to the interests of a party. Cronkhite *v.* Dickerson, 51 Mich., 178; Bond *v.* Railroad Co., 62 *id.*, 646; Sullivan *v.* Deiter, 86 *id.*, 404. There are many

pages of the arguments of counsel in the record showing the persistency with which counsel urged upon the jury the right of the petitioner to take the property of the Michigan Central Railroad Company, and it is too plain for argument that it must have affected the jury in determining the amount of damages to be awarded. The jury ought not to have permitted the testi-
1658 mony to be given relating to that subject, or listened to arguments thereon.

Objections 11, 12, 13, and 14 are directed to the refusal of the jury to permit the petitioner to show that another kind of dust-arrester could be placed in the building at a small outlay, and one which would make the building comparatively safe from ignition from falling sparks from passing engines. It is not necessary to enter upon a full discussion of that question. The jury were in error in rejecting this testimony in view of the testimony of respondents upon the subject.

The objections which we have discussed we think well taken, and for that reason the award of damages should be set aside. The court below well remarked: "The damages awarded are most remarkable. The right of way sought to be acquired is the right of way for an elevated railroad along River street in front of the property of respondents. They have a frontage on the street of some 238 feet and on Fort street of about 75 feet. At $150 a foot, which is a large estimate, the land itself is worth $46,950. The testimony of respondent Absalom Backus, Jr., is to the effect that the buildings and improvements had cost $150,000 and are worth that now; but, deducting 25 per cent. for depreciation, which is usual on buildings and improvements of some years' standing, we have a valuation of $112,500, or a total valuation for the entire property of $159,450, and yet for simply going in front of this property a jury makes a total award of $96,143."

It is objected by respondents' counsel that the award cannot be disturbed for the reason that since the award and confirmation petitioner has, by order of the court, paid the amount awarded to the respondents. We think this objection cannot be sustained. Section 11 of the union depot act provides for the recording of a certified copy of the order of confirmation in the office of the register of deeds and the taking possession of the land, and that the sum to be paid as damages, etc., shall be paid by the company or deposited as provided in section 10 within 60 days after the confirmation of the report, and upon failure to so do said company shall be
1659 deemed to have abandoned the proceedings. By section 10 the court may direct to whom the money is to be paid or where deposited. Section 11 provides for an appeal to the supreme court within twenty days after the confirmation, and on such appeal the court may direct a new appraisal before the same or another jury. If the amount of compensation is increased by the second report, the difference is to be a lien on the land appraised and be paid by the company. If the amount is diminished, the difference shall be refunded to the company. The appeal shall not affect the rights of a party not appealing, and only the right of the appellant

in the matters appealed from. It is apparent that it was the intent of the legislature that the rights of the parties appealing should not be affected upon the appeal by the payment of the money as directed by the court, either to the party or on deposit for the use of such party. The petitioning company has not appealed from the award as to the public necessity for taking the property, but from the amount of damages awarded; and the fact of the payment of the damages to the respondents under order of the court cannot affect the right to have the question retried by another jury.

The award of damages must be set aside with costs, and that question submitted to a new jury, to be impaneled before the circuit court for the county of Wayne, in accordance with the statute.

McGrath and Grant, JJ., concurred with Long, J.

MONTGOMERY, J. (concurring):

The opinion of Mr. Justice Long sufficiently states the facts in the case; and the only question to which I shall advert is that of whether the circuit judge has power, under the statute relating to these proceedings, to set aside the award of the jury and direct a new trial before another jury to be impaneled.

It would be unseemly and unwarranted for the court to overrule its former opinion in any case where such result is brought about by a difference in view between justices, one of whom succeeds the other (McCutcheon *v.* Homer, 43 Mich., 483); but inas-
1660 much as a majority of the court as constituted when the opinion in Backus *v.* Gartner was rendered concur in overruling that decision, I feel free to state that in my opinion the statute is sufficiently broad to confer the power assumed by the circuit judge in this case.

The statute imposing the duty and conferring power upon the circuit judge in such proceedings provides that he "shall confirm the same on the next or any subsequent day when in session, unless for good cause shown by either party;" and, further, that "said court, as to the confirmation of such report, shall have the powers usual in other cases." The words "powers usual in other cases" were so construed in Backus *v.* Gartner as to exclude the power to award a new venire, and it was held by the learned chief justice that the intent was to convey the same power as was conferred on the judge in other cases in which the confirmation of reports, made to such court by some body or persons authorized by law to make them, was committed to his jurisdiction, and the learned justice cites as an analogous proceeding the power conferred to confirm the report of referees, and concludes that the only power under that statute would be to confirm the report of the referees or send the same back to the same referees.

Section 7379, How. Stat., seems to have been overlooked, which provides that "the circuit judge may, by an order under his hand, filed with the clerk, discharge any referee on cause shown by affidavit, and may in like manner fill any vacancy that may occur in their number, or may direct the reference to proceed and be concluded without filling any such vacancy."

It cannot be doubted that under this section the circuit judge might, upon a showing that the referees were prejudiced or biased, discharge one or all of such referees, and refer the same to new referees to be appointed by him.

Under article 6, sec. 8, of the constitution, the circuit courts are vested with full power in civil and criminal proceedings. They are the courts of the highest original jurisdiction in the State, and are beyond the reach of the legislative power. Heath *v.* Circuit Judge, 37 Mich., 372; Allen *v.* Circuit Judge, *id.*, 474.

1661 The power to control the verdicts of juries and set aside the same for bias is among the most essential powers vested in a *nisi prius* court, and to justify a construction of a statute which excludes this power the language should be clear and unmistakable. In my judgment, such an intent is not evidence- by the act in question. The provision that the circuit judge shall have the powers usual in other cases fairly construed means the powers usual in other cases within the jurisdiction of such court. This includes the power to see that justice shall not miscarry by reason of the prejudice or misconduct of the jury.

The law of Tennessee provides that not more than two new trials shall be granted to the same party in any action at law or on the trial by jury of an issue of fact in equity. In Trott *v.* West, 10 Yerg., 499, the supreme court of Tennessee held that this act did not intend to prevent the court granting new trials for error in the charge of the court to the jury, for error in the admission or rejection of testimony, for misconduct of the jury, and the like. See also Turner *v.* Ross, 1 Humph., 16; Railroad Co. *v.* Hackney, 1 Head, 170.

I concur in the conclusion reached by Mr. Justice Long.

MORSE, *C. J.* (dissenting):

I am well satisfied with the decision of this court when this case was here before, and with the opinion of Chief Justice Champlin, reported in 89 Mich., 209. Any other holding is not only inconsistent with the repeated adjudications of this court, but contrary to the spirit and purpose of the constitutional provision relating to the taking of private property for the use or benefit of the public.

Under section 2, article 18, of the constitution, it is evidently contemplated that the necessity for the taking and the just compensation to be awarded are to be found by a jury of 12 freeholders (residing in the vicinity of such property) or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. It was never intended that the fixing of damages should

1662 rest in the discretion of any court, but the right of the person whose property is to be sequestered to the determination of 12 of his neighbors upon the question is guaranteed by the constitution, so that neither courts nor legislatures can deprive him of it. Yet in this case the judges of this court are asked to set aside the judgment of the 12 men provided by the constitution to ascertain respondents' damages, and, in effect, to fix our own estimate of damages to property which some of us have never seen and of the

location of and value of which we are ignorant, except as we weigh and determine the conflicting evidence in the record before us. For if we have the power, and, having it, exercise it, to set aside a verdict because we think it is too big, do we not, in effect, fix the limit beyond which a jury cannot go in the ascertainment of damages? Having no personal knowledge of the property of respondents sought to be condemned by these proceedings, and having no constitutional or statutory power to use a personal view of the premises in aid of my judgment, I shall not take the liberty to substitute my judgment for that of 12 men residing in the vicinity of this property and presumably having better knowledge of the property than I and the damages that will result to it by the proposed taking. I know of no other reason for a view of the premises except that such view may be used in the formation of the judgment of the jury, both as to the necessity of the taking and the amount of the compensation to be awarded.

The jury in condemnation proceeding-, "as in all cases where no certain measure exists, must trust somewhat to their own judgment. That is one of the purpose- *to which juries* for which juries of inquest are provided. They are expected to view the premises and use their own senses, both to obtain such an information as an eye-witness can gain and to interpret and comprehend the testimony of others."

Grand Rapids, etc., R. R. Co. *vs.* Chesebro, 74 Mich., at p. 475.
Toledo, etc., R'y Co. *v.* Dunlap, 47 *id.*, 466.

(CAMPBELL, *J.*:)

It has been uniformly held by this court, in the face of a statute which provided that the judge should attend the jury to decide questions of law and to administer oaths to witnesses, that after the jury were selected and sworn the whole matter was in their hands, and the decisions of such judge were entirely advisory, and
1663 that the jury were the sole judges of the law and the facts; and, further, that they were not conclusively bound by the opinions of witnesses either as to value or damages. Grand Rapids, etc., R. R. Co. *v.* Chesebro, 74 Mich., 471, 472, 475, and 478; Michigan Air Line R'y Co. *v.* Barnes, 44 *id.*, 226, 227; Toledo, etc., R. R. Co. *v.* Dunlap, 47 *id.*, 456; Port Huron, etc., R'y Co. *v.* Voorheis, 50 Mich., 510; Detroit West., etc., R. R. Co. *v.* Crane, *id.*, 182, 187; Flint & P. M. R. R. Co. *v.* Detroit & B. C. R. R. Co., 64 *id.*, 363; Fort Street Union Depot Co. *v.* Jones, 83 Mich., 415, 418.

The contention of the petitioner that the circuit judge had a right in this case to set aside the verdict of the jury and granted a new trial because of the admission of irrelevant testimony must rest upon the presumption that this is a judicial proceeding, to be controlled by the courts as in a suit at common law. This is not the theory of the constitution nor in accordance with the rulings of this court. It is not a judicial proceeding.

"Commissioners form no part of the machinery of a court, and a jury of inquest is not a court. It has always been settled that the appropriation of private property did not come under the 'judicial

power' as it is located under the Constitution in courts, and except for the Constitution the nature of the tribunal of condemnation would have been discretionary with the legislature." Campbell, J., in Grand Rapids, etc., R. R. Co. *v.* Chesebro, 74 Mich., at p. 471.

The proceedings in this class of cases are special and bear little resemblance to ordinary legal trials. Toledo, etc., R'y Co. *v.* Dunalp, 47 Mich., 462; Port Huron, etc., R'y Co. *v.* Voorheis, 50 *id.*, 510.

If the circuit judge can be permitted to set aside a verdict because *of* improper and irrelevant testimony has been admitted, then the long line of decisions above quoted must be overruled, or our holdings will be so inconsistent as to be absurd and the proceedings become a farce.

(First), we hold that the attending judge has nothing to
1664 do with the admission or rejection of evidence, and that if he rules upon any question the jury are at liberty to disregard such ruling, they being the sole judges of the law and the facts; and, second, that if the jury in admitting or rejecting evidence have erred in the estimation of the circuit judge he may for that reason refuse not only to confirm their verdict, but set it aside and order a new jury. If this last proposition is to be maintained, what sense is there in the holding that the judge cannot control the jury in their deliberations before verdict upon this matter of the rejection of testimony? Would it not be better and cheaper for all parties and more in accordance with the requirements of justness and fairness *and* that the attending judge should pass upon the matter and what is proper testimony before it goes to the jury? The answer is obvious.

The second proposition is entirely inconsistent with the first, and if established by this court, as contended for in this case, it would be well to state that the previous adjudications of this court — expressly overruled, and from this date inaugurate a new departure in the law of condemnation of private property for public use.

Much stress is laid upon the imperfections of the jury, but the answer to this is that they are the tribunal chosen by the constitution, as a highway commissioner was chosen to condemn lands for public highways. So far no court has undertaken to interfere with the commissioner's rulings as to the necessity of the damage in a highway opening where he had acquired jurisdiction. He is an autocrat beyond the law as to these matters, and made so by the constitution; and a jury, in my opinion, in a case of this kind, is a tribunal to fix the damages and are judges of the law and the facts, created so by the constitution; and, when clothed with jurisdiction as the law provides, their award can only be impeached for fraud or corruption or upon a showing that by mistake or wilfulness they have omitted to take into consideration substantial elements of damage, and therefore substantial injustice has been done; and this is a matter for the supreme court and not for the attending judge. As pointed out when the case was here before,
1665 no express power is given such officer in the statute to set aside the verdict of a jury and to impanel a new one, but such power is expressly granted to this court. The only power

given is to confirm, or, at best, to refuse to confirm, the report of the jury or commissioners. Here the duty of the attending judge ends under the statute, and, in view of the constitution, it is not to be presumed that he has any implied power, unless, indeed, it be true that this is a judicial proceeding and the judge has common-law powers, which has been denied time and time again by this court.

The absurdity of permitting the circuit judge in this case to set aside the verdict because of the errors in admitting testimony and because of the talk of counsel the same as — this were an ordinary lawsuit is well illustrated by one claim of the petitioner and the opinion of the circuit judge thereon. In the course of the proceedings it was contended by the attorney for the respondents in their behalf that there was no necessity for the taking of the Backus property or the street in front of it, because there was — strip of land belonging to the Michigan Central Railroad Company which might be taken instead. It was found by the circuit judge that the contention of respondents' counsel was wrong in law, and that he had put improper questions to witnesses in this respect, especially in drawing out from one witness that Mr. George V. N. Lothrop had at one time said that there was no difficulty in condemning this Michigan Central property for railroad purposes, and this was one of his principal reasons for setting the verdict of the jury aside. Yet the jury found against the respondents upon the question of necessity, the very question to meet which this claim that this Michigan Central strip could be taken and used was raised and argued by respondents' counsel; but the circuit judge, in the face of this finding, is convinced that, although the raising of this question and the argument upon it had no effect for the purpose for which it is used, yet it tended to largely increase the damages in favor of respondents, to the great prejudice of the petitioner. The award is not to be
1666 set aside even by this court unless it clearly appear that injustice has been done, and yet we are asked to go into the realm of speculation to guess that an argument made by an attorney for one purpose, and in which purpose it failed, was productive of great harm in another and altogether different direction.

We held in Kalembach *v.* Railroad Co., 87 Mich., 509, that it would not be presumed that the jury in that case were prejudiced upon the measure of damages because of improper instructions by the court upon the law of negligence. Mr. Justice Grant said the result of the opposite rule "would be that a court must correctly instruct the jury upon all branches of every case in order to avoid prejudicing the jury in their assessment of damages." But here the doctrine is announced that in condemnation cases, where the jurors have heretofore been considered the judges of the law and the facts and not bound by the instructions of the attending judge, the attorneys for the parties must make no mistakes in their claims as to the law upon any branch of the case, or the verdict will be set aside. I have yet to learn of any case in the history of jurisprudence where a verdict has been set aside because an attorney for either party was mistaken in his ideas as to the law of the case and contended in good faith for a proposition which was erroneous

in the estimation of the courts. If this principle is established, there will be but little safety or certainty in trials of any kind, since much litigation is born of lawyers' errors, and if the appellate courts must pass upon the errors of counsel as well as of the court reversals will be the rule and affirmation an exception.

This court has never held that a probate or circuit judge could set aside a verdict of a jury or a report of commissioners and impanel a new jury or appoint new commissioners because the award of damages was excessive or because improper evidence was received. In Marquette, etc., R. R. Co. *v.* Probate Judge, 53 Mich., 222, it was said that the commissioners' report might be set aside if the amount awarded was unreasonable and indicated that it was the result of prejudice or partiality or that they acted upon a wrong basis of estimating the damages. It has also been said in
1667 other cases that the commissioners' report could for substantial reasons be set aside or the award of the jury be vacated for irregularity or on the merits. Port Huron, etc., R'y Co. *v.* Callanan, 61 Mich., 14; Grand Rapids, etc., R. R. Co. *v.* Chesebro, 74 *id.*, 472. If a judge can, under these decisions, vacate the award of a jury, there is no adjudicated case in Michigan where an order was ever made by an attending judge granting a new trial before a new jury, and there is no showing that such an order was ever made except in this case. No provision is made in the statute for any such action; and, as the right of appeal is only given upon the confirmation of the report, it seems plain to me that the right to vacate an award of damages is not vested in the attending judge because of excessive damages or the reception of improper evidence. If he vacates the award, it must be for jurisdictional reasons or because of fraud, undue prejudice, or corruption in the jury or commissioners. The amount of the damages and the law of the case as to the reception or rejection of testimony are beyond his province. With either he has nothing to do, or the utterances of this court are to be disregarded.

In the very latest case in this court before this one Mr. Justice Grant, speaking for the whole court, said, after quoting from the language of Mr. Justice Campbell in Railway Co. *v.* Dunlap: "It was there also held that the functions of the judge in such cases were advisory and that such controversies as this cannot be disposed of on merely technical notions. These proceedings may be instituted in probate courts, the judges of which are frequently not lawyers and are unfamiliar with the rules of evidence. If they were to be set aside on account of error in the admission or rejection of testimony, the difficulty of obtaining a finding by the jury which could stand the test would be apparent." Fort Street Union Depot Co. *v.* Jones, 83 Mich., 418.

It will be seen that the petitioner in that case was contending for exactly the opposite rule that it seeks to have enforced in this case.

If it is to be held that a judge cannot control a jury by ruling as to what testimony they may receive, as we have *unfirmly*
1668 decided heretofore, and also that, after the jury come in and report, their award may be vacated and a new trial granted

by this same judge because they have received improper testimony or rejected competent evidence, then the language of Mr. Justice Grant seems appropriate, for a jury are presumably as ignorant of rules of law as are probate judges, and there will seldom be found a verdict that can stand the criticism of a circuit judge in this respect. As before said, the whole thing becomes a farce and absolute nonsense, unless this court goes still further than the majority opinion in this case and overrules all our former adjudications that the jury are the judges of the law and the facts and relegates the proceedings to the judicial practices after the form of the common-law trials. I am not prepared to go thus far, nor yet to take the initial step which logically must lead the court at last to this end.

In conclusion, I do not think the petitioner has any standing in this court. I know of no constitutional method by which an individual or a corporation can be authorized to take the property of another and hold, enjoy, and use it while litigating in the courts the amount it shall pay for the property. In any other case than a condemnation proceeding the voluntary payment of a judgment, after appeal, would discontinue the appeal. It is contended that under the statute it was the intent of the legislature that the rights of the parties appealing should not be affected by the payment of the money, as directed by the court, either to the party or on deposit for the use of such party; and it is further contended that as the petitioner has not appealed from the finding of public necessity for taking the property that question is settled and the company's right to contest on appeal the award of damages remains, although it has taken possession of the property and paid the damages. Under our constitution private property cannot be taken without just compensation, and it is not intended that possession of the property shall be given to the public or to a quasi-public corporation until the matter of compensation is settled or finally determined and paid or secured beyond peradventure.

Section 9, art. 15; Sheldon *v.* Kalamazoo, 24 Mich., 386;
1669 Marquette, etc., R. R. Co. *v.* Probate Judge, 53 *id.*, 226.

The legislature has no power to avoid this plain provision of the constitution. The petitioner could only get possession of this street in front of respondents' property by the payment of the award. On its own motion it paid the money to respondents and took possession of the property. By so doing it abandoned its appeal.

Order of the Supreme Court.

1670 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Allen B. Morse, chief justice; John W. McGrath, Charles D. Long, Claudius B. Grant, Robert M. Montgomery, associate justices.

THE FORT STREET UNION DEPOT COMPANY, Petitioner and Appellant,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. Dean, William H. Davison, Respondents and Appellees. } # 12421.

This cause having been brought to this court by appeal from the circuit court for the county of Wayne, and having been argued by counsel and due deliberation having been had thereon, it is now ordered and adjudged that the verdict and award of the jury in this cause, in so far as the same fixes and determines the compensation and damages that the petitioner ought justly to pay to the respondents, be, and the same is hereby, vacated and set aside, and that the said verdict and award, so far as the same determines the question of public necessity, be, and the same is hereby, affirmed.

It is further ordered and adjudged that *there be* a new appraisal of the compensation and damages that ought justly to be paid to the respondents be had before a new jury, to be impanneled and sworn according to the act under which the proceedings in this cause were instituted, and for the purposes of said new appraisal this cause and the record therein are hereby remanded to the circuit court for the county of Wayne, with directions to proceed with said new appraisal, the costs of this appeal to abide the event of said appraisal, as provided by said act.

1671 Parties.	Petitioner's attorneys.	Respondents' attorneys.
12421. The Fort Street Union Depot Company, petitioner and appellant, *vs.* Absalom Backus, Jr., A. Backus, Jr., & Sons, James N. Dean, and William H. Davison, respondents.	F. A. Baker. Appeal from Wayne.	Dickinson, Thurber & Stevenson.

Costs.	Journal.	Date.	Proceedings.
		1891.	
		Dec. 8	Record on appeal filed.
		Dec. 8	Note of argument filed.
		1892.	
	K, 371	Mar. 3	Argued in part.
	K, 378	Mar. 4	Concluded and submitted.
	K, 548	June 10	Reversed and remanded.
		June 27	Record remitted to court below.

1672 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

To Dickinson, Thurber & Stevenson, attorneys for respondents.

GENTS: Take notice that on Monday, the 10th day of April, 1893, at the opening of court, or as soon thereafter as counsel can be heard, the petitioner will move the court before the Hon. George Gartner, circuit judge, for an order to strike, summon, swear and impanel a jury for the trial of the question of damages in this cause in pursuance of the order and directions of the supreme court therein.

F. A. BAKER,
Attorney for Petitioner.

Detroit, April 5th, 1893.

1673 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

Edward A. Stricker, being duly sworn, deposes and says, that on this 5th day of April, 1893, he served a notice, of which the annexed is a copy, upon Dickinson, Thurber & Stevenson, and that such service was made at the office of said firm by handing the same to James H. Cullen, a clerk in said office, all members of said firm being absent therefrom.

EDWARD A. STRICKER.

Subscribed and sworn to before me, a notary public, this 5th day of April, 1893.

WALTER BARLOW,
Notary Public, Wayne County, Mich.

1674 At a session of the circuit court for the county of Wayne, held at the circuit court rooms in the city of Detroit, on the 10th day of April, A. D. 1893.

Present: Hon. Henry N. Brevoort, Hon. George Gartner, Hon. George S. Hosmer, Hon. Cornelius J. Reilly.

FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., *et al.*

Before Judge Brevoort.

In this cause it is ordered that it be and it hereby is continued as to the empanelling of a jury until Friday, April 14, 1893, without prejudice and without the defendant waiving any of his jurisdictional rights.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

In the Matter of the Application of THE FORT STREET UNION DEPOT COMPANY, a Corporation, Petitioner,
against
ABSALOM BACKUS, JR., "A. BACKUS, JR., & SONS," JAMES N. DEAN, and WILLIAM H. DAVISON.

Absalom Backus, Jr., who is a citizen of the State of Michigan, and a person residing in the city of Detroit, county of Wayne and State of Michigan, and A. Backus, Jr., & Sons, which is a corporation created and existing under the laws of the State of Michigan, having its principal office and carrying on its business in the said city of Detroit, and which is a person residing within the said city, on receipt of a notice of motion in this court that a jury be
1675 struck, summoned, sworn and impaneled before the Honorable George Gartner, circuit judge, for the retrial of the question of damages in this cause, in pursuance of the order and directions of the supreme court therein, appearing for the purpose of this pleading, objection and protest only, in their own proper persons come and say:

That this court, or the said judge, should not make said order or take any further cognizance or jurisdiction of this matter for the following reasons:

(1.) That the order and direction of the court heretofore, and the order and direction of the supreme court, affirming the order and direction of this court in that behalf, and all the proceedings in that behalf, providing and directing a retrial of the question of damages in this cause, and the proposed order to strike, summon, swear and impanel a jury for said retrial, and any order of the court directing a retrial have constituted, and do and will constitute, a denial by the State of Michigan to the said Absalom Backus, Jr., and the said A. Backus, Jr., & Sons, persons within its jurisdiction, of the equal protection of the laws, contrary to the intent and meaning of article fourteen of the Constitution of the United States, in this:

(1.) By the constitution of the State of Michigan and the laws adopted under and in accordance therewith, as uniformly construed by the courts of said State, except in single case where the

said Absalom Backus, Jr., and the said A. Backus, Jr. & Sons were parties whose property was sought to be condemned by the said petitioner, under the petition in this matter, the question of the amount of damages to be awarded for the taking of property for public use is one for a jury (when demanded as it was demanded in this case) as an independent and non-judicial body or referee of its own kind without interference or constraint by a court or by any
judge with or of the sound discretion of the jury in fixing it
1676 And in and by said constitution and said laws, as uniformly construed and applied by the courts of the said State, except in the single case of these two persons, a judge or court is not permitted to set up a judgment as to said damages by way of binding instruction to said jury and against their judgment in their said sound discretion or by coercing such constitutional body to adopt the judgment or discretion of said court or judge by granting new trials until an award may be reached which may be in accordance with the judgment of said court or judge.

And the said Absalom Backus, Jr., and A. Backus, Jr., & Sons aver, on information and belief, that the courts of the State and the supreme court of the State of Michigan have applied these principles repeatedly in adjudicated cases, without exception, in protection of all other persons than themselves within its jurisdiction and have never denied the application of the said principles of the constitution and the said laws of the State or to any person or persons except to them.

They aver that the said circuit judge has asserted the right to pass upon the question of the amount of damages to be awarded these respondents, and to set up his judgment against that of the said constitutional body or tribunal, and has sought to maintain his judgment by awarding a new trial in this case; and in this proceeding he is sustained by the supreme court of the State, which is a court of last resort in the State of Michigan; and said supreme court also, contrary to the uniform course of its decisions, of which there are many in the official reports of the adjudicated cases, affecting other persons within the jurisdiction of the said State, has, as to these respondents in this proceeding, affirmed its right to set up its judgment as to the proper amount of damages to be awarded,
against the sound discretion of said jury, and to coerce a
1677 conclusion as to the amount in accordance with its judgment,
by ordering a new trial in this matter against these respondents.

(2.) And in this, that under the said constitution and laws of the State of Michigan, and the adjudications of the courts of the said State, the uniform rule in condemnation proceedings, where business is sought to be condemned for public use, has been that damages for interruption of business and to the business stand, and for the diminution of business facilities, should be awarded as part of just compensation in addition to mere injury to the realty; but in this case, and to these persons, the said circuit judge and the supreme court have denied the protection of that constitutional rule and law, as repeatedly construed by the said courts, and have limited and do

limit in this proceeding the damages to mere injury to the realty and to the buildings thereon.

(3.) And in this also, that under the said constitution and laws of the State of Michigan, as uniformly and, as these respondents aver, repeatedly adjudicated by the courts of said State, no court or tribunal has jurisdiction to prosecute a proceeding as for condemnation under the power of eminent domain, when pos-session has been actually taken of the property sought to be condemned by the person or body upon whom the prerogative to condemn, under the power of eminent domain, has been conferred.

And these respondents aver that the said petitioner has been in full possession of all the said property since the confirmation of the award in this case by the said circuit court, and has thereon constructed its railroads, trestles and bridges, and has been carrying on regularly the railroad business of four great railroad companies, besides its own; and that the order for a new trial in
1678 these conditions, is a denial of the right of these respondents to this protection under said laws from the oppression of litigation, and their undisturbed holding of the amount they have received by the award of the jury, accorded under said laws by the said courts to all other persons than themselves.

(2.) That the proceeding sought to be taken in form for a new trial is a proceeding under the authority of the State, through its courts, to deprive the said Absalom Backus, Jr., and A. Backus, Jr., & Sons of their property without due process of law, in violation of section one, of article fourteen of amendments to the Constitution of the United States.

(1.) Because, on the confirmation of the award and proceedings by the circuit judge, the total amount of the award was paid to these respondents by the petitioner, and the petitioner entered into full and complete possession of the respondents' property, sought to be taken by the proceedings; whereby the title to said property, passed to said petitioner, and the title to said money passed to these respondents.

(2.) And because this proceeding for a new trial is prosecuted not to reach said property the title to which has passed and which is fully possessed by the petitioner, but to reach, under the constraint of the courts, a portion of the award in money the title to which has passed to these respondents.

(3.) And because the use of the said property contemplated by the petitioner, as shown by its said petition, is not a public use, and is not one as in which the public can make, compel, or have any part, interest, or benefit whatsoever, and its business and purposes are for the private ends and gains of the petitioner, in the prosecution of an enterprise charged with no duty to or service
1679 to the public by law; and a proceeding for condemnation for private use is not due process of law.

And these respondents here refer to and read, as a part of this their plea, objection and protest against this proceeding, the record and proceedings in this matter from the filing of the petition, including the proceedings of the jury as signed by them in the two

former trials, and the subsequent record and proceedings in this matter in the said circuit court and in the supreme court of the State of Michigan.

Respectfully submitting the premises, these respondents, Absalom Backus, Jr., and A. Backus, Jr., & Sons, protest against the summoning and impaneling of a jury in this matter and against any further trial or proceedings herein.

A. BACKUS, JR., & SONS,
By H. N. BACKUS,
Vice-President and Acting President.
A. BACKUS, JR.,
By H. N. BACKUS.

STATE OF MICHIGAN, } ss:
County of Wayne, }

Henry N. Backus, being duly sworn, upon his oath saith: That he is vice-president and acting president of A. Backus, Jr., & Sons, a corporation created and existing under the laws of the State of Michigan, and signed the foregoing statement by direction of the directors and all the stockholders of the said company; that he knows the contents thereof, and that the statements of fact contained therein are true as far as stated of the own knowledge of the respondents therein named, and that the statements therein contained on information and belief, or advice and belief, are true to the best of his knowledge, advice, information and belief.

He further saith that he is authorized and directed by
1680 Absalom Backus, Jr., by special direction, in his absence to append his signature to the foregoing statement.

HENRY N. BACKUS.

Subscribed and sworn to before me this 15th day of April, A. D. 1893.

JAMES H. CULLEN,
Notary Public, Wayne County, Mich.

(Indorsed: Plea and protest to jurisdiction. Filed April 17, 1893. John Marshall, deputy clerk.)

At a session of the circuit court for the county of Wayne, held at the circuit court rooms in the city of Detroit, on the seventeenth day of April, A. D. 1893.

Present: Hon. Cornelius J. Reilly, Henry N. Brevoort, George S. Hosmer, George Gartner.

FORT STREET UNION DEPOT COMPANY }
vs.
ABSALOM BACKUS, JR., *et al.* }

Before Judge Gartner.

The respondents in this cause appearing specially for that purpose, object to the jurisdiction of the court to proceed to select a

jury for a retrial of said cause, and file a plea and protest to the jurisdiction of the court, and thereupon the court, after hearing the arguments of counsel, overruled the same.

1681 At a session of the circuit court for the county of Wayne, held at the circuit court rooms in the city of Detroit on the fifth day of July, A. D. 1893.

Present: Hon. George Gartner, George S. Hosmer, C. J. Reilly, Robert E. Frazer, Henry N. Brevoort.

UNION DEPOT COMPANY
vs.
A. BACKUS, JR., COMPANY *et al.*

Before Judge Gartner.

Ordered that the trial of this cause be and the same hereby is set for August fifteenth, A. D. 1893.

At a session of the circuit court for the county of Wayne, held at the circuit court room in the city of Detroit on the 15th day of August, 1893.

Present: Hon. George Gartner, George S. Hosmer, Henry N. Brevoort, Cornelius J. Reilly, Robert E. Frazer.

FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., *et al.*

Before Judge Gartner.

In this cause ordered that the sheriff for the county of Wayne make and return to this court a list of twenty-four (24) freeholders from which to strike a jury in this cause, and that said sheriff summon said jurors to appear in room 1 of the circuit court for Wayne county on September the 1st, at 2 p. m., city time.

1682 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

COUNTY OF WAYNE, *ss:*

Benjamin F. Briscoe, being duly sworn, deposes and says: That he is one of the deputy sheriffs of the county of Wayne, and that he has been directed by the court to make a list in writing of twenty-four inhabitants and freeholders of said county of Wayne, who are qualified to serve as jurors in courts of record in this State,

from which to strike a jury in the above-entitled cause. Deponent further says and makes oath that he will select such persons according to his best judgment and without favor or partiality to either party.

BENJ. F. BRISCOE.

Subscribed and sworn to before me in open court on this 15th day of August, A. D. 1893.

GEO. GARTNER,
Circuit Judge.

1683 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

Sheriff's Return of List of Jurors.

COUNTY OF WAYNE, *ss:*

I, Benjamin F. Briscoe, deputy sheriff of the county of Wayne, do hereby certify and return, that in obedience to an order granted by the court on the 15th day of August, 1893, in the matter of the petition to acquire certain lands for public use of The Fort Street Union Depot Company, petitioner, against Absalom Backus Jr., and others, respondents, I have selected, according to my judgment and without favor or partiality to either party, the following list, in writing, of twenty-four freeholders and inhabitants of the said county of Wayne, qualified to serve as jurors in the courts of record in this State, and from which list a jury may be impaneled, according to law, in the case of the said The Fort Street Union Depot Company, petitioner, against the respondents named in the title to this return, and who are persons having estates, or are otherwise interested in one of the lots, tracts or parcels of land sought to be acquired by said petitioner:

1684 *List of Jurors.*

Names.	Residences.
1. Samuel Marks	Cor. Field & Milwaukee Av's.
2. Fred. Guenther	Commonwealth Ave.
3. Herbert Snow	Dearborn.
4. Thomas A. Dingwall	1087 Boulevard West.
5. Henry H. Eby	Wyandotte.
6. Wm. C. Hausherr	216 Pitcher St.
7. Wm. A. Eldridge	241 Bagg St.
8. F. F. Summers	143 Lincoln Ave.
9. Chester E. Wright	Belleville.
10. Berthold Mueller	300 Toledo Ave.
11. Joseph B. Moore	116 Alfred St.

12. John C. Jacob.....268 Rivard St.
13. Wm. Wreford .....345 Larned St. east.
14. John W. Leonard.....671 Fourth Ave.
15. Peter Flannigan .....871 Humboldt Ave.
16. Ferdinand Kuhn .....14 Michigan Ave.
17. Mason E. Safford.....208 Jefferson Ave.
18. Edward Kanter.....Madison Ave.
19. James B. Lauder.....87 Elizabeth St. east.
20. F. Wm. Lichtenberg.....205 Fort St. east.
21. Marvin H. Chamberlain.....17 Peterboro St.
22. John McLean.....1560 Woodward Ave.
23. John McDonald, Jr. .....407 Myrtle St.
24. Hiram Bunnell .....27 Michigan Ave.

Given under my hand on this the first day of September, 1893, at Detroit, in said county of Wayne.

BENJAMIN F. BRISCOE,
Deputy Sheriff.

(Endorsed:) No. 29249. Sheriff's return of jury list. Samuel Stewart, deputy clerk. Filed September 5, 1893.

1685 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

STATE OF MICHIGAN, } ss:
County of Wayne, }

To the sheriff of Wayne county, Greeting:

In the name of the people of the State of Michigan, you are hereby commanded that you summon:

1. Herbert Snow, Dearborn;
2. Henry H. Eby, Wyandotte;
3. Thomas A. Dingwall, 1087 Boulevard West;
4. William C. Hausherr, 216 Pitcher;
5. William A. Eldridge, 241 Bagg;
6. F. F. Summers, 143 Lincoln;
7. Chester E. Wright, Belleville;
8. Joseph B. Moore, 116 Alfred;
9. John W. Leonard, 671 Fourth;
10. Peter Flanigan, 871 Humboldt Ave.
11. Mason S. Safford, 206 Jefferson Ave.;
12. Edward Kanter, 25 Madison Ave.;

to be and appear in the circuit court for the county of Wayne at the circuit court room in the city of Detroit on Monday, the 11th day of September, A. D. 1893, at 2 o'clock in the afternoon of said day, to serve as jurors for the trial of the case of The Fort Street Union Depot Company against Absalom Backus, Jr., and others, and of this writ make due return.

Witness the Hon. George Gartner, presiding judge.

In witness whereof I have hereunto set my hand and affixed the seal of said court on this the fifth day of September, A. D. 1893.

[SEAL.] WILLIAM MAY,
Clerk of the Circuit Court for the County of Wayne, State of Michigan,
By JAMES A. ROBISON,
Deputy Clerk.

1686 STATE OF MICHIGAN, } ss:
County of Wayne, }

I hereby certify and return to the clerk of the circuit court for the county of Wayne that I have served the within venire, or writ of summons, upon the persons within specified.

Dated at Detroit this 11th day of September, 1893.

Fees, $15.00. CHARLES P. COLLINS, *Sheriff,*
By BENJ. F. BRISCOE,
Deputy Sheriff.

Received and filed on the 11th day of September, A. D. 1893.
WM. E. FENWICK,
Deputy Clerk.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

COUNTY OF WAYNE, ss:

We, the undersigned inhabitants and freeholders of said county of Wayne, being duly impaneled to serve as a jury in this cause to determine the damages or compensation which ought justly to be paid by said petitioner, The Fort Street Union Depot Company, to the respondents as the owners of and persons interested in
1687 the particular description of real estate mentioned and described in said petition, do hereby take and subscribe on oath that they will justly and impartially ascertain and determine the damages or compensation which ought justly to be made by said company to said respondents according to the constitution and laws of this State.

MASON S. SAFFORD.
WM. C. HAUSHERR.
RICHARD ROWLAND.
EVERETT N. CLARK.
VINCENT ZIMMEL.
HENRY H. EBY.
JOHN W. LEONARD.
JAMES M. YOUNG.
HENRY E. BAKER.
F. F. SOMMER.
CHESTER E. WRIGHT.
JOHN E. CALNON.

Taken and subscribed before me in open court on this, the 11th day of September, 1893.

GEORGE GARTNER,
Circuit Judge.

1688 At a session of the circuit court for the county of Wayne, held at the circuit court rooms in the city of Detroit, on the 11th day of September, A. D. 1893.

Present: Hon. George Gartner, Hon. George S. Hosmer, Hon. C. J. Reilly, Hon. Robert E. Frazer, Hon. Henry N. Brevoort.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON.

Before Judge Gartner.

In this cause, the sheriff for the county of Wayne on this day having made return to the venire issued that he had served said venire on the persons named therein, and all of the persons named therein except William A. Eldridge having appeared and the following: Herbert Snow, Thomas A. Dingwell, Joseph B. Moore, Peter Flannigan, after showing due cause therefor, and having been with the other jurors sworn on their *voir dire*, were excused from serving in said cause; and the court having ordered the sheriff to summon talesmen, and thereupon such proceedings were had that on the 11th day of September, 1893, the following-named persons, freeholders, qualified to sit as jurors in courts of record in this State, to wit: Henry E. Baker, Henry H. Eby, Wm. C. Hausher, Frank F. Sommers, Chester E. Wright, John W. Leonard, Mason E. Safford, John E. Calnon, Richard Rowland, Vincent Zimmel, James M. Young and Everett M. Clark, were duly impaneled, tried and sworn as a jury to determine the public necessity for taking

1689 and using for public use the real estate, property rights and assessments and privileges described in the petition in said cause and — which the above-named respondents are interested as owners or otherwise, and if they shall deem the same necessary to be taken, to justly and impartially determine the damages or compensation which ought justly to be made by the said petitioners to said respondents as owners or as interested in said real estate, property, interests, rights, assessments and privileges mentioned in said petition, said jurors having subscribed said oath and the same having been filed, they retired and elected Henry E. Baker, one of their number, as their foreman, and the sheriff appointed the sheriff of the county of Wayne as the proper person to attend and take charge of said jury while engaged in said proceedings.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
A. BACKUS, JR., & SONS, a Corporation, and ABSALOM BACKUS, JR., *et al*, Respondents. } 29249.

I, Henry M. Reynolds, clerk of said circuit court, do hereby certify, that it appears upon the calendar of said court that upon the 6th day of November, 1893, a verdict was rendered for respondents in said cause for the sum of $63,000, and I further certify that said verdict was not spread upon the journal of said court, nor is said verdict, as signed by the jury in said cause, now in the files of said cause in this office, and it does not appear of record in
1690 said court that said verdict, as signed by said jury, was ever filed in said cause.

In testimony whereof, I have hereunto set my hand and the seal of said court this 22nd day of August, 1894.

[SEAL.] HENRY M. REYNOLDS, *Clerk*,
By CHAS. C. KELLOGG,
Deputy Clerk.

Testimony Taken on Third Trial.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., SONS & COMPANY.

Before Judge Gartner.

SEPTEMBER 5, 1893.

Mr. DICKINSON: On behalf of the respondents in this case I desire to renew my solemn protest against a retrial and against a further harassment of these respondents in this matter for the reasons stated in the papers filed at the last hearing, when the order was entered to proceed with the drawing and striking of a jury. I desire that this protest be entered now and at every stage of the proceedings. I desire the report to further note that the court is present at this time.

A jury was then struck in the regular way by Mr. F. A. Baker, on behalf of the petitioner, and Mr. Don M. Dickinson, on behalf of the respondents, and an adjournment taken to Monday, September 11, 1893, at 2 p. m.

1691 SEPTEMBER 11, 1893—2 p. m.

The COURT: You may call the jury, Mr. Sheriff.

Mr. DICKINSON: Before the jury is called, if your honor please, I desire to ask whether your honor, Judge Gartner, of the circuit court, proposes to sit in this case.

The COURT: I have not yet considered that matter.

Mr. DICKINSON: So far as the presence of the court is required.

Mr. BAKER: If the court please, in regard to that matter, we argued the question somewhat fully before the supreme court in the second hearing in this case, and I became satisfied that the supreme court from the decision that they had made in the case and from what took place on the argument in that case, are of the opinion that it is perfectly competent for the circuit judge to try these cases precisely the same as in an ordinary civil action at common law, and your honor will remember that the statute expressly provides for it.

Mr. DICKINSON: I do not think you quite understand my motion, Mr. Baker. I was not going into that question of whether it is competent for the court to sit, whatever judge we have. I asked his honor whether it is his purpose to sit in this matter—leaving that question open as to the competency to sit permanently or a time.

The COURT: The matter is before me now, Mr. Dickinson.

Mr. DICKINSON: We had no means of knowing until this time because we are now just entering upon the examination of the jurors and the question arises. We had no opportunity of knowing whether your honor would sit here until this moment.

The COURT: I have had charge of the matter since its inception. I suppose I shall have to continue in charge of it.

Mr. DICKINSON: Very well. Now, upon that matter I de-

1692 sire to ask, under instructions of my clients—the specific instructions in writing of my clients—to have some other judge sit, on the ground that your honor is prejudiced against them and on account of the influence which your honor would be under, consciously or unconsciously, for the petitioner. This motion we would like to support by affidavit at any time your honor will hear it.

Mr. BAKER: Of course no such motion can be entered, if the court please. No such motion has ever been made in my experience in the State of Michigan—such a thing as challenging the court.

Mr. DICKINSON: I will cite your honor a precedent in the 89 Kentucky, in a precisely similar case as it happens, of the building of a viaduct, and it is always competent—wherever it is believed, I think, in any case at common law—wherever either party believes that he is entitled to a change of venue, for instance, or believes that the court before whom he is to be heard is prejudiced—it is always competent and he has a right to make a motion for a change of judge.

Mr. BAKER: No such practice has ever prevailed in this State or any other jurisdiction, unless there is some statute that provides for

it. In Kentucky they have some statute which authorizes either party to call for a trial by a member of the bar, but there is no such jurisdiction here. There is no such thing as change of venue because of the prejudice of the court, and it is an insult to the court to allege any such thing.

Mr. DICKINSON: I do not think your honor will so understand it as an insult to the court. It is perfectly competent for the party to make the objection and to support it.

Mr. BAKER: I frequently find fault with the judges, but I never come into court to do it.

The COURT: I think, Mr. Dickinson, that having had
1693 charge of this matter from the beginning, I will take charge of it at this time.

Mr. DICKINSON: And your honor will not listen to affidavits showing the prejudice or in support of the objection I have made?

The COURT: I have not said that. Of course, I do not know what the affidavits are.

Mr. DICKINSON: Well, we desire time to make that showing. We did not know before this time that your honor would sit.

The COURT: You might impanel the jury; they will have to view the premises.

Mr. DICKINSON: Your honor exercises the judical function at once on the impanelling of the jury. It must be made now if at any time. I suppose your honor has the power to go on without listening to the motion, if your honor sees fit.

The COURT: I am here willing to listen to any motion counsel desires to make.

Mr. DICKINSON: This motion I desire to make and sustain it by affidavits.

The COURT: I will hear it at this time.

Mr. DICKINSON: We have not been prepared.

Mr. BAKER: A man who comes in with such a motion as that ought to be prepared.

Mr. DICKINSON: Yes, he ought to be if he knew who the court was to be.

Mr. BAKER: You ought to know who the court was to be.

The COURT: I think you may go on and impanel the jury; the matter will be adjourned for a few days anyway.

Mr. DICKINSON: And your honor will listen to the motion later.

The COURT: Yes.

Mr. DICKINSON: If you honor has the 89 Kentucky, your
1694 honor will see that it is an entirely proper motion.

The COURT: I am not at all thin-skinned, Mr. Dickinson.

Mr. DICKINSON: I desire, may it please the court, at this stage of the case also to interpose the objection to a retrial of the case, which I have heretofore stated in writing on the files of the court, and to protest against this retrial for those reasons and against the jurisdiction of the court.

The COURT: You may proceed with calling the jury, Mr. Sheriff.

The jury was then called and selected in the regular way, and duly sworn.

The COURT: Gentlemen of the jury—this is a case which will probably take some time to try, and all that is necessary for me to say at this time is that in view of the fact that it is a very important case, you are to be very careful not to hold any conversation about it, either among yourselves, or to permit any conversation with any outsider with reference to the matter. You must keep your mind entirely clear and free from any influence. You want to listen to the testimony and the arguments of counsel as they are made in court, and after you retire to the jury-room then and only then to talk the matter over and consider the testimony offered in the case, together with the arguments of counsel, in arriving at a conclusion of such questions as may have been presented to you.

Adjourned till September 13, 1893.

SEPTEMBER 13, 1893—9.30 a. m.

Mr. BAKER: If the court please, and gentlemen of the jury: As is customary in the commencement of trials before a jury it is incumbent upon me to state to you the case on the part of the petitioner in this case, The Fort Street Union Depot Company,
1695 and to lay before you in a general way the character and nature of the testimony that we propose to introduce before you. You are impanelled in this case to determine the damages.

Mr. DICKINSON: Will you let me interrupt you for a moment, Mr. Baker. For all purposes the planing mill of the respondents ought to be running when the jury go to view the premises. It will be ready by the morning.

Mr. BAKER: You do not want them to go there until morning?

Mr. DICKINSON: The jury ought to see the planing mill running and in operation.

Mr. BAKER: That is a matter we can determine after I get through with my opening.

Gentlemen of the jury, as I said before, you are impanelled in this case to determine the damages and to determine the compensation that the Fort Street Union Depot Company should pay to Absalom Backus, Jr., and to a corporation known as A. Backus, Jr., Sons & Company, for building an elevated railroad or superstructure along River street in front of their planing-mill property, which has a frontage upon Fort street and also a frontage upon River street. The Fort Street frontage is about 75 feet and the River Street frontage is 238½ feet; and upon the property they have a large planing mill and box factory. The Michigan Central Railroad track bound them upon the east and the property owned by various individuals bound them upon the west, between their property and Twelfth street.

The Fort Street Union Depot Company is a corporation organized under the union depot act in this State for the purpose of furnishing depots and terminal facilities to railroad companies; and they have built their depot and have built their elevated track along River street, by which they reach the depot. And this case

remains to be determined as far as the damages are concerned.
1696 We will show to you on the part of the petitioner in the case the value as we understand it and as our witnesses will testify, of the planing-mill property, and we will introduce testimony showing the value of the land, if it was vacant, and as to the value of the buildings, which will be indicated by the testimony, showing what they can be duplicated for, and also the value of the machinery. We will show the value of the property and then it will be incumbent upon the jury in this case to determine what depreciation, if any, in the value of this property has taken place or been occasioned by the building of this elevated railroad along River street, and the maintenance and operation of railroad tracks thereon. So that you will see the question is quite a simple one and simply involves the exercise of the judgment of the jury as to how much their property has been depreciated in value, how much less it is worth, because of the construction of these railroad tracks of the union depot company along this street in front of their property. You will be permitted at a time that may be agreed upon to visit the property, and you will be allowed to go through the Backus planing mill and examine that property, as Mr. Dickinson has stated, while it is in operation, so that you can see the nature of their plant, and you can go upon and under and about the superstructure of the elevated railroad, and see to what extent, if any, that has caused any injury or creates any damage or has any bad effect upon the value of the planing-mill property. And if you find that it has depreciated the value of that property, to determine to what extent.

There will be some testimony in the case relating to the question of the increase of the fire risk. Upon the part of the petitioner in this case we will show you by competent insurance men that the fire risk upon that property has not been increased by the construction and maintenance of this road, that the rates are no larger
1697 and will be no larger because of the construction of this road, with possibly one modification. Upon the River Street front Mr. Backus has a shaving vault, a brick building, with two somewhat large apartments in it, some 18 or 20 feet wide, I should think, and 40 or 50 feet long, and into which the shavings and dust from the planing mill are carried through blow-pipes that are operated with revolving fans, and the shavings and dust in the mill are deposited in these vaults by the use of these fans and blow-pipes. And upon the top of this shaving vault they have what is known as the Backus dust-arrester, which is a large structure upon which burlap is stretched. Mr. Backus, I think, will tell us that there are some 2,700 yards of burlap stretched upon frames that are built in that shape, that is, V-like, the V standing up, and there are rows of them, the burlap running up and down, so that when the air comes through the blow-pipe into the shavings vault, carrying shavings in there, the air goes through the burlap and the shavings are gathered on the other side and dropped into the vault beneath. And there will be considerable testimony in the case in regard to this dust-arrester. We will endeavor to show you on the part of the petitioner by competent testimony that the dust-arrester which

Mr. Backus has there is not a proper one, but it is one that is not up to the present state of the art in regard to dust-arresters, and that it will be perfectly feasible and practicable, if he desired and was willing to do it, to put in what is known as the Vortex dust-arrester, which is a metallic one, and only about six or eight feet wide at the top and is funnel-shaped. It blows the air into the funnel and the centrifugal action upon the shavings in this funnel causes the air to go out at the top and the shavings to drop beneath, and we will show you by competent testimony that that is the dust-arrester that is in almost universal use in the United States,

1698 that it is made of galvanized or sheet iron and has an automatic top, so that when the mill is not in operation it drops down, and is absolutely fireproof as far as any exposure from the outside is concerned; when the mill is in operation the wind comes up through the top of this dust-arrester and it is impossible for any spark or anything to get into it, and when the mill is not in operation the top rests upon it, so that there is no more fire risk to it than with any other iron exposure of that kind, the same as any other roof. We will show by men who are engaged in this business and who know all about it, that this metallic dust-arrester, the Cyclone or Vortex dust-arrester, built upon these principles, was invented eight or nine or ten years ago, and it has been almost universally adopted throughout the United States and Canada and is successful, doing away with any exposure from outside either from the chimneys of your own plant or from any railroad or chimneys in the neighborhood. The only way to fire a shavings vault would be to start a fire on the outside, so that we will demonstrate to you by the testimony of insurance men and by the testimony of men engaged in the dust-arrester business that as far as that is concerned, there will be no possible increase in the fire risk if a suitable dust-arrester, one that is up to modern times and the present state of the art, is placed upon that mill, and that it can be done. My recollection is that the testimony will show that it can be done at an expense of $1,300.

This is the general nature of the case that you will be called upon to decide. It will take some days to put in the testimony. We will go ahead and put in our proof showing the value of the land, showing the value of the buildings and plant, and showing this insurance testimony and the testimony in regard to the shavings vault and dust-arrester, and submit the case as far as we are

1699 concerned. Then the respondents upon the other side will introduce their testimony and we will be at liberty to introduce rebuttal testimony, and when it is concluded the case will be argued the same as any other case and committed for your decision. Under the decision of the supreme court there is but one question for you to pass upon in this case and that is the question of damages to the property. With this statement of the general nature of the case as an opening, we will make arrangements with counsel on the other side for you to visit the property, either some time today or tomorrow morning, as may be convenient to the parties.

Mr. DICKINSON: As the value of the real estate may be a mere bagatelle as compared to the injury to the business, it is essential, we think, that the jury should see the mill in operation.

Mr. BAKER: We have no objection to that. I have no objection to the jury meeting here tomorrow morning and then going down and looking at the property.

Then adjourned till next day at 2 p. m., when the jury visited and viewed the property in question, when a further adjournment was taken till September 22, 1893, at 9.30 a. m.

FRIDAY, *September* 22, 1893—9.30 a. m.

FRANCIS ADAMS, sworn on behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you reside?
A. In this city.
Q. How long have you lived in Detroit?
A. Something over 20 years.
Q. What has been your business?
A. Lumber.
Q. What is your present business?
A. I have not any.
1700 Q. Have you been interested at any time in real estate?
A. Yes, somewhat.
Q. Are you acquainted with the property in the vicinity of the Backus planing mill and box factory?
A. I am.
Q. For how many years have you been acquainted with it?
A. 36.
Q. Did you formerly own property in that vicinity?
A. I did.
Q. Are you acquainted with real-estate values there?
A. Well, somewhat.
Q. Backus & Sons have a frontage on River street of 238½ feet, running back to the Michigan Central railroad on part of it and on a portion of it to the frontage on Fort street of about 75 feet. Can you tell us what the market value of the real estate separate from the buildings and improvements on it was in 1892 when the elevated railroad was built along in front of the property?
A. From $50 to $70.
Q. What frontage would you say was worth $50 to $70—the River Street frontage?
A. Yes, I should think that was worth the most.
Q. What was the Fort Street frontage worth?
A. Oh, I should not make much difference if I was buying it.
Q. You are familiar with the property, you know where it is?
A. Yes, sir.
Q. Next to the Michigan Central there. As I understand you, you testify with reference to the value of the land without regard to the improvements?
A. Yes, sir.

1701 Cross-examination.

By Mr. DICKINSON:

Q. The property that you owned down there is property which is now owned by the union depot company, is it not?

A. Yes, sir.

Mr. BAKER: By the old union depot company?

Q. The union depot company bought your property. Did you do any business for the union depot company?

A. I did some.

Q. And you have been a witness in the fifteen or twenty suits always for the union depot company?

A. Yes—always seemed to be just about this one. I have been here several times.

Q. Were you not a witness in a suit against Mrs. Zacharia Chandler by the union depot company?

A. I think I was. I have been on two or three besides this.

Q. Do you know of any that you were not on?

A. Yes, I think I can find some.

Q. What one?

A. Some of the Jones estate on Fifth street.

Mr. BAKER: I do not think he was sworn in but two cases.

Q. Were you not sworn on the Morton case?

A. Yes, sir.

Q. Were you not sworn in the Jones case over in the church property on Lafayette avenue when the court was held in that building—Philharmonic hall?

A. I think not.

Q. You have always been a witness whenever any of the Backuses were involved, haven't you?

A. I should judge so.

Q. Yes. You have been engaged to some extent in depot building, have you not, also?

1702 A. Yes, sir, but not here.

Q. What did you get for your property when you sold it to the union depot down there?

Mr. BAKER: That is objected to as immaterial and incompetent. His property is further down, and I do not understand under the authorities that testimony of actual sales of other property is competent.

The COURT: I think the latitude of inquiry in a case like this should be large, and if there is any doubt about it the testimony should be admitted. You may answer the question.

Exception for petitioner.

A. It was a different kind of property. What I mean by different is, it was different in form, comprised a much larger frontage.

Q. Well, but what did you get per foot for it?

A. About $200.00.

Q. You were sworn in the last trial of this case. Will you please tell the jury whether in answer to Mr. Baker's question as follows you answered as I read it: "Q. From your knowledge of the value of property in that vicinity and considering the location of the Backus mill property there, what in your judgment would be the value of the River Street frontage of that property running back halfway, and what would be the market value, in your judgment, of the land itself, vacant?" And did you answer $100 a foot.

A. May be.

Q. Do you think it is worth any less, or have you changed your mind in any way as to the value of the property at that time?

A. Not very much.

Q. Do you think the property has been reduced in value any since the railroad was built in front of it?

A. No, I don't.

1703 Q. Do you know anything about it?

A. Very little.

Q. Have you been inside of the mill in your life?

A. Yes, sir.

Q. When—since the last trial?

A. No, sir, I have not been inside since then—prior to that.

Q. Did you go in prior to that?

A. Yes, sir.

Q. In answer to me at the last trial did I not ask you on cross-examination, "Did you ever go into the Backus mill?" and did you answer, "No, except to look in there"?

A. Oh, I may have.

Q. Well, have you been into the mill and gone through the mill?

A. No, sir, I have not gone through the mill exactly. I have been through part of it.

Q. Do you know anything about it?

A. Yes, I have been through part of it.

Q. What part of it?

A. The lower stories chiefly.

Q. Do you know whether comparatively, it is one of the finest in the West of its kind?

A. Yes, always had that reputation.

Q. You think it is?

A. Yes, a good mill.

Q. Now, you lower your estimate of the property since the road has gone through there, of the property, of the real estate?

A. I have.

Q. You would lower your estimate?

A. I would somewhat.

Q. Would you not, in estimating the value of the property

1704 of Mr. Backus, take into consideration somewhat the kind of business it had been used for, and for which it might be used again?

A. No, sir; I don't think I would.

Q. In estimating the real-estate value of such property as that,

with the railroad connections of the Michigan Central, as it stood before the new structure was put upon the street, wouldn't you in considering the value of the real estate, estimate the advantages for business?

A. I certainly should, but exactly how I should do it, I don't know.

Q. But you would not estimate it over $50 or $70 a foot in '92, before the railroad went by there?

A. No, sir; I don't think I should.

Q. What has changed your mind from $100 a foot at that time to $50 or $70 a foot?

A. The value of other lands immediately adjoining—what they can be purchased for.

Q. Do you know how much Mr. Joy paid for the property just below on the corner?

Mr. BAKER: I make the same objection, that it is immaterial and incompetent.

The COURT: Answer the question.

Exception for petitioner.

A. No, sir.

Q. Do you know the property that Mr. Joy bought at the corner of Twelfth and River streets, just below Backus' property, 70 feet front?

A. I think I do. I know all the property there. Whethar Mr. Joy bought it or not, I don't know.

Q. You didn't know that Mr. Joy bought it and paid $274 a foot for it?

A. No, sir.

Q. Well, in making up your value of the property, you would take into consideration the sales made about, wouldn't you?

1705 A. Yes, sir.

Q. Will you please tell the jury where there have been any other sales above or below Backus' property?

A. I don't know where the sales have been made. I know of parties that wanted to sell.

Q. You don't know of actual sales?

A. No, sir. Except one, which is hardly a criterion. It is where Backus' chimney now stands, or right adjoining it.

Q. O, the little lot there adjoining it?

A. Yes, sir.

Q. He bought that next his mill?

A. Yes, some years ago.

Q. On the River Street front?

A. Yes, sir.

Q. Where the chimney is?

A. Yes, sir.

Q. What did he pay for that, if you know?

Objected to as immaterial and incompetent.

A. I did know, but I have forgotten what it was.

Q. Do you take into consideration the value of the property for Backus in giving your estimate of the value in 1892?

A. No, sir.

Q. You have not considered its comparative situation to his whole plant, his lumber yard below, and his storehouse above on East Fort street?

A. No, sir; I have not particularly.

Q. You have not taken that into consideration. Your property, I think, that you sold, was below Backus' planing mill?

A. Yes, sir.

Q. And above his lumber yard?

A. Yes, sir.

Q. How much front did you have on River street?

1706 A. I think I sold nearly 500 feet.

Q. And it ran back to the river, how much—the dock?

A. My impression is that it was between five and six hundred feet.

Q. Well, do you mean to the channel bank or the river?

A. The channel bank.

Q. You mean to the channel bank?

A. Well, that I mean to the river. The larger part of that was dock.

Q. You mean to the front of the dock?

A. Yes, sir.

Q. Did you have any railroad facilities to that property, to the Michigan Central, that you sold for $200.00 a foot?

A. No, sir.

Q. Nothing but dock front?

A. Nothing but dock front and street.

Q. Do you think the railroad facilities for shipping add anything to the value of the Backus property—the Michigan Central?

A. Yes, it does, somewhat.

Q. You knew that Backus for the use of his mill has to haul all his property from his lumber yard, all his lumber?

A. He does about a third of it.

Q. And for storage has to take it up on Fort street?

A. I would answer that in the same way. He does about a third of it, but not all.

Q. Does what?

A. He ships it by railroad a good deal.

Q. What proportion?

A. I could not say that; I am not conversant with his business enough to measure that.

Q. You are not familiar with his business?

A. Not familiar enough to state.

1707 Q. His lumber yard is usually pretty well stocked?

A. Not always.

Q. It is usually stocked? It is by lumber received by water?

A. That is the way he stocks it.

Q. Does he ever put in his lumber store yard there lumber received by rail?

A. Yes, I think he does.

Q. Will you tell the jury how he got there before the union depot company—by rail, how he could get the lumber by rail into his lumber yard?

A. I don't think I understand the question.

Q. I understand you to say that he stored lumber in his lumber yard that he received by rail in 1892?

A. Yes, sir.

Q. What was his railroad connection to store?

A. I don't know; I saw it coming from the dock, and different quarters.

Q. And stored it in his lumber yard?

A. Yes, sir.

Q. You saw the lumber being stored in the lumber yard that was received by rail?

A. Yes, I did.

Q. Would he take it up there by wagon?

A. Yes, sir.

Q. And store it?

A. Yes, sir.

Mr. BAKER: The railroad ran through the property.

Q. Yes, but he never used that. That has no lumber connections.

A. Mr. Backus bought lumber in various places in this State and other States. It was drawn in by rail.

Q. But his principal business is done on his dock front?

A. That is where the principal business is done.

1708 By Col. ATKINSON:

Q. Yours was one of the earliest sales of property, was it not, to the union depot?

A. Yes, I think it was the first.

Q. It commenced the deal down there, and that was how many years ago?

A. Eight or nine years ago.

Q. Now, you have not known any sales to be made of property down there since that time, have you?

A. Yes, sir.

Q. Except what was made to the union depot company?

A. No, sir.

Q. Now, the price you got was very small compared with the price everybody else got, was it not?

A. Well, I would hardly say everybody else, but lower than a good many.

Q. As events turned out you underestimated the value of the property very much in making your sale, and others got considerably more for theirs?

Objected to as immaterial and incompetent.

Col. ATKINSON: We are trying to fix the value down there.

The COURT: Answer the question.
Exception for petitioner.

A. That was somewhat the measure of it—the measure of the values that were paid there, but not altogether.
Q. Which was somewhat—your sale?
A. Yes, the manner in which you put the question.
Q. Well, the others got a good deal more as a rule, didn't they?
A. Somewhat more.
Q. And in every condemnation proceeding at that time as well as in the recent union depot, you were a witness, were you not, for the company?
1709 A. I was in a good many.
Q. And always put the value at considerably lower than the amount allowed by the juries, or sworn to by other witnesses?

Objected to as incompetent and immaterial.
Objection sustained.
Mr. DICKINSON: Will you permit me here, in accordance with the usage of the supreme court of the State, repeatedly stated in the judgments of the court—the duty of the judge at one of these hearings is purely advisory, that he has not the power to exclude or rule upon the testimony. I desire to make that objection.
The COURT: I overrule the objection.
Mr. DICKINSON: I desire to object to your honor's sitting and giving directions to the jury as to the competency or relevancy of the testimony.
Objection overruled.
Exception for respondents.
Mr. BAKER: What I object to particularly is this, the effort to get in the verdict of the juries in the other cases.
The COURT: The question is certainly objectionable.
Col. ATKINSON: Well, is it the form——
Mr. BAKER: No, sir; it is the substance.
The COURT: The substance.
Mr. BAKER: Getting in condemnation verdicts as evidences of value, or sales.
Mr. DICKINSON: Let me get my record straight. I understand that your honor purposes to sit here as in a trial of common law?
The COURT: Yes.
Mr. DICKINSON: And to rule upon testimony and to advise and instruct the jury?
The COURT: Yes.
Mr. DICKINSON: To that I object, and not only ask an ex-
1710 ception, but protest against it as a disregard of the constitution of the State, and a disregard of the supreme court of the State, the theory being that the jury are to get at the rights of the question at issue as an independent tribunal, a tribunal *sui generis*, the best way they can, without the limitations and restrictions of a common-law trial.
Objection overruled.
Exception for respondents.

Q. Were you acquainted with the Hubbard & King property?
A. I knew that.
Q. It was close to yours, was it not?
A. It was very near it.
Q. Do you know what that property sold for?

Objected to as immaterial and incompetent.
Objection overruled.
Exception for petitioner.

A. No, sir; I don't.
Q. That sold for four or five hundred dollars a foot, didn't it?
A. I was not aware that it did.
Q. You don't know what it brought?
A. No, sir.
Q. Were you acquainted with the Voight property?
A. Yes, sir.
Q. And with the Sibley property?
A. Yes, sir.
Q. Do you know what the Sibley property sold for—the right of way across, the hundred feet of the Sibley property?

Mr. BAKER: I object to that, if the court please, because that involved a mere right of way and not the value of the property.

The COURT: The reason I admitted this testimony was
1711 this, Mr. Adams has testified as to the value of the property, he has given that as his opinion, and I have permitted testimony to show as to what the property in the immediate vicinity or in that vicinity has sold for, as bearing upon the question of his knowledge.

Col. ATKINSON: That is the ground on which I ask it.

The question was repeated.

Mr. BAKER: That involves a mere right of way across.

Col. ATKINSON: It is 100 feet taken right out of it, it is what it sold for.

Mr. BAKER: Half or three-quarters of a mile below. I object to it as wholly incompetent and immaterial. We will have to try all those cases over again if this is to go on in this way. There are too many collateral issues introduced here as to the value of these different pieces of property, and of course we will have to go into every one of them if they are allowed to bring them in in this way.

Q. You say you knew the Sibley property and the Backus property. Which is the most valuable?
A. Do you mean the Backus property upon Fort street?
Q. Yes, the Backus property just as it is situated, stretching from Fort street to River street, or 100 feet taken out of the center of the Sibley lot, having neither a street front nor a river front, just a 100-foot chunk right across the center of that lot.

Mr. BAKER: I object to that as wholly immaterial.

Q. Which would be the most valuable?

The COURT: Answer the question.
Exception for petitioner.

A. One would be for one kind of business and the other would be for another.

Q. Which would be the most valuable for ordinary——

A. And the party that would have one would not take the other as a gift.

Q. Is that the best answer you can give?

1712 A. It is about as good a one as the case deserves. They are not parallel properties at all; not represented at all in the same line.

Q. Well, the piece of the Sibley property could not be used for ordinary business as advantageously as the Backus property, could it?

A. No, sir.

Q. Then it would be worth less, wouldn't it?

A. It would in one respect.

Q. In what respect would it be worth more?

A. Would the Sibley be worth more?

Q. Yes

A. I think if a party was getting some property together there for a lumber business, the Sibley would be worth the most.

Q. Just a hundred-foot piece in the center of the lot without a street front or river front?

A. Parties do not buy property in that way.

Q. I am trying to get at those pieces of property that have been sold. You have been acquainted with that district for how many years?

A. Well, I might say for over 30 years.

Q. What did you say you valued the Fort Street front at?

A. About $50 a foot.

Q. What depth of lot?

A. I think that would be about 120 or 130.

Q. Now, there was a time when Fort Street property was worth more than Woodward avenue, the same distance out?

A. Yes, sir.

Q. What has happened to it?

A. Well, the Lord knows and he doesn't tell.

Q. He has not informed his servant?

A. He has not informed me.

1713 Q. It has been largely destroyed by the railroads, hasn't it?

A. I don't know as it has.

Q. What is your opinion? What happened to it, what is the matter down there, anyway?

A. It seems to have gone to seed.

Q. And the railroads came. Has there any other change occurred to send it to seed except the railroads there?

A. There are some factories and things; yes.

Q. What has happened to destroy the property there?

A. There is some stove and other property down there.
Q. The stove property is valuable property, is it not?
A. It does not build up a residence part.
Q. Well, the stove property came there after. That is some distance this side, but from the Michigan Central down to Twenty-fourth street—what has happened to the property there?
A. I don't know of anything that you can put your finger on except the one of construction of buildings and the class.
Q. Well, there have not been any buildings constructed to speak of for ten or fifteen years.
A. Yes, there has been a chair factory, a soap factory, and I don't know what all.
Q. And a railroad has been built?
A. Yes, sir.
Q. Now, has there been any increase in the value of that region, including the Backus property, since the sale of your property to the union depot some years ago?
A. I don't think there has.
Q. Didn't you in every case where you were examined at that time swear that there would be a great increase when the railroad was built there?

1714 Objected to as immaterial.
Objection sustained.
Exception for respondents.

Q. Well, you have been disappointed, haven't you?

Same objection, ruling and exception.

Q. What is it you base your knowledge of values on, what sale or offer to sell?
A. Of two or three parties that I think still occupy some small pieces of land on the street just below Backus.
Q. Just below on River street?
A. No, sir; on Fort—one.
Q. What is the extent of his property?
A. It is not very large.
Q. Well, how large?
A. Well, I think he has 50 or 100 feet on Fort street.
Q. And how deep?
A. Well, it originally went to the River road; I don't know as it does now or not.
Q. And the River road. That is——
A. What you call River street.
Q. Is it on the corner?
A. No, sir.
Q. It is an interior 50-foot lot running from Fort to River street?
A. That is what it was originally, with still more on the south side.
Q. When did you know of that being offered for sale?
A. Just shortly after one of these trials, two or three years ago.

Q. What would that property be useful for—business or residence?

A. Well, he occupies it as a grocery store now.

Q. A grocery store occupies the Fort Street front?

A. And residence also.

Q. How far down is it?

A. I think it is three lots below Backus.

1715 Q. In the same block, then?

A. Yes, sir.

Q. Now, that property on account of the railroads coming there is only capable of being used for some heavy kind of business like warehouses or something of that kind? It has been destroyed for residence purposes, hasn't it?

A. Yes, except in a kind of crude way.

Q. Would you consider that lot at all parallel for business purposes with the Backus property?

A. I don't know why it is not just as good.

Q. That would be 50 feet by about 300 feet then in depth running from street to street and in the center of a block?

A. It is in the center of a block.

Q. Would that be large enough for a planing mill?

A. Yes, it would be large enough for several. But it would not be large enough for store-rooms.

Q. Well, what was that offered for?

Mr. BAKER: I make the same objection to that—offers of sales.

Col. ATKINSON: It is the only thing on which this witness bases his knowledge.

The COURT: Answer the question.

Exception for petitioner.

A. The party told me that he would be glad to get $50 a foot.

Q. Who is that?

A. I cannot tell you his name at present, although I have known him at least 30 years or more.

Q. What brought about the conversation?

Q. Were you trying to buy?

A. No, sir, I was not.

A. I think he was summoned as a witness on one of these trials.

1716 Q. You were making testimony then—one witness telling the other?

A. Well, we had got through that part.

Q. Well, you had been at it?

A. Oh, he said——

Q. Well, that is all.

Redirect examination.

By Mr. BAKER:

Q. That is, you had been testifying, you mean?

A. Yes, sir.

Q. You were talking with him afterward?
A. Yes, sir.
Q. Was he a witness?
A. I think he was.
Q. Was he the owner of the property?
A. Yes, and I think he is yet.
Q. And he had a case with the union depot company about the damage in front of it?
A. He may have had with the piece that was sold on the River road, but not the whole.
Q. Does he keep a grocery store down there?
A. I think he does yet.
Q. Is he a German?
A. Yes, sir.
Q. Mr. Ruhlman, isn't it?
A. I guess that is the name.
Q. The property that you sold to the old union depot company was where your saw-mill was?
A. Yes, sir, part of it and part of it was below.
Q. Your property was what is known as the river-front property?
A. Yes, sir.
Q. It ran from River street to the channel bank with all riparian rights?
1717 A. Yes, sir.
Q. And you were the first party that sold to the old union depot company?
A. I was.
Q. Were you compelled to sell in order to get money?
A. No, sir.
Q. Had you at that time abandoned your business of running a mill there?
A. I had some years before.
Q. Your mill was not in use?
A. No, sir.
Q. How many feet front did you have?
A. About 500, in three or four parcels—to sum it up.
Q. That is, it was in detached parcels?
A. Yes, sir.
Q. And you negotiated a sale to some one connected with the old union depot company?
A. Yes, sir.
Q. Do you remember who it was?
A. It was young Walker, I think.
Q. And you got $200 a foot for it?
A. About that.
Q. You didn't have any suit, any condemnation case?
A. No, sir.
Q. Was your property the same kind of property as the Backus lumber yard?
A. Yes, sir.

Q. About how far is it from River street to the channel bank or dock line?

A. It varies from 900 to about 500 feet.

Q. Some of it is 900 feet?

A. Yes, sir.

Q. So that that sort of property down there is large in extent and area?

A. Yes, sir.

1718 Q. You don't know anything about what Mr. Joy paid for the property on the corner of Twelfth street on the north line?

A. Yes, I understood he paid $12,000.00.

Q. Do you know how much a foot that was?

A. No—it is another street I thought of—not Twelfth street.

Q. Now, you said on your cross-examination that property upon Fort street has gone to seed. Will you state whether it had gone to seed before or after this union depot enterprise down there?

A. Partly both.

Q. Well, I ask you whether it had gone to seed before the union depot enterprises were started?

A. Yes, to some extent it had.

Q. Now, is it not a fact that years ago Fort street west was the leading residence street in the city?

A. One stretch of it was, but not as a whole.

Q. But from Woodward avenue down to about Third street; it was at one time considered the handsomest and most valuable residence property in the city?

A. It was.

Q. And in the growth of the city that has changed largely, has it not?

A. Well, I don't know whether it has changed or is changing.

Q. It has been changing for a good many years?

A. Yes, sir.

Q. To what extent would you say the real-estate front on River street that belongs to Absalom Backus, Jr., has been decreased in value by the fact that the union depot elevated road has been built in front of it?

A. No, I don't——

Mr. DICKINSON: Well, I object to that. He has not shown
1719 any knowledge of the way in which the property is affected.

Q. You have seen the superstructure down there?

A. I have.

Q. You have been under it?

A. Yes, sir.

Q. And along the street under it?

A. Yes, sir; I think I have a couple of times.

Q. So that you know about how it is situated with reference to the Backus property?

A. Yes, sir.

Q. Now, has there been any depreciation in the real-estate values from 1892 to 1893?

A. Very small.

Q. Has there been any depreciation during that time because of the hard times?

A. I think there has.

Col. ATKINSON: That I object to as leading.

The COURT: Hard times would necessarily affect everything more or less, Mr. Baker.

Mr. BAKER: Well, I withdraw that question.

Q. You say you have been down there a couple of times since the superstructure was completed. Have you been inside the Backus mill to see how the mill was affected?

A. Yes, I was in it as I told you, in the lower story.

Q. Since this superstructure was completed?

A. No, sir.

Q. You have only been by it outside?

A. Yes, sir.

Q. I ask you whether you have been inside since the superstructure was completed?

A. Well, I may; I think I was at one time, but it was only for a few minutes.

Q. From the River Street side?

A. Yes, sir.

1720 Q. When was that?

A. Some time early in the spring, I think.

Q. Did you go upstairs?

A. No, sir.

Q. Did you go inside the mill or inside the yard?

A. I think I went inside the mill; I know I went inside the yard.

Q. Whom did you see?

A. I didn't see anybody in particular.

Q. The structure was then up and trains running over it?

A. The structure was up, I think, and completed, but I don't know whether any trains were running over it.

Q. You didn't see any trains running over it?

A. No, sir.

JAMES F. JOY, sworn on behalf of the petitioner.

Examined by Mr. BAKER:

Q. How long have you lived in Detroit?

A. Since 1836.

Q. Whereabouts do you live?

A. On Fort street, No. 140.

Q. At the corner of what street?

A. First.

Q. How long have you lived there?

A. 30 years and upwards.

Q. You were formerly connected with the Michigan Central railroad?

A. Yes, I was connected with the Michigan Central a great many years.

Q. Were you connected with the Michigan Central when they located at the foot of Third street?

A. Yes, sir.

1721 Q. Have you any knowledge of real-estate values in the city of Detroit in that section of the country west of Third street?

A. Well, I have such as a man who has had a great deal to do with it for a great many years may have, sir.

Q. Do you know the property belonging to Absalom Backus, Jr., that is situated on River street just west of the Michigan Central railroad. It has a frontage on River street of 238½ feet and running back to the Michigan Central tracks and to Fort street, and a frontage on Fort street, on the street itself, of about 75 feet?

A. Yes; I know the property.

Q. Can you tell us what the market value of the real estate detached from the improvements upon the property, that is, separate from the buildings and machinery and so on, what it was worth at the time the elevated railroad was built in 1892?

A. It was worth about $150.00 a foot on River street and on Fort street—it extended back to Fort street.

Q. It was worth considerably less on Fort street?

A. I should judge $50 a foot.

Q. So you would put the Fort Street property at about $100?

A. Yes, sir.

Q. What would you say as to whether these estimates are liberal or not?

A. Very liberal, sir.

Cross-examination.

By Col. ATKINSON:

Q. How do you determine the market value of lands?

A. Well, because I bought a good deal of property there and have been well acquainted with the cost, known it to be sold, all through that section.

Q. You bought a good deal in the vicinity of the Backus property, did you?

1722 A. Yes, sir, and had it offered to me for years there.

Q. Where is the nearest piece that you bought below the Backus property?

A. Well, I bought some perhaps on this side—I have had it offered to me.

Q. I would rather you would follow my order.

A. I cannot tell you the nearest piece of property, because I do not know the distances there, but it is below Backus on River street; I have had it offered to me.

Q. Well, now, I do not want any offer. I want to know the nearest piece that you bought?

Mr. BAKER: Let him tell now what the offers were. You wanted offers.

Q. I have not asked for offers.

A. Perhaps the nearest piece which I actually purchased on that street would be this side of the Michigan Central railroad.

Q. But I say on the other side below Backus' property, what is the nearest piece of property that you purchased, west of the Michigan Central and west of Backus'?

A. I do not think I actually purchased any piece of property there—I think I did on the corner of the block.

Q. Corner of what streets?

A. It would be Twelfth street and the River road.

Q. What frontage on the River road?

A. 75 feet.

Q. And what depth?

A. Running clear up to Fort street.

Q. Then that would be the corner of the block in which the Backus property is situated?

A. I think it is, sir.

Q. Or is it a block below—the same block?

A. I think it is.

Q. Now, that was the nearest purchase you made to the Backus property?

1723 A. It is the nearest I have actually bought. I have had property offered to me there.

Q. What did you pay for it per foot?

A. I do not know what it was per foot. I paid for the whole about $28,000.

Q. $28,000 for 75 feet?

A. Yes, sir.

Q. Now, did you buy anything else in that block? That would be nearly $400 a foot.

A. Well, sir, I can't help that. I negotiated. I do not think I bought for the depot company any more than that. I don't think I did.

Q. That is the nearest piece of property below the Michigan Central that you know of being sold lately?

A. No, sir.

Q. Well, what is?

A. I cannot tell about the sales there, but I have had the property offered to me over and over again. I have settled for damages along there and know the price of the property.

Q. Do you know of any other sale, actual sale in that vicinity, within recent years?

A. Yes, I think I bought a piece there myself.

Q. Where?

A. I cannot tell you just where it is, but it is in that block.

Q. You bought other pieces yourself, you say, there?

A. Yes, one, I think.

Q. Whereabouts is that?

A. Well, I cannot tell you exactly where it is, sir. I bought it to accommodate a man rather than otherwise, and I don't know just exactly the location of the property, but I think there are 20-odd feet of it and running back a long distance.

Q. What street is it fronting on?

1724 A. On River street.

Q. Running towards Fort?

A. Running towards Fort.

Q. That would be between the other purchase and the Backus property?

A. Yes, sir.

Q. Do you know what you paid for it?

A. I don't remember exactly what I paid for it, but I think it was about $100 a foot.

Q. From whom did you buy it?

A. James A. Randall. I took it off James A. Randall's hands, I didn't buy it for the property, but I took a debt off his hands which he had for that property. He had taken it—I guess from somebody down there whose votes he wanted when he was a candidate for the legislature, and he came to me one day and wanted me to take that off his hands and I took it. It had been sold to him or the party who had it for $100 a foot.

Q. Well, that was a case of security rather than a real purchase?

A. Well, I took the property and paid for it—relieved him of the debt.

Q. A sort of accommodation, rather than a mercantile transaction?

A. Yes, I paid more than it was worth to accommodate James A. Randall.

Q. Are you in that business now?

A. No, sir, I am not.

Q. You did not buy it for the union depot company?

A. I bought it for myself. That is to say, the union depot company had nothing to do with it then.

Q. Have they got it since?

A. No, sir; I settled with them for a right of way across in front of it.

Q. That was a 20-foot strip?

1725 A. I think it was 22, that is my impression. I am not certain about the width; I didn't pay much attention to that.

Q. That is between the corner of Twelfth street and the Backus property, you think?

A. I think it is.

Q. And running to Fort street?

A. Yes, sir; it does not go to Fort street, but it runs very deep. Those lots are very deep, I cannot tell you just how deep they are.

Q. Is it of uniform width?

A. I think it is.

Q. 20 feet there would be of no value for the kind of business that would have to go to that region?

A. O, well, they are divided into 20-foot strips. I have had another 20-foot strip offered to me.

Q. What would a 20-foot strip be good for?

A. I cannot tell you that.

Q. It would not do for the kind of business that has to be conducted there?

A. I cannot tell you anything about that. I am not a business man. I know what the property cost; I know what the property is worth there; I know what I paid for it.

Q. You paid cash for that?

A. I paid money, yes, sir.

Q. At the time or——

A. No, sir; I took his debt off his hands.

Q. The party owed Randall that much upon it and you took the debt?

A. I took the debt.

Q. So the party now owes you?

A. No, sir; I paid for the lot. It was a contract for a lot; contract assigned by Randall to him, and I went and paid for the lot; that is what I did, and got the title to it.

1726 Q. The contract ran to Randall?

A. No, sir; it ran to a man of whom he took it; a man who had a little saloon down there. He had bought that land and made a contract for it. He got Randall to take that contract off his hands, and Randall came to me and wanted me to take it off his hands. I took it off his hands and paid for it and got a title to the lot.

Q. You would not regard that as a mercantile transaction at all?

A. No, sir; it was not a mercantile transaction, strictly speaking. I did it to accommodate Randall.

Q. Hasn't there been another piece of property in that region sold from the Detroit, Lansing & Northern to the Michigan Central?

A. I don't know anything about that, sir.

Q. Do you know the piece that has changed hands there?

A. I know there was a piece running across the Michigan Central depot grounds down there which belonged to the Detroit, Lansing & Northern road.

Q. Has that road parted with it, do you know? Do you know whether that has been sold?

A. I don't know about that. I cannot give you any information about that.

Q. What street did that front on?

A. Fronts on River street and runs to the river.

Q. What would be river property?

A. Yes, sir; runs right through the Michigan Central grounds; about the middle of it.

Q. You do not fix the market value then of property there by that transaction with Ran dall

A. I know the market value of property there because I have had it offered to me so much.

Q. You do not fix it then by that sale at all?

A. Well, no more than I tell you; that was not al——

1727 Q. Now, can you give us any other sale, any actual sale?

A. Yes, sir; there was one other actual—no.

Q. In the ordinary course of business, except your own purchases?

A. I will tell you of one other sale which took place there, but it was disaffirmed afterward. There was a piece of property sold at auction there, a lot 50 feet wide.

Q. When was that?

A. That was an estate of a man out at Howell.

Q. Where was this situated?

A. It was west of Backus and east of Twelfth street. I cannot tell you just where. I was there at the auction sale and bid upon it myself.

Q. That was an auction sale?

A. Yes, sir.

Q. It was afterwards disaffirmed by the court.

A. Disaffirmed; I cannot tell you how.

Q. And it didn't go off?

A. Didn't go off.

Q. Do you know of any other sale?

A. That is all I know of there—actual sale. I tell you I have had property offered to me there.

Q. The only transaction then in that neighborhood, actual sale, has been the purchase by yourself on the corner of Twelfth street?

A. And the other lot.

Q. And the vote lot?

A. Yes, sir.

Q. But that is the only one.

A. That is the only actual sale I know of.

Q. Haven't you bought a piece of land just this side of Backus, between them and the Michigan, that little brick building there, on the corner?

A. Yes, I think I did.

1728 Q. How much was there of that?

A. I cannot tell you that.

Q. Well, it is just a little——

A. A little piece of land there with a little brick building on it.

Q. About 20 feet?

A. Yes, about that.

Q. What did you pay for that?

A. I don't remember, but I think $8,000.

Q. That would be four or five hundred dollars a foot?

A. I never figured up how much it was a foot, sir.

Q. That runs back only a short distance?

A. I never figured up how much it went back.

Q. A little triangle. That joins the Backus property, doesn't it?

A. I cannot tell you that exactly, either; it is close by it; it may adjoin it.

Q. What is that valuable for?

A. Valuable to the Michigan Central to have, sir.

Q. Did you buy it for the Michigan Central?

A. No, sir, bought it for myself.

Q. Thinking the Michigan Central would want it some day and you would get a good price?

A. No, sir; I bought it because we had to arrange for a right of way in front of it. That is what I bought it for.

Q. So you bought it and paid $8,000 for that piece?

A. Yes, I wanted to arrange for a right of way in front of it.

Q. The same right of way you had to have in front of the Backus property?

A. Yes, sir. I am not certain that was the amount I paid for it, but I think it was.

Q. In referring to your testimony upon the former hearing of this case, I find that you stated fully the particulars about the sale of that piece by the Detroit, Lansing & Northern.

1729 A. That all may be.

Q. You said it was just below the Michigan Central and part of the course of the Michigan Central as it now is on it. "It is just below the Michigan Central tracks, except that they run over one corner, I think. That is 50 feet wide, I think. The tract of land they bought—I forget how wide it was, it is on River street, fronts on River street, but I sold it to the Michigan Central for $50,000."

A. Yes, sir.

Q. "That was pretty soon after the war?"

A. I didn't sell it to the Michigan Central, that is not there.

Q. That is the way it runs.

A. That is a mistake, sir, in the reporter.

Q. (Reading.) "The property has been sold by the Lansing road to the Michigan Central, and that is all that has been sold, and freight sheds are now on it."

A. That is right.

Q. "For how much?" was the question asked you. "I think $80,000, running through 300 feet to the river with a river front and a front on River street." Does that refresh your memory now that the sale was $80,000?

A. I probably stated what I thought was the case at that time.

Q. You do not now recall?

A. No, sir, but I probably stated what I had been informed at that time. I know nothing about it myself.

Q. That possibly is about 200 feet wide, isn't it?

A. No, sir.

Q. How wide?

A. It had, I think, 50 feet, and 10 feet more—the city had a right to build a sewer.

Q. That would be 60 feet wide?

A. That is my impression, 60 feet.

Q. And $80,000?

1730 A. That is my impression.

Q. That would be over $1,000 a foot.

A. That all may be.

Q. How far is that from the Backus property?

A. That is on the other side of the road, sir. I cannot tell you just how it is situated. The Backus property was on the other side of the road there, and this was in the middle of the Michigan Central road, and runs to the river.

Q. It is almost directly opposite the Backus property?

A. Yes, on the other side of the road.

Q. And nearly across from the Backus property?

A. Yes, sir.

Q. That would be about $1,300 a foot front?

A. Yes, sir; that was in the Michigan Central yard and all covered with tracks.

Q. It was not any more valuable, was it, being in the Michigan Central yards, than it would be anywhere else, except to them?

A. Yes, sir, a good deal more valuable.

Q. For what purpose?

A. For yard purposes of the Michigan Central.

Q. Well, to the company it would be worth more, but for ordinary purposes it would not be worth any more?

A. The value of property is dependent upon where it is situated a great deal. That was located in the middle of the Michigan Central yard as it is now, and all covered over with tracks belonging to the Lansing road.

Q. Then it was quite valuable to the Michigan Central?

A. To the Michigan Central, yes, sir.

Q. Now, property is worth what it will pay an income on, isn't it—real estate?

A. It depends a little upon circumstances about that.

1731 Q. What would you consider a fair return for the value you put upon real estate, what percentage?

A. I have got a good deal that pays a devilish little percentage.

Q. Well, if you got 2 per cent. out of your real estate you would be very well satisfied, wouldn't you?

A. No, sir, I would not.

Q. How much?

A. I should want to get five or six, if I could.

Q. How much do you get?

A. It depends on circumstances. I have got a great deal I do not get anything from. I have a great deal I get a little bit from.

Q. If a piece of property paid 4 per cent. net——

A. No, sir, it would depend on circumstances. If it were merely land and was rented, about 4 per cent., and the party who had it paid the taxes on it, and everything of that sort, that would be perhaps a fair rent.

Q. So that if it would produce 4 per cent. net you would consider it worth——

A. Rent.

Q. A fair investment at present that would produce 4 per cent. net?

A. For perpetual lease, and the party who had leased paid all the taxes and everything of that sort, I would be willing to loan money on it.

Q. Four per cent. net would be a fair return, then, on the value?

A. Yes, sir.

Q. The value you put on this property, I suppose, is just for the real estate, without regard to the buildings at all?

A. Yes, sir.

Q. Without regard to the mill?

A. Yes, sir.

Q. That property is very advantageously situated on the
1732 Central, is it not, for shipping by the Central road?

A. That gives it its value, sir. It would not be worth $150 but for that, at all.

Q. Through the Central road it can reach any other railroad centering in our city, can it not?

A. Well, it gets its value through that.

Q. So that this property has shipping facilities which enabled it to reach any railroad coming into the city?

A. Well, you can reach other roads over the Central; you can reach any road in the world.

Q. It had its switches and connections all made with that road?

A. Yes, sir.

Q. And a very large frontage on the Michigan Central?

A. Well, Mr. Baker told you how much it was; I don't know.

Q. I think Mr. Baker omitted that frontage, the distance on the Michigan Central.

A. I don't know what it is.

Q. Now, Mr. Backus has been there a long time in business, has he not?

A. Yes, sir.

Q. How many years?

A. I don't know.

Redirect examination.

By Mr. BAKER:

Q. Did you attend this auction sale?

A. I did.

Q. That was regularly advertised and put up to the highest bidder?

A. Yes, sir.

Q. Will you state the circumstances under which you
1733 bought that property on the corner of Twelfth street and the River road?

Col. ATKINSON: I object to that.

A. The old union depot company, of which I was president, bought it. It was bought under my directions——

Col. ATKINSON: Give us an exception.

A. We bought that property for the purpose of putting twelve feet into the street and making the street leading down to the old depot grounds twelve feet wider, at the time. We paid a great deal more than that property is worth, because we wanted it for a special purpose and had to have it, and there were half a dozen ones to deal with, and it cost us more than it was worth, the company having no right to condemn that for a street.

Q. Did you widen the street?

A. No, sir; but we are going to. We bought it for that, and we hold it for that purpose.

Q. How much frontage on Fort street?

A. About 300 feet, I think. It may be a little more or a little less—75 feet on the River road.

Q. How much front on Twelfth street?

A. I think about 300 feet.

Q. The whole length of the sidewalk?

A. Yes, sir.

Q. Has the Backus property a frontage on the side street?

A. No frontage anywhere except on River street.

Q. There are shops and buildings on the Twelfth Street front of this property?

A. Yes, sir; some.

Q. You used to be connected with the Detroit, Lansing & Northern?

A. Yes, I built that road.

1734 Q. Did you buy that strip of land that runs from River street through to the channel bank?

A. Of the Michigan Central he has been alluding to?

Q. Yes.

A. Yes; I bought it.

Q. That was deeded to the Detroit, Lansing & Northern?

A. Yes, sir; I sold it to the Detroit, Lansing & Northern.

Q. That company used to come into the Michigan Central yard?

A. Yes, sir.

Q. Do you know under what circumstances they left that yard?

A. They left that yard because they had so much difficulty in doing business; they could not stay there, as I understand it.

Q. What was the attitude on the Michigan Central in regard to it?

Col. ATKINSON: That I object to as immaterial.

Mr. BAKER: They have gone into the value of this strip of land they claim was sold for $80,000. I want to show the circumstances under which the $80,000 was paid for that land.

Col. ATKINSON: Do you propose to show the attitude of the Michigan Central?

Mr. BAKER: As bearing on that.

Col. ATKINSON: We would prefer to have some one who knows about it. Mr. Joy says he knew nothing about it at first. If there

is any special circumstance the Michigan Central representative or the Lansing representative will know about it.

Mr. BAKER: All I desire to prove by Mr. Joy in regard to that is that anybody who is familiar with it at all knows it—that
1735 the Michigan Central gave the Detroit, Lansing & Northern notice to get out of the depot, and that the Detroit, Lansing & Northern owned this strip of land that ran right through and severed the Michigan Central yard, and the Michigan Central had no power to condemn it, and it was a matter of treaty and negotiation between them as to how much that would pay them, and under those circumstances the Detroit, Lansing & Northern got $80,000. That is generally what I want to prove.

Col. ATKINSON: But he does not know that, and if you go into it we will show it was not the fact, because we had that before. They were not given notice to get out; they had all the room they wanted there. It is so testified; Mr. Mulliken so testified.

Mr. BAKER: Mr. Mulliken said they had all the room, but there were other things that interfered with it.

Col. ATKINSON: They were not notified to get out at all.

Mr. BAKER: Do you object to Mr. Joy testifying to it because you want a witness that knows about it?

Col. ATKINSON: Yes, and I object to the competency of the testimony.

Mr. BAKER: Well, I will not go into that with Mr. Joy, but I will call somebody that knows about it. I think that is all, Mr. Joy, unless there is something you desire to state.

A. Yes, I should desire to state about the value of the property down there. As I stated, I have had property offered to me down there for sale.

Q. I put that question to you. Will you state to what extent your judgment of the value of the Backus property is based upon offers to you of property in the vicinity?

Col. ATKINSON: I object to that on the ground that offers do not tend to show.

The COURT: The value of the property is largely a matter of opinion.

1736 Col. ATKINSON: What I urge is that in the direct examination of the witness, as to values, it is not competent to draw out offers of property.

Mr. BAKER: Under the facts testified to by Mr. Joy, I submit it is perfectly competent for him; considering the amount of business he has done there it is competent for him to state to what extent the offers of property in that vicinity influence his judgment.

The COURT: I suppose it would be perfectly competent to show upon what he bases his opinion.

Col. ATKINSON: On cross-examination it would be proper, but on direct examination I think the market value is fixed by actual sales, and not offers.

The COURT: I think I will admit the testimony.

Exception for respondents.

Mr. DICKINSON: We object on another ground, that he cannot state the facts upon which he bases his judgment without stating the persons who have made the offers. He cannot state generally that he bases his judgment on offers made to him without stating the facts of the offers.

Mr. BAKER: Well, I do not know to what extent he can do that.

A. I do not think the offers of property I have had there have any influence on my judgment. I have bought property all along that street, both sides of the Michigan Central, vacant property as well as property occupied, and I know the value of the property there as well as any other man living.

Q. So that you do not rely so very much on offers that were made to you?

A. No, sir; I know what property is worth there. I bought both on the east side of the road and the west side of it.

1737 Recross-examination.

By Col. ATKINSON:

Q. I would like to ask you this question that I omitted. That Backus property is so situated to the Michigan Central yards, is it not, that it might be very valuable in connection with them some day?

A. No, sir, I don't think so, ever.

Q. Isn't it situated exactly like this little $8,000 piece that you bought?

A. No, sir; not at all.

Q. Could you use that little piece without using a piece of the Backus property?

A. Yes, it is the other side of their track. Now, I will tell you about that piece.

Q. The other side of their track?

A. The other side of the switch to Backus. Backus' switch runs down between that property and the Backus property, if I remember right.

Q. But the Backus switch is on the Backus property?

A. Yes, but it is the other side of that little piece of property.

Q. Isn't the Michigan Central rather crowded for room there?

A. Not for tracks.

Q. Well, for room, yard room?

A. Their yard is the other side; they will never want to use the Backus property for the yard.

Q. Why not?

A. Simply because it is not convenient for them for a yard; they cannot use it.

Q. What is the reason they cannot use it?

A. Because it is not located so they can use it.

Q. It is right alongside of their tracks, isn't it?

A. Right alongside of their grounds, sir. All the Michigan
1738 Central want there is access in and out to their railroad yards, sir, and they have all the tracks they want or ever will there.

Q. Now, in your former testimony I find substantially this statement, that the Michigan Central is so crowded for room it has practically made a yard of all its tracks at West Detroit?

A. So it has.

Q. If it is crowded in that way won't it some day take in adjoining property?

A. No, sir, they have acquired large yards away out to the junction there, perhaps 50 or 60 or 70 or 80 or perhaps 100 acres, where they built their outside yards, and all they want now is access between those yards and the yard in the city.

Q. They had those outside yards when you gave your testimony as to the crowded condition of the track?

A. To some extent.

Q. The business of such a road as the Michigan Central will increase from year to year in the natural order of events?

A. Yes, sir, and that is the reason why they built their outside yards. All they want now between the yards and the yard in the city is convenient tracks to pass to and fro over.

Q. They have that and yet they use them practically as a yard at any rate?

A. Well, they run their trains over there.

Q. That is not good business, is it, to have to use your tracks as a yard?

A. Well, if you want my judgment about that I can give it to you distinctly. They will never want any more track room between the yard in the city and their great yards outside; they will never want Backus' grounds.

Q. They will never want it?

A. No, sir. That is my judgment.

Q. Don't they own a little strip between the piece that
1739 you bought and the Backus property now; haven't they acquired a little 17-foot strip there?

A. I cannot tell you anything about that.

Q. Do you know who owns next——

A. I don't know anything about it. I know only what I bought there. I know the Michigan Central track ran down by Backus' ground. Now, I want to explain about the little tract of land I bought there and for which I paid perhaps more than the land was worth; but we were so situated that I felt sure that after making a fair allowance for right of way in front of it, that the Michigan Central would take it for the balance. Now, I don't remember exactly what I paid for that. I bought it under Mr. Baker's advice. He advised the depot company to buy it and the depot company hadn't given me any authority to buy it and I could not buy it for them, so I advanced the money for it myself out of my own pocket, agreeing with Mr. Baker, who was the counsel for the depot company, what the damage would be for the right of way in front of it. That amount was deducted from the price which I paid, as I remember it, and then I offered it to the Michigan Central for the balance, whatever it was, and they took it.

Q. So that the Michigan Central now owns it.

A. They own it; yes, sir.

Q. They acquired right up to the Backus property now, then?

A. That is what I said before, sir, and the reason why they wanted that property was this: I knew perfectly well that I should not lose money by it, because the Michigan Central wanted to build an elevated road over there, an elevated road for passengers, and the end of their track, I think, came right down upon that piece of property where they wanted to build it, or close by it; and with that piece of property there, if I had seen fit to oppose their building it,
1740 they could not have built that passageway over it, so I authorized Mr. Baker to say to them that he had made a bargain with me for what damages should be paid for the elevated railroad coming along there, and to offer it to the Michigan Central for the balance of the money and they took it, and I made not a farthing out of it. I have forgotten, Mr. Baker, the price I paid for it. You advised with me about it and I remember I advanced the money.

Mr. BAKER: I don't remember the figures now myself.

A. We took off what was fair for the damage for the elevated road to go along there and the Michigan Central took it at the balance of the price.

Q. You did not buy that because you did not want Mr. Backus to get it, did you?

A. No, sir; I simply bought it because we wanted the right of way in front of it, and so much time had elapsed, and I bought it to get rid of that quarrel about the right of way in front of it, knowing I could sell the balance to the Michigan Central after taking off that.

Mr. BAKER: The company would save the expense of a condemnation case?

A. Yes; which might be a good deal.

Q. Might be more than the difference?

A. Yes, sir.

Q. So that it was bought and disposed of under those circumstances?

A. Yes, and those were the motives.

Q. The only object of buying it was to save the expense and close the matter up of the right of way?

A. Yes, that is all.

ROBERT M. ZUG, sworn on behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you live?

1741 A. Corner of Howard and Fourth streets in the city of Detroit.

Q. How long have you lived here?

A. I was born here. I am 42 years of age.

Q. What is your business?

A. Handling real estate, making loans and so on.

Q. Are you a son of the late Samuel Zug?
A. I am.
Q. Did you or your father formerly own property in the vicinity of the Backus property?
A. He owned a piece considerably this way.
Q. This side of the railroad?
A. Yes, this side of the railroad.
Q. This side of the Michigan Central?
A. Yes, sir.
Q. How far this side was it?
A. Between Seventh and Eighth streets.
Q. Are you, as a real-estate dealer and as one of the heirs of the property that you refer to, familiar with real-estate values in that vicinity?
A. Well, not so very—simply handle money there.
Q. Well, you would become more or less familiar from that, wouldn't you?
A. Yes, sir.
Q. Will you tell us what, in your judgment, the Backus property, which has a frontage of 238 feet on River street and extends back, say, half a block—taking the River Street front by itself and not going through to Fort street—what, in your judgment, situated as that is near the Michigan Central tracks, was worth in 1892, per foot front?
A. Well, I think being next to the railroad there it would probably have more value than property in the same block that was not near the railroad.
Q. Yes, undoubtedly. But leaving out the railroad——
1742 A. I would consider that property then worth about $100 a foot.
Q. If the Michigan Central did not lay alongside of it you would say it was worth about $100 a foot?
A. Yes, possibly that.
Q. What additional value would you put on it because of the Michigan Central alongside of it?
A. That I could not say.
Q. You would not want to form any judgment about that?
A. No, sir, I would not. I would say I get that value from the fact that there was other land there in that same block which my father owned down below there.
Q. So that you became familiar with the property in that way?
A. Yes, sir.

Cross-examination.

By Col. ATKINSON:

Q. Do you still own that property down there?
A. No, sir.
Q. How long since you parted with it?
A. Well, that between Seventh and Eighth, I sold a part of it

about six years ago, I think, or seven years ago, and the rest about five years ago.

Q. And did you ever own any below the Backus property in that block?

A. Yes, sir.

Q. How long since you parted with that?

A. About five or six years ago.

Q. What kind of a piece did you own?

A. I think it was 40 feet front and about 100 feet deep.

Q. On River street?

A. On River street, and the north side.

1743 Q. A small lot there, then?

A. Yes, sir.

Q. It did not go through to Fort street?

A. No, sir, I think it was 100 feet deep. I paid no attention to it for years.

Q. Have you known of any sale of property between the Michigan Central, say, and Twelfth street, within the last five years?

A. I simply know of one, and that was the piece that was referred to by the last witness, that was put up at auction. That is the only one that I know anything about.

Q. That was only attempted to be sold; the sale did not go through?

A. No, sir.

Q. Then you do not form your estimate——

A. Well, I don't know whether that sale went through or not.

Q. You do not form your estimate, then, from any actual sales?

A. Except from the one I made myself.

Q. That is five or six years ago?

A. Yes, sir.

Q. And a little lot?

A. Well, I don't know, 40 feet. I do not consider that a very small lot.

Q. That is not a region that is suitable for stores, is it?

A. No, sir.

Q. It is not suitable for residences?

A. Well, hardly.

Q. It would be more suitable for heavy manufactories or warehouses than anything else, wouldn't it?

1744 A. Well, anything in the way of manufacturing, large or small, could go in there. There is an establishment there now that has been there for years.

Q. There is no alley to it?

A. No, sir.

Q. What kind of manufacturing do you carry in your mind that is running on a lot that size in Detroit?

A. Well, I don't know as I can place any now. There is an institution there now, the Baraga graphite works.

Q. On that piece?

A. Yes, sir.

Q. What do they manufacture?

A. I don't know. I have never been in the place since they went in.
Q. What was it you called it?
A. Some graphite works.
Q. The Baraga?
A. Yes, sir.
Q. It is a mere office, isn't it?
A. No, sir, they have a factory there.
Q. What is graphite, anyway?
A. Black lead.
Q. They are manufacturing there, are they?
A. As far as I know. I have not been by the place for three years.
Q. Well, the only sale, then, that you have known, has been the sale to Mr. Joy?
A. Yes, sir.
Q. Don't you know of the sale from the Detroit, Lansing & Northern to the Central?
A. No, sir, I paid no attention whatever to anything in that neighborhood since I disposed of it.
Q. Where there are no sales being made, how do you estimate the values and get at the market value?
A. Well, thinking of what values are in the same locations where there is business.
1745 Q. You say you have not even looked over this property for three years?
A. I don't know as I have been in front of that property—yes, I did, I went down about a year ago.
Q. How near to it do you know of any sale having been made?
A. No sales at all that I know of; there has been some offered me there repeatedly, down below there; that is all I know.
Q. There have been no sales?
A. No, sir, as far as I know.
Q. You have had some offers, I suppose, since the railroad was built there?
A. Yes, sir.
Q. Whereabouts was the property that has been offered to you?
A. On the north side of River, below Scotten's building, Thirteenth street, in through there—Twelfth or Thirteenth.
Q. That would have no railroad connection at all?
A. No, sir.
Q. You say you are incompetent, you think, to form any judgment of the value of the Backus property, as it is really situated in connection with the Michigan Central?
A. Yes, sir.
Q. Now, you are a real-estate man, are you?
A. Well, to some small extent.
Q. Can you tell us where in the city there is a piece of property of that size, situated as well with the railroad as that is—where it could be got?
A. Well, without giving it any thought, I don't know.

Q. It is a very hard thing, isn't it, to pick up a piece of property as large as that, and situated in that way, with any of the railroads around the city?

1746 A. Well, there is a good deal of vacant land lying around the railroads.

Q. There are small pieces, yes; but it is pretty hard to get a piece of that extent?

A. That I don't know; I never attempted anything of the kind.

Q. You don't know where it can be got?

A. No, I cannot say that. I simply say I know there is a good deal of vacant land lying around the railroads; whether it is owned by one or a number I don't know.

Q. Can you tell us of any piece that would be large enough to accommodate the Backus plant, and where it is, and what he could buy it for?

A. No, sir, I could not.

Q. You have had no experience, then, in that kind of property?

A. No, sir.

Q. Do you know of any piece of vacant property as near to the center of the city and connected with a railroad, as Backus' is?

A. No, sir, I certainly do not.

Q. It is an exceptional——

A. There might be on the east side; I am not familiar through there.

Q. It is an exceptionally situated piece of land?

A. Yes, sir.

Q. Which is the most valuable front, River or Fort street?

A. I would say River street.

Q. You estimate it $100 a front foot on River street?

A. Yes, sir.

Q. How much on Fort?

A. Excuse me one moment. What year did you put that as to what my valuation should be?

Q. 1892. That is before this railroad was built.

1747 A. Yes, sir.

Q. You estimate the River Street front $100 a foot, and the Fort Street front at how much; or do you run the property all through at $100?

A. No, sir, it is simply to the center.

Q. And at how much do you put the Fort Street front?

A. Oh, I don't know, $60 to $80.

L. H. PHISTER, sworn on behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you reside?

A. Detroit.

Q. How long have you lived here?

A. Twenty-five years.

Q. What is your business?

A. Real estate.

Q. How long have you been in the real-estate business?
A. About seven years or a little over, I think.
Q. Buying and selling on commission?
A. Partly, yes, sir.
Q. What would you say as to whether there is any vacant property in this city that could be procured for a manufacturing plant alongside of a railroad?
A. You can get plenty of it, if anybody wants it.
Q. Now, the Backus property is just over the crossing on River street of the Michigan Central, and it has a frontage of 238 feet on River street and runs back to the Michigan Central track bordering upon an angle upon the north, and to Fort street, the Fort Street frontage being about 75 feet. There is a jog in the property, so that it is best to separate the two frontages. What I want to know is, what that property was worth in 1892, not considering the
1748 plant and improvements, considering it as vacant land. I ask you in the first place what, in your judgment, the River Street front was worth per foot front at that time?
A. Well, I estimate it at that time about $150 a foot.
Q. What would the 75 feet frontage on Fort street be worth?
A. I estimate that about the same figure.
Q. In your estimate do you consider the utility of the Michigan Central railroad with reference to the property?
A. Yes, sir, I do.

Cross-examination.

By Col. ATKINSON:

Q. Where could you get a piece of property of that size, situated in the same way with the railroads?
A. Well, I could not say now without looking up my books, whether I have any right on the Michigan Central or not. I know there is just above the bridge a little further up some vacant property that has been there a long time, that I presume could be bought.
Q. Piece as large as this?
A. Yes, it must be fully as large, some by the Baker Street bridge. I cannot say that the property is in the market; I simply know that it is vacant property.
Q. And you think you could select a piece there 300 feet in depth and 238 feet front—having frontage on a street of 238 feet?
A. It is quite a large piece; I do not recall the dimensions of it.
Q. You do not know of any such piece as centrally located as the Backus property?
A. No, sir, not as centrally located. That, I think, is about the nearest piece to the depot that can be got.
Q. The nearest point to the center that such property
1749 could be got at all?
A. Yes, I think so.
Q. How do you get at your values?

A. Well, we have to base that upon the general experience and sales.

Q. What sales have you known of down there?

A. The only sale that I know of personally was one I made myself in the same block a little further down, between there and Twelfth street.

Q. That is that little graphite piece?

A. That is the graphite factory.

Q. Forty feet by 100?

A. I think it is 45. I was looking at my books to find out, but I made that sale a few days after I dissolved partnership and I do not find any record; but I think it is 45 feet.

Q. How long ago was that?

A. A year ago last July.

Q. That was a forced sale, was it not?

A. You might call it a forced sale. The party had to sell, he was hardly able to hold it, but I think it was partly on account of the partnership conditions in the management of that factory. He was practically compelled to sell.

Q. Do you know of any other sale?

A. I know of other sales made in that block.

Q. That has no railroad connection?

A. No, sir.

Q. So that it is not situated like the Backus property?

A. No, sir.

Q. What other sales have you known in that block?

A. There was property sold between that and the Backus property, but I have forgotten the figures exactly.

Q. Who bought that?

A. There was a Mr. Bennett bought some.

1750 Q. Running through from one street to the other?

A. No, sir, I think it ran back 140 feet or thereabouts.

Q. That had no railroad connections?

A. No, sir.

Q. No alley?

A. No, sir.

Q. Don't you know of any other sales?

A. I cannot recall. I know of that property, that it was all offered there, but I cannot recall the price of other sales.

Q. Your real-estate business has never led to any transactions down in that region except this graphite one?

A. No, that was all in that immediate vicinity.

Q. Was that sold on a mortgage?

A. There was a mortgage on it, yes, sir.

Q. Well, it was sold to collect the amount due on the mortgage?

A. Well, it was not under foreclosure; it has been deeded as security—George C. Langton, I think, had part of the title. I think the title was in two or three different parties; the party had it on contract, and practically had to sell, or pay up.

Q. And Langdon had failed in business?

A. That I don't know. He had no ownership——

Q. You would not consider that sale as fixing the value of property in that region?

A. Not for railroad frontage, no, sir.

Q. Can you recall any sale of railroad frontage something like the Backus property, within the last five years, in Detroit?

A. I cannot recall, in that vicinity, on the Michigan Central, any sale that I could recall the particulars.

Q. With any railroad?

1751 A. I have, up around the junction and around the city in various other localities.

Q. Do you remember a piece near the junction?

A. There is a piece sold there where the electric motor or storage-battery factory is, located, I think, on the Y, and I think it fronts on the D. & M.—both railroads.

Q. Did you have anything to do with that sale?

A. The party that bought it was in my office. I had the property for sale, but his nephew, who was in the same office, practically made the sale.

Q. How much was there of that piece?

A. I think there were about two acres.

Q. When was that?

A. The first sale of that was five or six years ago, but he sold an acre of it something like a couple of years ago, one acre sold within about two years, if I recollect rightly.

Q. Well, that is four miles from the center of the city, isn't it?

A. A little over three; not much over three miles, I think.

Q. And from what experience do you get at the advantages from the connection with the Michigan Central and their market value?

A. Well, no practical experience of my own, simply a general knowledge of what it is worth.

Q. You do not know of a sale within five years of property situated like that?

A. On the Michigan Central—no, sir, not like that.

Q. I do not confine you to the Michigan Central.

A. Well, this piece that sold up there was only two years ago, the last sale of that.

Q. Well, property out at the junction is not worth quite as much as it is on Fort street yet.

Mr. BAKER: Some of it is worth more.

1752 Q. You have been a witness in all the union depot cases, have you?

A. Not in all of them, I think.

Q. In how many?

A. I think in a case against the Michigan Central, and in the previous trial of this case.

Q. Don't you know of the sale of property down there from the Detroit, Lansing & Northern to the Michigan Central?

A. Only as I heard of it, not of my own knowledge.

Q. You have heard of a sale of that kind?

A. I heard it talked, heard it in the testimony here, but not being conversant with it, I did not give any particular study to it.

Q. Wouldn't that have as much tendency to fix the market value down there as a sale under a mortgage?

A. I think where one was a forced sale that the other was a forced purchase.

Q. So you would think that the Michigan Central was forced to purchase, and that railroad companies pinch one another when they get a chance?

A. I know so about that piece.

Q. You know Mr. Joy pretty well?

A. We all know him as a citizen.

Q. He has the reputation of being a shrewd, careful business man?

A. He undoubtedly is; yes, sir.

Q. Did you know of the purchase by him on the corner of Twelfth street?

A. I knew of it at the time, but I have forgotten the price.

Q. Don't you think a sale to him would have about as much to do with fixing the market value as a forced sale of a small piece?

A. Well, the market value is what you can get out of a
1753 piece. If you get a man where he has got to have a piece it is easier to get more out of him than otherwise.

Q. Then you consider Mr. Joy and the Michigan Central as people who had to pay higher than any one else?

A. If the circumstances were such they had to have a piece, I think they would.

Q. Do you know anything about the circumstances under which Mr. Joy bought?

A. Except as I have heard it stated. They wanted that to widen the street.

Q. Do you know of the little piece this side of the Backus property that was purchased by Mr. Joy—20 feet?

A. I don't know the particulars of it.

Q. Do you remember that little brick building this side of the Backus property?

A. I do; yes, sir.

Q. Would that property be worth any more than the Backus property per foot front on River street?

A. As far as actual value is concerned, taken into connection with the property, it is a little hard to say, but as controlling the frontage there, and being in the way it might compel a little higher price on that account.

Q. Would you consider it for the purpose of use as worth any more than the Backus property?

A. Well, it is too small a piece for actual business to any very great extent, as I understand it.

Q. Did you know of that being sold for $8,000, less than 20 feet front.

A. I didn't; no, sir.

Q. And less than 60 feet in depth at the deepest point, and only a little triangle.

A. If it was sold at that price I should consider it as rather a forced sale in one sense.

Q. So that wherever Mr. Joy buys you consider the sale
1754 forced, and wherever there are sales on mortgage you think it fixes the market values?

A. Hardly that. I do not wish to be interpreted as saying that. I think the fact that they wanted the property, they were forced to buy it and pay a higher price than they would——

Q. Nobody buys unless he wants a thing?

A. Yes, sir; sometimes they do.

Q. You have no other knowledge of values down there?

A. Not in that vicinity, until you get further out.

Q. Have you been employed by the union depot company to examine the property and fix values?

A. No, sir.

Q. Did you ever go through the Backus property?

A. Not through the plant. I have been around the grounds. I have been on the grounds, but not through the buildings.

Q. What did you do that for?

A. The only time I have ever been on the lot to my knowledge was when I have been in their office some years ago. I do not think I have ever been on the lot except along the River Street frontage, if that is on the lot.

Q. What I want to get at is, did you make an examination for the purpose of testifying?

A. When I was subpœnaed to appear I went down there and looked the property over to refresh my memory, for some questions might be asked me on which I would like to be posted, as to its location.

Q. Were you subpœnaed before they knew of the testimony you would give?

A. That is my recollection; yes, sir. I do not recollect how I came to be subpœnaed. I think that Mr. McKay told me once he had told Mr. Baker to subpœna me on account of my knowledge and the general commission business. He thought I was
1755 pretty well posted. That is my general recollection of the way I was first subpœnaed. I had no conversation with Mr. Baker at that time, and did not know him personally, and I never had the honor of Mr. Joy's acquaintance personally.

Q. You ought to know them both well.

A. I do by sight.

EDWARD F. CHAPMAN, sworn on behalf of the petitioner.

Examined by Mr. BAKER:

Q. Where do you live?

A. Detroit.

Q. How long have you lived here?

A. Nearly two years and a half.

Q. What is your business?
A. I am inspector for the Michigan Inspection Bureau.
Q. What is the Michigan Inspection Bureau?
A. It is an association for the purpose of making rates and inspections of property—insurance rates.
Q. For what purpose?
A. For the use of insurance companies.
Q. Who passes judgment on the different rates in this city?
A. I do.
Q. Personally?
A. Yes, sir.
Q. That is, you have charge of this bureau?
A. Yes, sir.
Q. You have been here doing this work for about two years and a half?
A. Yes, sir.
Q. Who preceded you?
A. David Beverage.
Q. Where did you formerly reside?
1756 A. Before coming here I lived in Cleveland.
Q. Did you do similar work there?
A. Yes, sir.
Q. Do you know of the rates here upon the Backus planing mill and box factory, on River street?
A. Yes, sir.
Q. When you came here the union depot company elevated road had not been built, had it?
A. No, sir.
Q. It was actually completed in 1892?
A. I think so.
Q. Will you state whether or not there has been any increase in the insurance rates on that property since the railroad was constructed, because of the construction of the railroad?
A. There has been no increase at all.
Q. Can you give us the rates that were paid upon the property before the railroad was built?
A. No, sir; I cannot. I can give you our advisory rate, but what the rate that was paid was I cannot say.
Q. Can you give the rate that was fixed by your bureau?
A. Yes, sir.
Q. I suppose there is a separate rate on each structure?
A. There is a separate rate on the mill and boiler and engine houses.
Q. Give us the rates.
A. On the mill the rate was 5.25; boiler and engine house, 4.50; lumber shed attached to mill, 5.25. Your question was what the rates formerly were?
Q. Yes.
A. There was no rate on the shavings vault until a few months ago.
Q. Have you omitted the dry kilns?
A. Yes.

1757 Q. What was the rate on the dry kilns?
A. I don't know. I don't remember about the dry kilns.
Q. Let me refresh your recollection. Do you remember the dry kilns and something connected with it, 4.50?
A. It is my impression it is the same as the boiler and engine house.
Q. And on the office?
A. According to my recollection it is 2% on the office.
Q. You say that before the railroad was built or until recently there was no rate on the shavings vault?
A. No rate until recently on the shavings vault.
Q. Is there any rate on it now?
A. Yes, sir.
Q. How did you come to put a rate on it?
A. I was asked to put a rate on it.
Q. By whom?
A. I think I received a letter from Backus & Sons, some time in April.
Q. Last April?
A. Yes, sir.
Q. What rate did you put on it?
A. 8%.
Q. Prior to that had any rate been on it?
A. None that our record shows.
Q. Do you know whether any insurance had been placed on it before?
A. I don't know of any.
Q. But outside of the shavings vault then, are the rates now the same as before the railroad was built?
A. Yes, sir.

Cross-examination.

By Mr. DICKINSON:

Q. For what insurance companies do you act as inspector?
1758 A. The organization is maintained by or stands in the name of the Michigan Fire & Marine, the Detroit Fire & Marine, of Grand Rapids—State companies.
Q. You do not represent all the fire-insurance companies, do you?
A. No, sir.
Q. You do not know or do not pretend to state whether or not Backus' rates had been increased by the insurance companies in which he insured?
A. I do not.
Q. Does he insure in any of your companies?
A. I could not say.
Q. Don't you know whether he does or not?
A. No, sir, I have nothing to do with that.
Q. You have only these insurance companies you have spoken of?
A. That is all. We furnish rates to different companies who purchase them. We furnish rates to a great many other companies.

Q. You don't know whether the Backuses have insured with any of the companies to whom you have furnished rates?

A. Yes, I know that they have done so.

Q. You have nothing to do with the fixing of the rates they actually charged them?

A. I cannot control that. We make advisory rates.

Q. Your business is merely advisory to the insurance companies?

A. Yes, sir.

Q. Then after that if the insurance companies choose they make their own terms to be insured?

A. Yes, sir.

Q. What have you to say as to whether or not the cost of the Backuses insurance has or has not been increased since the building of this road?

1759 A. I have no means of knowing.

Q. Do you know of the rule by which rates may be increased or the cost of insurance may be increased by compelling the insured to take four-fifths valuation?

A. I know there is such a clause in use.

Q. For what purpose does that apply; under what circumstances has it applied?

A. It is applied on manufacturing risks generally.

Q. All manufacturers are not required to take four-fifths valuation, are they?

A. Yes, sir.

Q. In this town?

A. Yes, sir.

Q. Was Backus required to take four-fifths valuation insurance before the building of this superstructure?

A. When I say they are required I mean our rates are based on the use of it. We cannot require anybody to give those rates.

Q. The insurance company can say they won't insure unless they take four-fifths valuation?

A. Yes, sir.

Q. Do you know whether the insurance companies, before the building of this superstructure, did or did not require Backus to take four-fifths valuation?

A. We did not require the use of the 80 % clause on manufacturing risks; that is, we did not fix it previous to a year ago last August, I think.

Q. Will you please answer the question, whether you know anything about whether Backus was required to take four-fifths insurance prior to the building of this superstructure?

A. I don't know.

Q. Do you know of any other manufacturing interest in town that is required to take the four-fifths valuation, and if so, please state.

1760 A. We advise it on all.

Q. You advise it, but as a matter of fact whether they do?

A. I know it is in use.

Q. Can you name any manufacturing institution that does actually insure on the four-fifths valuation?
A. Why, I think nearly all of them do.
Q. Do you know anything about it?
A. I don't keep any record in my mind.
Q. Did Backus insure his dust-room and shavings-room before this structure came there?
A. I don't know.
Q. You simply don't know whether it was rated or not?
A. That is all we do—give a rate on it.
Q. But if the dust-room caught fire it would probably burn out the mill in the ordinary nature of things?
A. It might.
Q. Will you please state whether within the last year, since January 1, 1892, the general rate of insurance has not been lowered here in the city?
A. No, sir.
Q. Within the last year or year and a half?
A. We have not made any reductions; not any general reductions.
Q. Whom do you mean by we?
A. I mean the association with which I am connected.
Q. Directly connected. That association you will please name again.
A. The Michigan Inspection Bureau.
Q. Who composes that?
A. The Michigan Fire & Marine Insurance Company, and Detroit Fire & Marine Insurance, and the Grand Rapids Insurance Company.
1761 Q. Have you furnished any inspection rates to, we will say, the Ætna Insurance Company, of this city?
A. Yes, sir.
Q. Do they not also have inspectors of their own?
A. Yes, sir.
Q. They get all the advice they can, do they not, and then do as they please?
A. Yes, sir.
Q. So that all you do is like a merchant, who is determining a question of sale on credit—you give the agency reports and give all the advice you can give and he makes such terms as he pleases?
A. Yes, sir, we furnish advisory rates.
Q. You simply give your opinion?
A. Yes, sir.
Q. You are not an officer in any way of the State?
A. No, sir.
Q. And who pays you?
A. I am paid by the inspection bureau.
Q. Composed of these three companies?
A. Yes, sir.
Q. When you furnish rates to an outside company, who pays you?

A. Our business is to furnish them. They subscribe to the rate of the bureau, the companies do.

Mr. BAKER: Every company does.

A. And pay for them.

Q. Can you give me a list of the companies here that take your risk?

A. No, sir, I could not.

Q. Can you by looking at your books give us a list?

A. Yes, sir.

Q. I wish you would.

Mr. BAKER: To what extent is the insurance business carried on on your rates?

A. I could not say.

1762 Mr. DICKINSON: Do you mean to say that a railroad running by a property does not increase the fire risk?

A. No, sir, I don't say so.

Q. You don't say that it does not. What did you put upon their office?

No answer.

By Mr. BAKER:

Q. Why are you employed as this inspector?

A. Really, I could not say.

Q. Perhaps you do not understand my question. Have you a knowledge of insurance, of fire risks, are you an expert?

A. I have been engaged in the business for a number of years.

Q. How many years?

A. Twenty years.

Q. Did you ever work at this business in any city besides Cleveland and Detroit?

A. Not wholly. I have been connected with insurance companies for that time, and it has been a part of my business to estimate rates during that whole period.

Q. Isn't the fact—of course, you may be a little modest in regard to it—that you are employed to fix rates in this city because you are an expert in judging of the fire risk?

A. Because I have had some experience in it, yes, sir.

Q. And do companies that do business with you rely upon your judgment?

A. Yes, sir.

Q. Now, in answer to Mr. Dickinson, you say that you would not testify that a railroad in front of a piece of property like this would increase the risk. I will ask you whether or not, in your judgment,

1763 the presence of the elevated railroad in front of this property has so far increased the fire risk as to make it necessary or advisable to increase the insurance rates down there?

A. No, sir, not to that extent.

Q. So that they can get their insurance just as cheap as they ever could, as far as their rates are concerned?

A. I don't know.

Q. Of course, you don't insure yourself, but as far as your office is concerned?

A. Yes, sir.

Q. You say your association is maintained by three Michigan fire-insurance companies?

A. They formed the organization. It is maintained by subscriptions from whoever has its rates.

Q. Are not nearly all the insurance companies doing business in this city subscribers?

A. Well, a large proportion of them are.

Q. Most all of the old New York, Connecticut and Massachusetts companies?

A. Yes, sir.

Q. You could give us a list of the subscribers?

A. Yes, sir, by tomorrow or this afternoon perhaps.

Q. Well, we won't want it this afternoon, I think; in fact, you need not bring it here until we call for you, but you can make up a list so as to bring it here.

By Mr. DICKINSON:

Q. Were you in this building when trains were passing?

A. No, sir.

Q. Did you examine the building?

A. I looked it over a year ago or so.

Q. When did you do it?

A. I could not tell you.

Q. You could not tell whether it was in the summer or in the winter?

1764 A. No, sir; but it is my impression that I looked at it last year and the year before in the summer time.

Q. When did you come here?

A. Two years ago in June.

Q. Now, when you looked it over last year the structure was built, was it not, the elevated road?

A. Yes, I think the structure was there.

Q. Where did you go in the building?

A. I went through the mill itself.

Q. Did you go in the lower floor?

A. Yes, sir.

Q. Upstairs?

A. Yes, sir.

Q. Did you go into the dust-room?

A. No, I think not.

Q. Did you see the place where the dust is removed from the buildings into River street?

A. I don't recollect seeing it; I may have seen it.

Q. Did you go into the shavings-room?

A. I don't think so.

Q. Did you see how the accumulation of shavings and dust is removed from the mill?

A. You mean how it is caught?

Q. How it is removed from the mill?
A. No, I didn't see it.
Q. Do you know how the shavings and the dust are removed from the mill so as to prevent their flying all about?
A. I understand there is a dust-catcher in that frame structure on top of the shavings-vault building.
Q. You saw the dust-arrester on the top?
A. Yes, sir.
Q. But did you see in the mill itself how the dust and shavings are removed from the mill?
A. They are blown by pipes, as I recollect.
1765 Q. You did not follow it up to see where they are received or how they are removed?
A. I think I followed them up to see how they were received, but as to how they were removed I don't recollect that I did.
Q. Did you see any trains passing while you were there?
A. No, sir.
Q. You don't know whether or not they threw cinders. Did you inquire as to whether they threw cinders?
A. No, sir; I didn't inquire.
Q. Where were you engaged before you went to Cleveland?
A. I was traveling in Ohio mostly, Ohio and West Virginia.
Q. As inspector?
A. As inspector and special agent.
Q. For fire risks?
A. Yes, sir.
Q. For what concern?
A. For the Queen Insurance Company.
Q. In Cleveland have they any elevated structures in front of any manufacturing property?
A. No; I think not.
Q. Have you in your business been familiar with the effect upon manufacturing property of elevated structures about the second story?
A. Not specially.
Q. Did you ever have any inspection of that character before you inspected this?
A. Never had any occasion to consider it specially.
Q. You did not inspect this with the trains running by at all?
A. No, sir.
1766 Q. Never observed the practical effect upon the property or diagnosed the effect of passing trains in front of property?
A. No, sir.
Q. Did you inspect in Bay City?
A. No, sir.

By Mr. BAKER:

Q. Have you got in your business a map of the Backus property?
A. We have the fire-map such as is furnished to all insurance companies.

Q. You make up a survey of this whole city?
A. There is a map company that does that for the whole country.
Q. They make a map of the city with accurate outlines of the property, and do you have one of those when you are inspecting property?
A. We have it in our business, yes, sir, very much. It is in large volumes.
Q. And the insurance companies have duplicates of it?
A. Yes, sir.
Q. Could you bring that when you bring this list of the companies?
A. Yes, sir.

Adjourned till Sept. 27, '93.

SEPTEMBER 27, '93—9.30. a. m.

PHILLIP C. MILLER, sworn on behalf of the petitioner.

Examined by Mr. BAKER:

Q. Where do you reside?
A. Chicago.
Q. How long have you lived in Chicago?
A. For the past six years or a little longer.
1767 Q. What is your business?
A. Blowpipe and dust-collector business.
Q. How long have you been connected with that business?
A. About six years.
Q. What does that business consist of; what is this blowpipe and dust-collector business?
A. Putting in fans and a system of galvanized or iron piping for carrying off the shavings and dust from various wood-working machines and taking and depositing it in the shavings vault; and we put in furnace feeders to drop them right into the furnace, if parties wish.
Q. Do you know what dust collector or arrester, whatever you call it, is in general use at the present time?
A. Yes, sir.
Q. What is it called?
A. Well, there are several different makes. There is one known as the Allen & Curtis, and one called the Vortex manufactured in Milwaukee, which our company handles, and there is one manufactured here in Detroit by Hyde & Smith, and there are several others manufactured in a small way, but they all consist of the metallic form of dust-arresters, driving the dust out of the air current by centrifugal force, as it is called.
Q. Are all these that you mentioned upon the same general plan?
A. They all work on the same principle, about, but somewhat different in construction.
Q. What do you do—manufacture these or travel about the country introducing them?
A. Travel about the country and take contracts for putting in systems.

Q. And what parts of the United States have you visited in this business?

A. Well, the New England States, New York, Pennsylvania,
1768 Ohio, Indiana, Missouri, Wisconsin, Michigan and Illinois.

Q. State whether or not you have a general knowledge of this business or art?

A. I have.

Q. Throughout the parts of the United States where wood-working manufactories are carried on?

A. Yes, sir.

Q. Have you a model of the Vortex, the one that you introduce?

A. Yes, sir.

Q. Is this the model that I have here?

A. Yes, that is the machine that we use in connection with our system. You might get one of these cuts there and you can see a little more. This is a metallic machine. The air is blown in here with the shavings and dust and the heavy particles have a tendency to keep to the outside walls, and they drop down, and all the shavings and dust practically come out of this end without any air. The air escapes on the top here.

Q. What is the object of that cover?

A. That is simply to keep out a spark, rain or snow—the weather. It is not absolutely necessary, and a great many do not put them on.

Q. When the mill is not in operation that will drop down automatically?

A. Yes, it will drop down automatically. The air opens it.

Q. Have you a cut here that shows how they are usually placed on mills?

A. Yes, there are some drawings there. (Taking papers.) That will give you a general idea of the system. You see we put in this fan here and this is supposed to be galvanized iron or steel piping
and runs to all these various machines connected with this
1769 fan and blown into this machine here, but you gather all these shavings with the air and you want to have some means of separating, taking the air out of them and allowing the shavings to drop; by blowing into this machine they whirl around there and are separated. The air takes this direction and the shavings this.

Q. Just pass that along so the jury can see. Have you had any experience with dust-arresters that are made out of burlap or cheese cloth?

A. Yes, sir.

Q. How long ago were they in use?

A. Well, it is in 1885, I believe, and a few sold, I think, in 1886, just about the time these machines came out.

Q. When did this centrifugal dust-arrester come out?

A. 1886. I think that was the year, but it may have been 1885.

Q. About how many have been introduced, to the best of your knowledge and judgment?

A. I should judge, at a low estimate, there are some three thousand of them.

Q. Have you canvassed or been through the city of Detroit so that you can tell us whether they are in general use here in this city?

A. I was around yesterday to see how many there was in use. I did not go all over in one day, but I got quite a number.

Q. What would you say as to their being in general use here?

A. I should think they were in general use the same as in the other cities.

Q. Will you state in what respect this excells the old-fashioned burlap or cheese-cloth dust-arrester?

A. The one I was connected with was known as the O K,
1770 which was a series of screens with cheese cloth, and that was set up above on top of the building. They were very inflammable affairs and a great many of them are burnt up now. I guess they are practically out of use, but when you would start the fan up they would blow all up for a little while and then they would mat up, the lighter dust and cause a back pressure on the fan, would not give a free outlet. Sometimes they would blow full, although they were considered a pretty fair thing at that time, just about as good as there was; they had to use something; but as quick as these metallic machines came out most of them were taken out right away. They would mat up and cause a back pressure and would not draw up the shavings. There is lots of light dust from the pores of the wood that will mat right up against the piece of cloth, and on this O K at noon and night you had a bumper; you had to scrape it to clean it. I believe this one that is known as the Backus—I have seen that, they are web-shaped screens, and they are supposed to be self-cleaners. When the fan stops they come back and scrape off, but there is no screen in this Vortex at all.

Q. Pass that around to the jury so that they can see the internal construction of it. Have you examined the plant of the dust-arrester that is in use at the Backus planing mill and box factory?

A. Yes, sir.

Q. Have you made an estimate of what it would cost to put in an improved dust-arrester in the plant?

A. Yes, sir; I made an estimate a year ago, or when I was here before.

Q. Have you made your measurements again?

A. I just looked over it the other day when I was here with you; I guess it is about the same.

Q. Will you state how Backus would have to change his building, if any, in order to put them in?

A. There is only one thing about it before you put this
1771 machine up. The shavings hopper off, for there is no wind to blow them, and if a man wanted to have the same storage capacity as before with the old device he would have to have his vault a little higher to do it. People that want a large storage-room for shavings generally build their a little higher, build the vault a little higher.

Q. What would that necessitate in his place—building his walls to his shavings vault somewhat higher?

A. Yes, building them about on a height with that roof that now contains the other dust-arrester.

Q. Lengthening the pipes some.

A. Lengthening the pipe a little; yes, sir.

Q. Would you use his same fans and pipes?

A. Yes, as far as they would go. There would have to be a little additional to get further air to the machine.

Q. State whether or not as they are usually put in, they have a building, or whether they put the shavings right down into the fire-box of the boilers?

A. Well, the furnace-feeder has not got into such general use as the separater; that is, we have put in a great many, but there is a difference of opinion in regard to the value of them. The people when we first started in were a little skeptical in regard to the fire running up their pipes, but we put in a great many large plants.

Q. The shavings go right into the fire-box?

A. Yes, right into the furnace.

Q. What is that you have there?

A. That is a drawing of the Madison car-furnace feeder.

Q. That is not a part of the dust-collector?

A. No, sir.

Q. You can either put the shavings into the fire-box or you can put them into the vault?

A. Yes, sir.

Q. Just as you see fit?

1772 A. Yes, sir.

Q. Now, will you state what it would cost Mr. Backus, what would be the reasonable cost of making this change in his mill so as to put on this metallic dust-arrester, exclusive of the raising of the wall and putting on a new roof?

A. My estimate before on that was that I would put these machines, furnishing the additional pipe, for $1,380, exclusive of the masonry and carpentry work, what they might have to do with the vault; or if he would set them on the same roof he would have to put a new roof on, or tear that old one off. This is for the machines put up on the roof wherever he might wish them and with the necessary additional pipe to connect to them.

Q. Can you state, as far as you have examined, the list of manufacturing institutions in the city of Detroit that have these in use?

A. I have a list of some of the factories that I got yesterday.

Q. Will you name some of them?

A. Pingree & Smith have one made by the Allen & Curtis Company, right down here on this street, on their shoe factory. We put a system of the same kind in shoe factories.

Mr. DICKINSON: O, everybody knows Pingree.

Q. He does not need any blowpipe.

A. A. C. McGraw. I sold them when I was with the Allen & Curtis Company. The Detroit Wooden Ware Company, W. A. C. Miller Lumber Company, and there is one not in use there on a plant up here, on Walker's plant, up along the river, a car shop that is not running. I saw a machine up there. There is Vinton

& Company. Then there is the Adams Machine Company, I have just put up two machines, a man is working there now putting in the pipe system.

1773 Q. That is right alongside of the elevated railroad?

A. Down in here somewhere, I don't know what street. The Detroit Casket Company, Posselius Brothers, C. D. Widman & Co. There is the Force & Dickinson Co., and Murphy & Wasey chair factory. There is the Michigan-Peninsular Car Co., the American Harrow Co., F. J. Sarmiento, Hartz, Hosbach & Co., Farrand & Votey, the Wolverine Manufacturing Co., Dwight Lumber Co., and I believe there is one in the Ideal Manufacturing Co., I think it is the Ideal Manufacturing Co. I made them prices; they didn't buy our machine, but the other parties put it in—the Saginaw firm.

Q. You have not examined the western part of Detroit?

A. I have not been out at West Detroit. They tell me there are a lot of factories there, but I have not been out there.

Q. I suppose you have been in the Saginaw valley?

A. I have been up there in Saginaw.

Q. Do you know whether or not there is a firm there devoted to this business?

A. Yes, the Allen & Curtis Company.

Q. Do they put in these same machines or substantially the same apparatus?

A. The same thing; the dust-arrester is a little different. They blow in down on the bottom, but it is a metallic machine; they do not screen the air—separate it in the same manner.

Q. That is, it works by centrifugal force, the same as the Vortex?

A. Yes, sir.

Q. What do they call it?

A. It is known as the Allen & Curtis machine.

Q. Then there is the Cyclone.

A. The Cyclone is manufactured by Heiser, or the Knick-
1774 erbocker Co., at Jackson. That is, they have abandoned it now. There was a consolidation between those two companies, and Heiser took the right from the Knickerbocker Co. to make what is called the Cyclone, and after he consolidated with the Allen & Curtis. Now the Knickerbocker make nothing except for flouring mills, and the Allen & Curtis Co. for wood-working.

Q. Do you mean to say they use these same apparatus for flouring mills?

A. Yes, sir.

Q. Do you know whether they are in general use in Minneapolis and Duluth, the great flour centers?

A. I have not been in many of the flour mills. I know the Vortex sell a great many; I have put them in in elevators.

Q. What do you mean, a grain elevator?

A. Yes, sir; I put them in for Armour & Company, and Counselman, at Chicago.

Q. That is, they can be used in any place where it is advisable to collect dust through pipes and fans?

A. Yes, sir.

Q. This apparatus being used to separate the air and the dust?
A. The air from the dust.

Cross-examination.

By Mr. DICKINSON:

Q. What is your age?
A. 31.
Q. How long have you been in the dust-arrester business?
A. About six or seven years.
Q. Now, what are you doing—showing your patent again?
A. I am just showing my plans.

Mr. BAKER: One of the jurymen looked at it.

1775 Q. That is all right, but we will object to putting in the specifications of any patent in this case. What was your business before you went into the dust-arrester business?
A. Tinner and sheet-iron worker.
Q. Whereabouts?
A. In Chicago. I learned my trade in Lockport, Ill.
Q. How long have you lived in Chicago?
A. I have lived in Chicago off and on. I have been there the past six years; perhaps longer.
Q. And you have been engaged for the last six years in introducing dust-arresters?
A. Yes, sir.
Q. When was the patent taken out for this dust-arrester you have shown?
A. I do not know the dates of the patents of this particular machine.
Q. Isn't it on the machine?
A. No, sir, it is not on any of these cuts.
Q. Look at your model. Isn't it on the model?
A. I guess they are on these papers. It is not marked patented. Of course it is only a model. I have a list of some of the patents here.
Q. Which patent is this a model of?
A. It is manufactured under all the patents.
Q. This is called the Vortex shavings and dust collector?
A. Yes, sir.
Q. Patented January 29th, '89; June 25th, '89; some improvement, I suppose?
A. I suppose so. I am not posted so particularly on the patents.
Q. March 26th, 1889, and February 17th, '91. I suppose that is right, is it?
A. The Vortex Company built these for us. We do not
1776 build them. That is the patent they told us to put on.
Q. You have to put on every machine you put up the certificates of patents?
A. Yes, sir.
Q. Those are right I have read over from this circular?

A. That is right as near as I know. I am not the patentee of it myself.

Q. What is your company itself?

A. We are an independent company and make a special business of putting in blow-pipe systems in wood-working factories.

Q. You have the right from the Vortex Co. to use it.

A. We have the exclusive right of that machine for word-working purposes.

Q. In all the States?

A. In all the States.

Q. Do you know how many patents there are for dust-arresters taken out in the United States Patent Office?

A. Of the metallic machines?

Q. Yes.

A. It is on the top there.

Q. I do not mean the same patent exactly as this, but how many patents for dust-arresters?

A. Well, I had a list of them once, and I believe I had between 40 and 50 patent papers.

Q. Don't you know that there are 361 patents for dust-arresters?

A. No, sir, I don't know it, I never looked it up.

Q. Did you ever hear that?

A. No, sir, I never heard that.

Q. But you yourself know of some 60 or 61?

A. I know of some 40 or 50. I send for them on the metallic machines.

Q. You don't know how many other dust-arresters there are patented in the United States?

1777 A. No, sir.

Q. For other than metallic patents?

A. I know of two.

Q. Now, did you put in the dust-arrester for C. D. Widman, for instance?

A. No, sir.

Q. Who did? Is it a Vortex?

A. No, sir, it is not a Vortex.

Q. Some other patent?

A. I guess I can tell you what it is. What one did you have reference to?

Q. Widman?

A. W-i-n-t-o-n?

Q. W-i-d-m-a-n?

A. From the outside appearance that looks to me to be a Huyett & Smith machine, manufactured here in Detroit.

Q. It is not a Vortex, at all events?

A. It is not a Vortex.

Q. Force & Dickinson, is that a Vortex?

A. No, sir.

Q. Now, I will ask you to go through your list and tell how many of your patent machines are here?

A. We haven't got any of our make here.

Q. Not one in this city?

A. No, sir, not that I know of that we have sold. The Vortex Company, before we got the right to sell, may have sold some.

Q. You don't know of any?

A. No, sir.

Q. The others that you have seen are of some other patent than the Vortex?

A. Yes, I suppose.

Q. When did you make this model?

A. Yesterday.

1778 Q. Make it here in town?

A. Yes, sir.

Q. Made it from drawings?

A. Originated it. I am familiar with the machine and just made a sketch and told the man to make it.

Q. Made it here in town for this case—the model that has been shown?

A. Yes, sir.

Mr. BAKER: I want to ask here—about how wide in diameter do you usually put them on?

A. They run all the way from 24 inches up to 11 feet. We build them as large as 11 feet in one machine. Of course sometimes a factory has on two or three machines.

Q. Did you talk with Murphy & Wasey, for instance?

A. No, sir.

Q. Didn't ask them whether they are satisfied and whether their place is full of dust, whether it worked or not?

A. No, sir.

Q. Do you sell in New York?

A. Yes, New York State.

Q. Do you sell in New York city?

A. No, sir, I have not sold any that I know of in New York city.

Q. Probably for the sake of your business you know something of where dust-arresters are used, don't you?

A. Yes, sir.

Q. Do you know the number that are used in New York?

A. Of the metallic machine?

Q. Of any machine, where they use dust-arresters.

A. No, sir, I don't know the number, but it is used there.

Q. You don't know the number of institutions that require dust-arresters?

1779 A. No, sir.

Q. Have you heard?

A. I have not.

Q. I suppose in a great institution where there is a great deal of manufacturing and a great deal of dust created, one object that must be obtained is to prevent the flying of dust?

A. That is what they are put on for.

Q. This dust, you know, in your business, when it becomes dense is almost as inflammable as gunpowder?

A. They claim so, I believe.
Q. That it will explode, it does occasionally explode and blow up mills?
A. Yes, I have known of several that blew up.
Q. So that they must prevent the flying of dust?
A. That is what they are for.
Q. In the mill?
A. In the mill or outside.
Q. Or. outside or anywhere?
A. Yes, sir.
Q. Now, is there a single Vortex dust-arrester in use in New York city?
A. There are two in shoe factories. You have that circular there of mine. I can tell you, I guess.
Q. How many have you used in New York?
A. We got two there in shoe factories, we may have more.
Q. What flies in shoe factories—pegs?
A. No, sir, heel-trimmers and edge-trimmers.
Q. Your dust-arrester works perfectly in a shoe factory?
A. Well, they of course are not perfect. They are absolutely free from dust—as good a thing as can be gotten up for the purpose.
Q. In shoe factories they are absolutely free from dust?
1780 A. They use them; they are not absolutely free from dust, some of the lightest escapes.
Q. Don't you know in the city of New York there are 48,000 factories and mills that require dust-arresters, in the city of New York and Brooklyn?
A. I don't know anything about it, but that is a big estimate, there might be. I would not know anything about how many there are. There is a great many there, the Allen & Curtis Company have an established agent.
Q. Who are Allen & Curtis?
Mr. BAKER: The Saginaw men.
A. They have a man established there; they are a little bigger company than ours.
Q. Do you know what proportion of the New York mills of various descriptions that use dust-arresters, use metallic ones?
A. Yes, I could say safely that all wood-working factories do.
Q. Well, the factories that use dust-arresters to avoid dust and prevent explosions?
A. We are connected more particularly in our business with wood-working.
Q. Well, but you put in grain-elevators, you say, and in flouring mills?
A. Yes. I don't know anything about how many are in use in flouring mills, because we never had anything to do with a flouring-mill plant.
Q. Do you know how many dust-arresters are in use in planing and wood-working mills in New York?
A. No, sir, I could not say.

Q. How many can you say of your own knowledge? How many metallic dust-arresters are in use in New York and Brooklyn of any kind or description?

A. No, sir, I could not say.

Q. In wood-work?

1781 A. I can give you the names of some firms that use them.

Q. But you cannot tell the number?

A. No, sir.

Q. They don't all use the Vortex, do they?

A. No, sir.

Q. Have you the exclusive right also in Canada?

A. No, sir; we do not go outside.

Q. You haven't the right, then, in Canada?

A. Yes; we have the right if we want to.

Q. You would know if they used the Vortex dust-arrester, a model of which you have shown, anywhere in the United States and Canada, wouldn't you, as you have the sole right?

A. Of course I am not familiar with every place we put them in. We haven't sold any in Canada to my knowledge.

Q. In New York you haven't?

A. In New York State?

Q. New York city and Brooklyn?

A. We have sold some in New York. We have two there that I know of.

Q. Well, only two?

Mr. BAKER: That he knows of.

Q. Those are shoe factories?

A. Those are shoe factories.

Q. Now, you haven't any doubt, have you, your company being the sole agents and having the sole right in the United States—you haven't any doubt that this dust-arrester is the best in the world?

A. Well, I claim it.

Q. You claim it every day when you sell it?

A. Yes; ours is the best, of course. There are several others of the same type.

Q. There are a lot of others that claim to be the best?

1782 A. Yes. Of course Allen & Curtis claim theirs is the best. I used to when I sold it.

Q. You run onto their machine all over in your business?

A. Yes, sir.

Q. They all claim to be the best?

A. Certainly.

Q. You run onto agents who sell dust-arresters that are not metallic?

A. Yes, sir.

Q. And you run onto agents who make a good business by selling dust-arresters which are not metallic?

A. Not for wood-working factories. We do not run against anybody in our business—I have not for the last four years—that makes anything but a metallic dust arrester that we run against. There

are several firms in that business, and we run against them; but they all handle metallic machines.

Q. But you do run onto those who use cloth and burlap?

A. In flouring mills. I met an agent the other day.

Q. In flouring mills the dust is fine, and has to be provided for?

A. Yes, sir.

Q. It is claimed on behalf of the cloth dust-arrester, is it not, that it is the only dust-arrester that will take and hold the dust? Am I right—do they claim it? I want to ask you that, an agent of the Vortex?

A. I don't know what they claim for flouring mills.

Q. Do you know that the agents of cloth dust-arresters, of any description, non-metallic dust-arresters, claim that the metallic dust-arrester don't arrest the finest dust?

A. Yes, sir.

Q. There is a good deal of war in dust arresters as there was in lightning rods and different businesses?

1783 A. Yes, sir.

Q. They issue circulars, oppose each other and so on?

A. Yes, sir.

Q. Now, do you sell any in Boston?

A. Yes, sir.

Q. How many have you got in Boston?

A. Well, we sell a great many to the Boston Blower Company, and they make a business of putting in pipe-work there.

Q. Give them the license to put them in?

A. We simply sell them the machine for so much money.

Q. You could not say where they put them in?

A. No, sir.

Q. How many have you sold in Boston to the blower company?

A. We have sold, anyway, eight or ten machines.

Q. In Boston?

A. And then we put one in for a large piano factory.

Q. How many have you sold in Philadelphia?

A. We haven't sold any that I know of.

Q. How many have you in the great city of Chicago?

A. We have quite a number.

Q. The metropolis of the Republic?

A. We got some in there, yes. We got them in McCormick's.

Q. How many? Give us them.

A. There is McCormick's and Wiltz——

Q. Give us the number; we do not care for the names. It is the home office of the Vortex?

A. The home office of the United States Company.

Q. That is your company, the sole agent of the Vortex?

A. Yes, sir.

Q. How many, in round numbers, have you put in in the city of Chicago?

1784 A. Well, I suppose we have some thirty machines in there.

Q. Can you tell me how many institutions in the city of Chicago use dust-arresters?

A. No, sir.

Q. Haven't you had any list made so that you could canvass for your own machine?

A. We send out circulars there.

Q. I want you to answer the question: Haven't you, in your home office there, the sole agents of the Vortex, a list of the people who want dust-arresters or who use them in the city of Chicago?

A. We have not; only Dun. We check our circulars out of Dun.

Q. You cannot tell how many people want the dust-arrester such as you manufacture?

A. No, sir; certainly not.

Q. Or how many people use any dust-arrester in the city of Chicago?

A. No; certainly not. We advertise in the wood-working journals; travel on inquiries entirely. We have our standing ads. in the papers.

Q. Well, but you have only some 30?

A. In Chicago, yes, sir.

Q. Do you know anything about how many institutions in Chicago use the metallic of any kind or description?

A. Well, I could *from* an estimate of what I think.

Q. I want you to know.

A. I would not give you that. I can give you an estimate of what I think there is there.

Q. Did you ascertain that by inquiry and investigation?

A. No, sir, not by inquiry, just from what I know, what we have sold and what the Allen & Curtis people have sold, and what
1785 Huyett & Smith have sold, and what Kuche, a man that used to be in the business, sold. There were four or five firms in this business, and all sold a number of those machines.

Q. There are some 50 or 60 other patents in this business, to your knowledge?

A. Fifty or 60 others that make a special business——

Q. Fifty or 60 different patents for dust-arresters?

A. I said I have seen 40 or 50 papers that I have in my office. That is all I know. You said 300.

Mr. BAKER: You don't claim that every patent is manufactured?

Q. I won't claim that, but there are at least 300 that are manufactured.

A. Well, I don't know.

Mr. BAKER: 300 patents, I understood you?

Q. 381 patents, and they are all the best dust-arresters on earth.

A. Some of them are back numbers, probably not made at all.

Q. You don't know anything about that at all, do you?

A. I know about one of them in particular.

Q. You don't know anything about what is in the city of New York, evidently, you don't know anything about what is in the city of Philadelphia, evidently, you don't know anything about what is

in the city of Boston, evidently, and you don't know anything about dust-arresters in the city of Chicago. And that is all you know?

Mr. BAKER: He has testified to no such thing.

Q. He says he don't know the concerns that use dust-arresters in the city of Chicago.

A. That may be, but I can easily give you a list of them if you want them.

Q. Do you know any one that uses anything but a metallic dust-arrester in Chicago?

1786 A. Wood-working institution?

Q. In any institution where fine dust flies?

A. I am only testifying on wood-working, I don't know much about mills. I can say of wood-working institutions that I don't know of any other but metallic dust-arresters, although there may be some others.

Q. There is a pretty strong argument made for the merits of the cloth dust-arrester, made by the owners of the cloth dust-arrester.

A. Not for wood-work.

Q. As against yours?

A. Not in wood-working plants.

Q. They do not claim they can do the work as well as yours?

A. No, sir.

Q. Those who own patents on dust-arresters?

A. No, sir.

Q. Now, you do not claim in your scheme of the dust-arrester the discharge of the dust into the furnace, do you. That is not in your scheme or patent—the discharge of the dust into the furnace?

A. This part here (referring to model).

Q. Discharge into the furnace. That is plain English?

A. You mean the furnace-feeder.

Q. Yes, you don't include in your patent the discharge of dust into the furnace?

A. Everything that goes down this hopper here goes into the furnace if you feed it.

Q. Don't you think in that case that if this avalanche of dust went into the furnace it would be apt to blow up your mill?

A. Well, it don't do it.

Q. Then I understand you to say that you include in your design the turning of the dust into the furnace?

1787 A. That is, if people want it. That is another device entirely.

Q. Is there any patent on that?

A. Well, we have not, because Allen & Curtis claim a patent on the feeder.

Q. Where have you seen it where the dust was conducted from the dust-arrester into the fire, where it is in use?

A. Well, we have got it in the Madison Car Co., and we have it in Mason & Myer in Buffalo.

Q. What is their business?

A. Sash, doors and blinds, and Metz has it—hardwood interior finish.

Q. They conduct it directly into the furnace?

A. Yes, sir.

Q. How large an institution is that sash, door and blind institution?

A. It is a good-sized plant. We put in two three-thousand-dollar jobs of piping, dust-arresters.

Q. As large as the Backus mill?

A. Well, I don't know, but I think it is as large. It may not be.

Q. What amount of horse-power is necessary to use to work your dust-arrester?

A. There is no moving parts in there. It don't require anything in the way of power for this. It is for the fan.

Q. Doesn't it require some considerable increase of power over the old style of dust-arrester?

A. Not over the old style. Of course you rotate air, and it takes a little back pressure. Of course you cannot blow air through a straight pipe any distance but what you will get a certain amount of back pressure.

Q. If it was not for the back pressure the metallic dust-arrester could not work?

1788 A. Not necessarily need to be back pressure. Of course, as I say, you rotate air, or drive it through a straight pipe and elbow, and you cause some back pressure. You can see by putting a glass on it and testing it, but I claim that these machines, the fan, always have a free outlet, and there is less back pressure on this class of machine than on any other that is used.

Q. You are going to leave that model with us, are you not?

A. Yes, sir.

Q. Do you know any other place where they discharge dust and shavings into the furnace?

A. McCormiek Harvester Co. and Wiltz. That is the plant here (referring to paper).

Q. Do they discharge it in the McCormick Harvester Company directly into the furnace?

A. Yes, sir.

Q. Without any stoppage anywhere?

A. Not unless they want to throw them into the vault—getting too many. Then they will switch in there?

Q. If they get too many?

A. Yes, sir.

Q. Isn't the tendency of putting dust on fire in furnaces to smother the fire if it comes in great quantities?

A. Well, I don't know anything about that. All I know is they work when we put them in.

Q. Any other place where they turn the dust into the furnace?

A. There is the Buffalo Planing Mill Company.

Q. That is the one you just told us of?

A. No, sir.

Q. Another one? That is three.

A. That is another one. And the Milburn wagon works at Toledo. And we put them in at North Baltimore, at the North Baltimore Furniture Company.

Q. Maryland?

1789 A. Ohio.

Q. Yes—5.

A. If you get that circular there, I have got a lot of names on there. I can tell that have got feeders. A. H. Andrews, Chicago. I put in feeders there.

Q. Well, do they discharge directly there?

A. Just the same as this cut shows.

Q. I don't want the cut. I want to know how the dischage is made from the mill?

A. From here. We simply put a switch right on here. This side leads to the shavings vault in case they are getting too many on, and the other side will lead down to the furnace.

Q. They all provide for a discharge when they get too much into the vault?

A. Yes, sir.

Q. How is the dust and shavings vault relieved when that gets filled?

A. When the shavings vault and furnace gets filled?

Q. No, sir. The shavings vault and dust vault—they are separate?

A. No, sir. They are all in one, unless you get a sawdust pipe separate from the shavings.

Q. How is the vault relieved when it is not discharged into the furnace?

A. You got to haul them out or shovel them out; that is all.

Redirect examination.

By Mr. BAKER:

Q. Now, you have given some testimony as to the number of Vortexes that are in use in Chicago as thirty. Will you state whether Allen & Curtis, the Saginaw firm, have an agency in Chicago?

A. Yes, sir.

1790 Q. Do you know whether or not they have put in a large number of them there?

A. Yes, sir.

Mr. DICKINSON: Just give your number.

Q. Have you any way of telling or have you ever made any account so that you can tell how many there are?

A. No, sir, I have not done that, I have not counted them. I can merely make an estimate of what I think there are there, but I can name a few of the firms that have them.

Mr. DICKINSON: Do they do a better business than you?

A. They do four or five times the business we do. They are a larger company.

Q. Have they been at it longer?

A. They have been at it a great deal longer. We have been in it only three years and they have been in it since the patent came out.

Q. There is a lawsuit pending between your company and that company as to the validity of your patent?

A. Yes, sir.

Q. Now, do they make a metallic dust-arrester that acts by centrifugal force, substantially like this?

A. Yes, sir.

Q. This firm in Jackson, the Knickerbocker Company—do you know whether they make a similar apparatus?

A. For wood-working Heizer had that right here before the consolidation between these two companies.

Q. What did the Knickerbocker Company make it for?

A. For flouring mills. They divided the patent and one took it for flouring mills and the other for shavings and dust.

Q. Do you know of any burlap dust-arrester like that down on the Backus mill in use in Chicago?

A. I don't.

1791 Q. Do you know of any one except this one that is in use anywhere in the United States?

A. Well, I saw one right down here on this next factory, up this way. There is one in there. I should judge it is either the O K or the Backus by the looks of the house.

Q. That is the organ works, Clough & Warren?

A. I think so, down along the tracks.

Q. You have traveled pretty much over the Northern States in this business?

A. Yes, sir.

Q. Have you found one elsewhere, and just tell us where, if you have?

A. I have not in the last three years that I know of.

Q. You don't remember of seeing one in use anywhere in the last three years?

A. No, sir.

Q. Prior to that what were they?

A. Well, the Milburn Wagon Co. had one.

Q. How do you know that?

A. They told me so and we put in a system of pipe and dust-collector there about three years ago. Allen & Curtis had put in their type of machine and we took theirs out and put ours in, but before that they told me they had a burlap. I believe it was a Backus dust-arrester.

Q. In all your travel any time in the last six years have you run onto any burlap Backus dust-arrester?

A. Palmer & Fuller had one in Chicago, but it is not in use; they have taken it out, and Peters had one, and when I was coming through here I saw they had substituted the other machine.

Mr. DICKINSON: Is it Backus or burlap?

A. I don't know, I suppose it is Backus dust-collector. And Mar-

shall, and Allen & Curtis man I met on the train, said he had sold him an outfit, so that that is out of there.

1792 Q. You knew they had a cloth arrester there although this one was being put in now?

A. Yes, sir.

Q. You saw that the other day when you came from Toledo?

A. Yes, sir.

Q. Where is there any other Backus dust-arrester?

A. I saw one about five years ago, I think, in Milwaukee, a party had one there, and there was one used at Oshkosk, if I remember right.

Q. What has become of them?

A. I don't know, but the one at Milwaukee—the party says it was taken out.

Q. What was put in in place of it?

A. Cyclone.

Q. The Cyclone is the dust-arrester that is manufactured by Allen & Curtis?

A. Well, I don't know the real name, but the Cyclone was this one made in Jackson. They have all got their different machines. We call the Allen & Curtis the A. & C. machine, although the general public call all of them that name, but we have a particular name in the trade. The public says the Cyclone; they were named that when the machine first came out and most of the people commonly talking call them that now.

Q. Have you ever visited New York city in connection with your business?

A. No, sir.

Q. Has your company an officer there?

A. No, sir.

Q. Have Allen & Curtis?

A. Yes, sir, they have a man there.

Q. Do you know whether or not the centrifugal dust-arrester is in use in New York city?

Objected to. He says he has not been there.

1793 Q. You say you have been there on business?

A. Yes, sir.

Q. From your knowledge of the manufacturing institutions in the city of New York, will you state whether or not the Cyclone or Allen & Curtis, or Vortex are in general use there?

Objected to. The witness has not shown any knowledge.

Q. State whether you know or not?

A. I know something about it; yes, sir.

Mr. DICKINSON: Well, he wants to state his knowledge.

Q. What do you know about it? How many days did you spend there?

A. I put in centrifugals when I traveled for Kuehe for Hall & Son up at 100th street, and I had another job there for another

party, a mantle man; I cannot think of his name. Kuche had sold a machine to Behr Brothers and to the Fisher Piano Company, but I cannot think of the other party there. I was connected with Kuche, and I knew the list of machines—that is, referring to his books, and I knew that there were some of his machines there, and Allen & Curtis, of course.

Q. You say you have been there in New York and put in these machines. Do you know of any burlap dust-arrester that is in use there?

A. No, sir; I never run across it.

Q. Have you visited Boston?

A. Yes, sir.

Q. In your business?

A. Yes, sir.

Q. Do Allen & Curtis do business there?

A. Yes, sir.

Q. Do you know whether or not the burlap dust-arrester is in general use in Boston?

A. For wood-working purposes it is not.

1794 Q. Have you visited Philadelphia?

A. I have been there, but not for four years.

Q. Not in your business?

A. Yes, on business.

Q. Do you know whether or not the burlap dust-arrester is in general use there in wood-working establishments?

A. I never run across any there. Allen & Curtis have sold machines there and Kuche the centrifugal; he has put in some there.

Q. You were the agent, as I understand you, some years ago of the cheese-cloth dust-arrester?

A. When I was working for Kuche; yes, sir.

Q. Will you state what the fact is in regard to the back pressure there on a cloth dust-arrester, what causes the back pressure?

A. The light dust mats up the pores in the cloth, and consequently it don't give the free relief. It is all right for a little while, an hour or two, and then it will mat up, and they have to clean it. This Kuche machine had a bumper, and they had to clean it morning, noon and night. Besides that they would mat up and in a month or two be all filled up, and you could not get it off. We had a great deal of trouble with them, although he sold quite a number of them at the time; but they have been taken out since.

Q. Is that more or less true of any cloth dust-arrester?

A. Yes, sir.

Q. If the mesh is very coarse, of course it is not——

A. It won't mat up as freely, but then it will allow sawdust to get out.

Recross-examination.

By Mr. DICKINSON:

Q. Did you go into the American Pencil Company factory in New York?

1795 A. No, sir.
Q. The Eagle Pencil Company?
A. No, sir.
Q. Ever been in a pencil factory?
A. No, sir.
Q. You don't know, then, about the fineness of the dust?
A. No, sir; not in a pencil factory.
Q. Do you know in your business generally, from hearing it, that in the manufacture of pencils very fine dust is raised?
A. I had a communication from the Eagle Pencil Company in Florida, wanting to know about this dust-arrester. They were building a plant there—about a year ago.
Q. I am asking you if you know about the fineness of the dust raised?
A. No, sir.
Q. Have you heard of the American Pencil Co.?
A. I don't know it.
Q. You know of the Eagle?
A. I know of the Eagle.
Q. They have put in the burlap and won't have any other?
A. That might be, I won't say anything to the contrary.
Q. You say you don't know of any, although on your cross-examination you did not seem to be very familiar with the number of dust-arresters in Chicago. You don't know of any in Chicago that use Burlap?
A. No, sir.
Q. I understood you correctly that you had no list in your business and depended entirely upon inquiries of the people who used dust-arresters, depended upon inquiries for your dust-arresters?
1796 A. All I mean to say, in my travels I have not run against any, there may be some.
Q. Didn't I understand you on cross-examination to say you had made no canvass of the dust-arresters and depended upon inquiries?
A. Yes, sir.
Q. Then you do not go about Chicago making inquiries and looking up dust-arresters?
A. I live there and am around there a good deal.
Q. Have you made any canvass, do you change your testimony—whether you have made any canvass in the course of your business?
A. Only in the course of our business.
Q. Only when you have been called upon to put them in?
A. When we go to one factory we will see another and see a great many.
Q. You haven't made any canvass?
A. I have not gone out with a paper and made a canvass.
Q. Have you been around to see what dust-arresters there are?
A. In the course of our business we are out there every day.

Q. Then do you correct your testimony that you depend upon inquiries for your business, and don't go about asking for it?

A. A good deal—mostly on inquiries and letters.

Q. You say you never run across a cloth, burlap or any other than a metallic dust-arrester in Chicago?

Mr. BAKER: In the woodworking business.

A. I said I saw one at Palmer & Fuller's.

Q. In Chicago?

A. Yes. It is not in use. I sold them an Allen & Curtis machine.

1797 Q. Did you go into Newell's piano-key factory in Chicago?

A. No, sir.

Q. Don't know what they use there?

A. No, sir. I have heard of the factory, I never was in it.

Q. Do you know whether in the manufacture of piano keys they make a very fine dust?

A. Yes, sir.

Q. You don't know whether they use burlap?

A. In Comstock & Cheney's——

Q. Will you answer my question, Mr. Patentee.

Mr. BAKER: He is not a patentee.

A. I don't know what they use.

Q. I want to know whether you know that the manufacture of piano keys makes a very fine dust?

A. Yes, sir.

Q. I want to know if you know whether they use burlap?

A. I don't know what they use.

Q. Will you swear then to the jury that there are not 38 concerns in Chicago that use burlaps and cloths.

A. In wood-working?

Q. I don't care what it is in, it is where fine dust is.

A. I am on wood-working, and I don't want to go into the flouring mills or anything of that kind. You can ask me anything you want on wood-working.

Q. Will you swear there is nobody in Chicago in the wood-working business that uses cloth today.

A. I don't know of anybody.

Q. Will you swear there is not?

A. No, sir.

Q. Will you swear there are not ten where they have particularly fine dust in wood-work.

1798 A. I will simply say I have not seen a burlap or cloth dust-arrester in a wood-working factory.

Q. I ask you whether you swear; you know you said you did not go to these mills in your business except as you went in the ordinary course of your business. I ask you whether you will swear there are not at least ten in Chicago who use burlap and cloth?

A. You mean in wood-working?

Q. Yes, I said 28 generally.

A. I won't swear. There might be 100, for all I know.

Mr. BAKER: Of course you don't know whether they are there or not.

A. No, sir, but I can name some leading concerns in the business who use the metallic.

Q. You are in the business?

A. I have not seen one. Of course we are in the city looking after the metallic, and when one machine goes in we know it.

Q. Do you know of any piano-key factory that has metallic?

A. Comstock & Cheney, of Vermont, use the centrifugal.

Mr. DICKINSON: Do the Comstock & Cheney Piano Company make piano keys?

A. Piano keys and key-boards.

By Mr. DICKINSON:

Q. Is that Gov. Cheney, of New Hampshire?

A. I don't know.

Q. Will you state to this jury that they make piano keys?

A. They make them, cut out the celluloid. There is one fan there that does nothing but take its dust; there are a lot of machines that cut this celluloid and ivory, and they have a big bleaching-house to bleach the ivory.

Q. They have one machine that takes the dust?

1799 A. One fan.

Q. And you swear that Comstock & Cheney make piano keys and finish them?

A. They make key-boards ready to put in an organ or piano.

Q. Do they make piano keys and finish them in that factory?

A. They saw out——

Q. Will you answer the question whether you know or not?

A. Well, I will say yes.

By Mr. BAKER:

Q. What do you say they make there?

A. They make key-boards; that is, they cut out the ivory and cut out the black keys and make the whole thing. This is one of the largest in the country, supplying firms like Fisher and a great many other concerns in the city—key-boards, as I call them.

Q. Mr. Dickinson was very careful to ask you to testify whether they finished them or not. Do they make them in the rough?

A. They sell them right out of their shop, all ready to stick in.

Q. Do they polish them and finish them?

A. Yes, and the Monroe Organ Reed Company are in the same business.

Mr. DICKINSON: Do you mean piano boards?

A. Piano or organ.

Q. You swear to the keys as well as the key-boards?

A. I suppose you call a key that thing they put their finger on?

Q. Yes?

A. They make them.

Q. And finish them?

A. Yes, sir.

1800 Mr. BAKER: Do you know whether they finish them there or not, polish them finally?

A. They saw the celluloid out there and put it on?

Q. You have seen that?

A. I have seen that.

Q. You don't know Gov. Cheney?

A. No, sir.

Q. You are not very familiar with politics in New Hampshire?

A. No, sir. This was Connecticut.

JOHN FINN, sworn on behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you live?

A. Detroit.

Q. How long have you lived here?

A. Twenty-two years.

Q. What is your business?

A. Building and mason-work.

Q. Do you know Patrick Dee?

A. Yes, sir.

Q. Did you go with him to examine the Backus property?

A. Yes, sir.

Q. Yesterday or the day before yesterday?

A. Yes, sir.

Q. Did you and he make an estimate of what it would cost to duplicate the mason-work down there, and the brick-work and plastering and stone-work?

A. Yes, sir.

Q. Did you and he make the estimate together?

A. Yes, sir.

Q. Make your own measurement?

A. Yes, sir.

1801 Q. You measured all the different walls and the plastering and all sorts of mason-work down there?

A. Yes, all that we knew of.

Q. All you could see?

A. All we could see.

Q. The foundations of the building and all that sort of thing?

A. Yes, sir.

Q. What would it reasonably be worth to duplicate the mason-work there?

A. $26,884.08.

Q. You would be willing to take a contract to duplicate that amount of work for that amount of money?

A. Yes, sir.

Q. Would it be a fair and reasonable price for it?

A. I think so.

Q. You didn't make any estimate of the wood-work?

A. No, sir.

Cross-examination.

By Col. ATKINSON:

Q. That is just the mason-work?
A. Yes, sir, the brick-work, the rubble-stone work and cut stone.
Q. Does that include all the plant?
A. Yes, sir.
Q. The office and everything?
A. Yes, I have them all separate here.
Q. How deep a foundation do you allow?
A. Five feet below the ground, below the grade.
Q. How wide do you make the foundation walls, how thick?
A. From 16 inches to 4 feet.
Q. Did you measure them yourself or make an estimate?
1802 A. I measured them as they are with the exception of the two retaining walls, which we measured and used our own judgment about what was necessary. We measured them four feet thick but Mr. Backus said they were six. Of course we could not see the walls but we put them in at four feet thick.
Q. So that in some respects you lessened the masonry from what the Backuses told you it was, from what you could see and used your own judgment of what it ought to be?
A. Yes, sir.
Q. What difference would that make in the cost of those walls?
A. That would make a difference of about $1,500.
Q. On the other walls did you assume the measurement as Mr. Backus told you?
A. Yes, sir.
Q. So that if you did the mason-work as Mr. Backus says it has been done, you would add $1,500 to your estimate?
A. Yes, sir.
Q. What price do you figure the brick at?
A. $9 a thousand.
Q. In the walls?
A. In the walls.
Q. That is a very low figure, isn't it?
A. Well, that is what I figure work at now.
Q. You are figuring it then at the present depressed prices?
A. Yes, sir.
Q. How would you figure that two years ago?
A. Well, about the same, that class of work—a fair price.
Q. Do you think you included everything that there is there?
1803 A. Yes, I think I did as near as I could get it.
Q. You would be willing to take the contract, would you?
A. Yes, sir.
Q. And replace the mason-work at that figure?
A. Yes, sir.
Q. Then that would make for you, adding the $1,500, a little over $28,000 for the mason-work alone of that plant?

A. Yes, sir.
Q. Did you figure any stone capping?
A. Only on the office.
Q. Isn't there any stone used in the mill?
A. I didn't notice any on any building except the office building.
Q. Then what you endeavored to do was to see what you could put up a duplicate of that work —, just as it is.
A. Yes, sir.
Q. Did you figure the foundation walls of stone?
A. Yes, sir.
Q. And the retaining walls?
A. Yes, sir.
Q. You figured it, then, just as it is?
A. Yes, with that exception I made about the retaining walls.
Q. What did you allow for the stone-work?
A. 20 cents a cubic foot; that is, $3.20 a perch, and 25 cents a cubic foot for the retaining wall, which was to be laid with Portland cement.
Q. In the mason-work or brick-work, as it is called, do you figure anything for sewers?
A. No, I didn't estimate anything for that.
Q. That is entirely separate?
A. Yes, I haven't got that.
1804 Q. Then this simply covers the walls of the building, the brick and stone work of the walls?
A. Yes, sir.

Direct examination:

Q. What about the retaining wall? Where is that?
A. That is the retaining wall of the yard.
Q. Between the Michigan Central and Backus?
A. Yes, sir.
Q. Do you know whether that was built by the Michigan Central or Backus?
A. No, sir.
Q. You reduced the width there to four feet on what ground?
A. Well, I called it four feet because I thought that was necessary. Mr. Backus said it was six.
Q. Did he tell you that the Michigan Central built it?
A. No, sir, he didn't say who built it.
Q. But, as a builder, would you say that four feet was enough?
A. Yes, sir. I think if it was made of that class of cement, Portland cement.
Q. How long is that wall?
A. 172 feet, I think.
Q. And it runs from Fort street?
A. Yes, sir.
Q. Along the line of the Michigan Central property?
A. Yes, sir.

Q. So as to hold the land up there?
A. Yes, sir.
Q. You don't know who did build it?
A. No, sir.
Q. And if you figure that wall two feet wider, as Mr. Backus says, you would add $1,500?
A. Yes, sir.
1805 Q. Otherwise your figures are correct, duplicating it just as it is?
A. Yes, sir.

Recess until 2 p. m.

2 O'CLOCK P. M.

CHARLES M. HEALD, after being duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. BAKER:

Q. Where do you reside?
A. Grand Rapids, Michigan.
Q. What is your occupation?
A. General manager of the Detroit, Lansing & Northern road.
Q. Of any other road?
A. Of the Chicago & West Michigan; vice-president of the Fort Street Union Depot Company.
Q. The Detroit, Lansing & Northern railroad runs from this city to Grand Rapids on another line up to Howard City?
A. Yes, sir.
Q. Did your road—that is, the Detroit, Lansing & Northern—formerly own a strip of land just this side of the River Street crossing; that line from River street through the yard of the Michigan Central Company to the river?
A. Yes, sir.
Q. How wide was that parcel of land?
A. 160 feet on the water and running back equal width through to River street.
Q. Will you state the facts and circumstances connected with the sale of that property to the Michigan Central Railroad Company; how it came about and how the price was fixed? State a
1806 history of your controversy over that property. That would, perhaps, be the better way.
A. Well, in 1887 the Grand Rapids, Lansing & Detroit railroad, a corporation formed for the building of a road from Grand Ledge into Grand Rapids, a continuation——

Mr. ATKINSON: I would like to interpose an objection to this testimony as incompetent and immaterial.
Mr. BAKER: This was drawn out, if the court please, by the cross-examination of Mr. Joy. Mr. Dickinson wanted a witness who knew the facts in regard to it.
The COURT: I think I will admit the testimony.
Exception for the defendant.

A. (Continuing:) I must go back, necessarily, a little bit in my testimony in order to show the cause for the sale of this strip of land——

Mr. DICKINSON: Let me ask you right here: When did you come here?

A. On the first of March, 1890.

Q. Then you were not here in 1887?

A. No, sir.

Q. Are you going back of the time you came here?

A. Yes, sir, the reason I do that is simply to show the condition of affairs at the time I took hold.

Objected to.

The COURT: You will have to confine yourself to your own personal knowledge.

A. I purpose doing that. I simply want to mention in advance the situation I found, not to state why that was the condition of things, but to state what I found at the time I took hold. As I say in 1877 this road was built. The Michigan Central claimed it was a violation of the contract between the Detroit, Lansing & Northern and that road, and for that reason declined to further accept the rental which the Detroit, Lansing & Northern road had been paying the Michigan Central road for the use of its terminals at that time.

1807 Q. What had the rent been?

Objected to as immaterial and incompetent.

Mr. BAKER: It is a part of this same subject, if the court please.

Mr. DICKINSON: We insist upon the objection.

The COURT: How do you claim that is material?

Mr. BAKER: What we desire to show is that they got into a controversy about this rental, and that there was a settlement of the controversy. I want to show how they differed in regard to the rent. It will all appear to be competent as soon as he goes on and states the facts in regard to it. And it was all settled in one transaction.

WITNESS: I may state here that the sale of this piece of property was not an out-and-out sale of property, but it was merely put in as a part of a general settlement of old accounts between the two roads. That is the reason I wanted to go back a little bit.

Q. Will you state what that controversy was, and how you settled it?

Mr. DICKINSON: That we object to as incompetent and immaterial.

Mr. BAKER: As bearing on the value or the price that was paid for it.

The COURT: I think I will admit the testimony.

Exception for the defendant.

A. (Continuing:) The Michigan Central objecting to the building of this connection between Grand Ledge and Grand Rapids raised the rental from $10,000 to $40,000 per annum. The Detroit, Lan-

sing & Northern took exception to that, and continued to pay on the basis of $10,000. The Michigan Central claiming $40,000, only credited the payments on account. That was the condition of affairs when I took hold.

Q. How did you finally adjust it?

A. When I took hold I was notified shortly after that by the
1808 Michigan Central that we must either pay the $40,000 rental or must leave there. About the same time or shortly afterwards I ascertained that the D., L. & N. Company owned this strip of land which ran from the river back to River street, right straight through their yards, and I notified the Michigan Central people they would either have to pay a rental for the use of that land or they would have to discontinue the use of it.

Q. It ran right across their tracks?

A. It ran right straight across their tracks; it was a strip 160 feet wide, for which the D., L. & N. road never received any compensation whatever. That led to a number of conversations and a good deal of correspondence between the two roads, and it was finally adjusted, the rental having accrued, on the basis of $40,000 for three years and a half, up to the first of March, 1891. On that date a settlement was made. In that settlement this strip of land 160 feet wide was put in at a valuation of $80,000.

Q. What was the rent figured at?

Objected to as incompetent and immaterial.

Mr. BAKER: I desire to show they figured the rent at $40,000.

Mr. ATKINSON: It will open up an issue whether the Michigan Central had a lawful claim or an unlawful claim of $40,000. It seems to me that is an issue we cannot try here.

Objection overruled. Exception for the defendant.

Q. State at what amount the rent was figured at, please? In fixing up your account, I understand you allowed $80,000, in the settlement, for the land?

A. The Michigan Central had the D., L. & N. charged for three years and a half on the basis of $40,000; that was $160,000 in round figures. As against that they offered to take in part payment
1809 this strip of land and another piece of land which the D., L. & N. road owned in Detroit in part payment, and the balance was paid in cash.

Q. So the Detroit, Lansing & Northern had to make a large payment to them?

A. They made a payment of $25,000 to them in cash, in addition to the balance of this account.

Q. What, if any, agreement was made in regard to the rent until you could move into the union depot?

A. That was a part of the agreement under which this settlement was made; that the Michigan Central were to permit the D., L. & N. to stay there for two years from the 1st of March, 1891, at the rental which was based upon this settlement. Each item of this settlement was a part to make up the general whole.

Q. Do you know, in a general way, how long the Detroit, Lansing & Northern had been in that depot?
A. No, sir, I don't.
Q. That is, you have no personal knowledge of it?
A. No, sir, I haven't.
Q. Do you know whether or not it was customary for the Detroit, Lansing & Northern to pay a rental of $10,000?
A. It had been for a number of years past; some ten or fifteen years back.
Q. After you assumed the management, did you continue to pay at that rate?
A. We paid at that rate, but we were credited on account merely. They insisted on the $40,000.
Q. In the end it was just as you have stated?
A. On the basis of $40,000; yes, sir.

Cross-examination.

By Mr. DICKINSON:

Q. Was the arrangement with the Michigan Central by which you paid $10,000 in writing?
1810 A. Yes, sir.
Q. Where is it?
A. It is on file.
Q. Have you it?
A. Not with me.
Q. Can you get it, so we can have it in evidence?
A. Not today.
Q. Will you get it and send it in?
A. A copy will be sent here. If it is necessary to send the original I will do so.
Q. The agreement was in writing?
A. Yes, sir.
Q. Then I insist upon the original?

The COURT: I think you are entitled to that Mr. Dickinson.
Mr. DICKINSON: I move to strike out the testimony in reference to the conflict between the Michigan Central and the Detroit, Lansing & Northern.
Mr. BAKER: I object to its being stricken out. All he has testified to is that they paid $10,000 a year, and went on to pay it. He has not undertaken to give the contents of this written lease. If they want a copy of the lease we will be glad to furnish it at the proper time.
The COURT: I think, Mr. Baker, they are entitled to a copy of the written agreement. Unless that is furnished the testimony will be stricken out.

By Mr. DICKINSON:

Q. Are the Detroit, Lansing & Northern using this strip of land?
A. Using it merely to pass over with the trains.

Q. They were not using it independently of the Michigan Central?
A. No, sir.
Q. It is a part of the yard for which the Detroit, Lansing & Northern paid ten thousand a year?
1811 A. Yes, sir.
Q. You had no special use for this except as the tracks of the Michigan Central ran over this strip?
A. No independent use of it.
Q. And you had no use for it, as far as you know, for years before?
A. I know of nothing prior to the time I took hold.
Q. Will you please state, Mr. Heald, whether the agreement by which you say a settlement was made was in writing?
A. It was.
Q. Where is it?
A. It is on file.
Q. Will you produce it?
A. I can do so.

Mr. DICKINSON: I move to strike out the testimony, the entire testimony, may it please your honor, of this witness.
The COURT: The testimony will be stricken out unless the agreement is produced.
Mr. BAKER: We will produce the agreement.
The WITNESS: The agreement will not show up the transaction. It will simply tend to corroborate my statements.

Q. But you did make the agreement in so far as the settlement between the Michigan Central and your road was concerned, in writing.
A. The first agreement you asked for I found in effect when I took hold. That formed the basis of the rental we were at that time paying, and the furnishing of that will simply corroborate my statement. The second agreement is an agreement for the use of their premises from the first of March, 1891, to the first of March, 1893, which shows the new rental after the settlement in which this strip of land was taken as a part.
Q. You will produce that agreement?
1812 A. Certainly I can produce that.
Q. Did you in making the adjustment in figures, allot so much for this thing and so much for that—I think, to use your language—was that reduced to writing?
A. No, sir.
Q. Was it not reduced to writing in the correspondence?
A. It was reduced somewhat to writing in the shape of correspondence.
Q. So that the various items are in some writing?
A. Not exactly; they were finally settled at a conference.
Q. Between whom?
A. Between Mr. Ledyard and myself.
Q. The final adjustment was made between Mr. Ledyard and yourself?

A. Yes, sir.
Q. Any one else present?
A. I don't remember as there was.
Q. Did the Michigan Central ever abate its claim for $40,000?
A. No, sir.
Q. They insisted that it was their legal right to charge that?
A. They did.
Q. And your original agreement for $10,000 was then some ten or fifteen years old, was it?
A. The date of it I don't remember, sir.
Q. Well, fifteen or twenty years?
A. I don't think it was as long as that. I cannot tell.
Q. It will show for itself when you produce it?
A. Certainly.
Q. Had the business of the Michigan Central largely increased since that?
A. It had.
1813 Q. So that they were crowded for room?
A. I presume it was increased. I don't know of my own knowledge.
Q. So that they were crowded for room, I say.
A. No necessitating the removal of our trains, not to that extent.
Q. You were not present at the previous trial of this case when they said they were so crowded for room you had to get out?
A. No, sir, I was not present.
Q. At least the business had doubled in fifteen years?
A. That I cannot answer. I don't know anything about their business.
Q. Do you know the rental value of the entry into the Michigan Central depot had increased in fifteen years?
A. I don't think that is a question I would care to answer, unless I am required to.
Q. I am only asking you what you think. You stated you ought not to pay over $10,000, and they insisted you ought to pay $40,000.
A. I am perfectly willing to answer that to the extent that I thought $40,000 was an excessive amount.
Q. But the business had largely increased in the yard of the Michigan Central?
A. I don't know anything about the Michigan Central. I can only answer for the D., L. & N.
Q. When any one has anything to rent they usually charge what it is worth to them?
Mr. BAKER: Not if they have made an agreement to take less.
Q. But if the agreement had expired it makes a difference. They had a right to charge more if they thought it was worth more. You never proposed to refer it to see what was a proper rental?
A. There was no action taken in that direction.
1814 Q. The Michigan steadily maintained that it was worth $40,000, and they would have to charge it, didn't they?
A. Yes, sir.

Q. Did Mr. Ledyard ever say in the conference that $80,000 was too much for the piece?

A. I don't remember that he ever made that remark.

Q. That was your proposal to charge him that?

A. No, sir.

Q. Who did suggest it that the price fixed for the piece should be $80,000?

A. I don't remember what the original price fixed for the piece was. That was done in a conference between Mr. Ledyard and myself, but just what the original price was, I don't remember.

Q. I am not asking you for the original price.

A. I mean to say the original figures suggested. It is impossible to remember that.

Q. What did the D., L. & N. pay for that strip of land?

A. I don't remember.

Q. The books show?

A. I presume they would.

Q. Will you kindly send that in?

A. I will furnish whatever is required.

Q. Do you know who you bought it of?

A. No, sir.

Q. Do you know anything of the circumstances under which it was bought?

A. No, sir. It was bought a good many years ago.

Q. After you went out of there, you had already made your arrangements when you had your talk with Mr. Ledyard on the part of the union depot company?

A. Yes, sir.

Q. And were going into the union depot company?

A. Yes, sir.

1815 Q. That was before you had settled this matter you had arranged to go?

A. Yes, sir.

Q. After leaving the Michigan Central you had no use for this strip?

A. Yes, we could have made excellent use of it on the water front.

Q. Did you have any way to get at it except over the Michigan Central tracks?

A. No, sir. We would not have used it in connection with the D., L. & N. That would have been impractical. We could have used it the same as any other person for warehouse purposes.

Q. Not in connection with the D., L. & N.?

A. No, sir.

Redirect examination.

By Mr. BAKER:

Q. At the time you came here, was your road and the Michigan Central doing business together under this agreement you refer to?

A. Yes, sir.
Q. With a fixed rent at $10,000?
A. Yes, sir.
Q. Although it may have been dated some years before, it was still extant?
A. Yes, sir. The agreement, I think, was dated in 1874.

Mr. ATKINSON: That is objected to as incompetent.

Q. I don't care about the terms of the agreement. I want to know whether, as a matter of fact, you were still operating under it when you came?
A. Yes, sir.

Mr. ATKINSON: All that Mr. Heald can state is that he
1816 found the agreement in the files of his office, and he also found a notice from the Michigan Central that they must pay $40,000 instead of $10,000.
The COURT: The question is under what agreement they were operating at the time he went there.
The WITNESS: I beg your pardon. I did not find the notice that we were to pay $40,000. That was given subsequently.

(After leaving the stand the witness states that it is a rule of his office not to allow an original paper — go out of his office, and it is agreed by counsel that a certified copy may be used in place of the original agreement.)
(The further consideration of this case was then adjourned to next day at 9.30 a. m.)

SEPTEMBER 28, '93—9.30 a. m.

GEORGE F. SHERWOOD, sworn on behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. Jackson, Mich.
Q. What is your business?
A. Agent for the Allen & Curtis Dust-arrester Company, of Saginaw.
Q. What sort of dust-collector do they sell?
A. They sell a metallic dust-arrester, a centrifugal machine.
Q. How long have you been connected with that company?
A. A little over five years?
Q. What do your duties consist of?
A. Making drawings of factories, such as planing mills and furniture factories; in fact, every factory where they make shavings and dust from wood.
1817 Q. Does your work relate to wood-working establishments?
A. Yes, sir.
Q. Exclusively?
A. Why, not entirely so. We sell to shoe factories.
Q. Do you have anything to do with flouring mills?
A. Nothing at all, sir.

Q. Were you connected with any manufacturing institution some years ago before you went with the Allen & Curtis Company?

A. Yes, sir, with the Smith Purifier Company, at Jackson.

Q. That was a large wood-working institution?

A. Flour-mill machinery.

Q. They manufactured flour-mill machinery?

A. Yes, sir.

Q. And it was a wood-working establishment?

A. Well, we had wood-working machines there, of course.

Q. You did not manufacture flour there?

A. No, sir.

Q. Will you state whether or not you travel throughout the United States in the introduction of this metallic dust-arrester?

A. Why, I have traveled as far as California, Tacoma, Seattle, Lower California, Kentucky, West Virginia, Ohio, Michigan, Virginia, North and South Carolina, Iowa and Wisconsin.

Q. Then you travel pretty much all over the United States?

A. Yes, sir.

Q. How far east have you gone?

A. As far as Hampton Roads.

Q. Have you gone to the State of New York or Massachusetts?

1818 A. No, sir.

Q. Are you, then, generally familiar with the dust-arrester business and with the state of the art?

A. I think so.

Q. Do you know anything about the former dust-arresters that were in use, the burlap and the cheese-cloth dust-arresters?

A. Why, when I was superintendent of the Smith Purifier Company at Jackson we put in a burlap set of V-shaped machines for handling our dust before this machine was known.

Q. Before what machine was known?

A. Any of these metallic centrifugal machines.

Q. Before they were invented?

A. Yes, sir.

Q. They used that burlap dust-arrester there some years?

A. Used it about a year and a half.

Q. What became of it then?

A. Well, we burned it up and blew it up; burned it up twice and exploded it.

Q. What did the company do then?

A. After I left they put in a centrifugal machine made by Allen & Curtis.

Q. They put in this new invention?

A. Yes, sir.

Q. Will you state what, if any difference, there is between the Vortex and the Allen & Curtis?

A. It can be nothing more than a matter of construction, a difference of construction, that is all. The system is the same, the separation is made the same, by centrifugal action; the main principle is the same—in fact, of all these metallic machines.

Q. Do you know whether these metallic dust-arresters
1819 acting centrifugally are in general use in the United States at the present time or not?

A. They certainly are.

Q. Will you state whether the burlap and cheese-cloth dust-arresters are in general use?

A. I have yet to see the second one, or, I might say, the third one.

Q. I suppose you have some competitors in the business?

A. Why, yes.

Q. Will you state whether there is any firm at the present time in the United States competing in the dust-arrester business with the burlap or cheese-cloth?

A. I never have met any such firm. Or even heard of them.

Q. Or an agent of any such firm?

A. No, sir.

Q. So they are not in the trade at the present time?

A. I should not consider them so.

Q. Have you been down to look at the Backus property?

A. I went down there this morning.

Q. From your knowledge of this art, would it be practicable and feasable to put one of these metallic dust-arresters on those premises?

A. Yes, sir, decidedly so.

Q. Will you state from your knowledge of the art whether or not it would be an improvement to that plant.

A. It certainly would be an improvement as a protection against fire, back pressure, etc.

Q. What is there about that back pressure. Can you explain that briefly to the jury?

A. In our machines, I would not consider any more back press
ure—in our machines or any centrifugal machines in fact—
1820 more than the friction of the pipes, the discharge from the fan to the machine and the twirling of it in the machine. It makes a centrifugal motion.

Q. How would the back pressure be with one of these machines as compared with the burlap or cheese-cloth?

A. Whereas our machine will work clear all the time, it will work for ten years, as long as the machine lasts, but the burlap machine will always clog up. It did with us when I used them—gain in pressure.

Q. From your knowledge of the art what is your opinion as to whether it would require more power to run a metallic centrifugal-acting dust-arrester upon these premises than the one that is now in use?

A. Well, you could build your burlap machines large enough to overcome the back pressure, without a doubt, at a cost of three or four times as much as a metallic machine would cost. Take them on the same area, why it would be decidedly in our favor.

Q. Well, is there a back pressure just from forcing the air through the pipes?

A. Why, I would consider it so by the friction, there certainly is friction, and where there is friction there must be back pressure.

Q. So that there is some back pressure that is incident to the machines?
A. We consider it very little.
Q. Very little with the centrifugal?
A. Yes, it is relieved very quickly.
Q. Have you put in any machines in Detroit?
A. Yes, sir.
Q. Can you name any of them?
A. I sold one to the Murphy & Wasey chair factory.
Q. Out here at the junction?
A. Yes. And the house of correction.
Q. The prison here?
1821 A. Yes, and to the shoe factory of A. C. McGraw. The Dwight Lumber Co.
Q. Is that the lumber company out on the Michigan Central?
A. Yes, sir, and also to a novelty wood company.
Q. From your knowledge of the art would it be feasable to continue the use of the burlap down there and to put in a construction on the top of that building all around it in any away, so as to avoid sparks from the outside?
A. Why, I would hardly think so before seeing it, but after seeing it this morning and the area they have, and so little dust escape, I should think it could be very nicely done by enclosing it and carrying the pipes down half way or clear to the ground.
Q. How would you do that?
A. Just enclose those ventilators there with iron or anything that the insurance company will agree to and carry pipes delivering, down from those.
Q. Carry the pipe so that the air would go downwards?
A. Yes, sir.
Q. That could be done at a small expense, could it not?
A. Well, it would cost considerable in the size of that machine. I could not say how much, but perhaps four or five hundred dollars, something of that sort.

Cross-examination.

By Col. ATKINSON:

Q. What firm do you say you represent?
A. Allen & Curtis.
Q. And their business is furnishing dust-arresters?
A. Yes, sir.
1822 Q. Well, your idea is that to overcome the dangers of the railroad there ought to be a change in the construction of this property down here, is it?
A. Why, it would be much better.
Q. But some change would have to be made?
A. I would think so; yes, sir. If it were mine I would make it
Q. So as to make it reasonably safe?
A. Certainly.
Q. What is the chief danger from fire now?

A. Well, you know there is always a matter of fine particles of dust coming out through those ventilators. Cheese cloth or anything else put in that form with the pressure at the back of it will certainly discharge some fine particles of dust in the air, and a spark coming in contact with that might make you trouble.

Q. Your idea is that from this dust-arrester now in use there is a fine dust escape which is liable to be set fire to from the railroad?

A. To a certain extent there is a danger to it; the same as from the smokestack.

Q. That fine dust, I suppose, is somewhat explosive?

A. Yes, under pressure.

Q. And that would be the danger, I presume, of sparks igniting or exploding it as it escapes?

A. Yes, sir.

Q. So that the only means, then, of meeting the additional risk would be to put in your dust-arrester?

A. Any centrifugal dust-arrester. Of course I would say mine, naturally. We think ours is the best.

Q. Of course you wouldn't sell it unless it was the best?

A. We think we own it all, and we are trying to make everybody else believe so.

Q. You believe it yourself?

A. I certainly do.

1823 Q. What would it cost to put your machine there?

A. I could tell something about that by knowing the size of the discharge pipes from each fan. I understand there are three fans going there.

Q. You cannot tell us at present what the additional cost to Backus & Sons would be?

A. For the separators—only in that way, if I knew the size of the discharge pipes.

Q. You haven't examined it enough to tell us at present?

A. No, sir.

Q. You say there would be an increase of power required to overcome the back pressure?

A. In which way?

Q. The friction of your machine over the burlap.

A. I don't see why. We have no more discharge pipe than they have. Ours is the same every hour of the day. Our back pressure—what little we do have—is the same every hour of the day, and theirs certainly cannot be with the particles of dust held in suspense all the time; they certainly must clog those.

Q. Will you state whether more power would be required or not?

A. I certainly don't think so.

Q. Now, is there any escape of dust from your arrester?

A. Very little indeed.

Q. Is there any?

A. On that style of factory we would not consider any.

Q. There would be no escape of dust at all?

A. Very little.

Q. How would that establishment there compare with Murphy & Wasey?
A. Murphy & Wasey's is a good deal worse factory.
Q. There is more dust over there?
A. Yes, it is very fine dust; all sandings.
1824 Q. Do you know enough about these two establishments to say that the dust is finer that is made by Murphy & Wasey than Backus?
A. I certainly do.
Q. There is a very great escape at Murphy & Wasey's, isn't there, with your machines?
A. I have not seen them since they have been running.
Q. Have you ever been in the Backus mill when it was being run?
A. I never have been in the Backus mill.
Q. How do you know what dust they make?
A. Well, I think I am pretty well informed in the business of any kind of dust-arresters.
Q. Yes, but what is your information as to what dust is made at Backus'?
A. No more than I would get from a long experience in such things; by looking from the outside and seeing the machines run and what machines a factory of that style would have to run.
Q. Did you ever look at the Backus establishment when it was in full operation?
A. I don't know whether I have. I never saw it before, and it is not in full operation now.
Q. Did you ever see one just like it?
A. Yes, a thousand of them.
Q. Same kind of machines as Backus'?
A. Yes, sir.
Q. Will you tell us where there is one?
A. I have seen about every wood-working machine there is made in the United States.
Q. Tell us where there is one just like Backus'?
A. O, I could not tell you exactly.
Q. Where is the one nearest like it?
A. I would consider my large planing mill, sash, door and blind factory.
1825 Q. Have you examined the particular machinery?
A. No, sir.
Q. That is used in the Backus mill?
A. No, sir.
Q. Do you know what the machines are?
A. I don't, what they have in that factory.
Q. Have you examined the dust that is made there?
A. No, sir.
Q. Yet you feel competent to swear to its fineness?
A. I feel competent to swear to there being a vast difference between Murphy & Wasey's and that place.

Q. You have not examined Murphy & Wasey's since you put in your own machines?

A. No, sir.

Q. Don't know how much dust is escaping?

A. I don't.

Q. There is an escape of very fine dust in your machine?

A. I think there is in all centrifugal machines, no more in ours than any others.

Q. Isn't there a hole in the top?

A. Yes, sir.

Q. Out of that doesn't the fine dust come up, like clouds?

A. At times it may, not always.

Q. What is to prevent a fire if a spark gets in that?

A. A spark could not get inside of that with the pressure on it, that goes out of that air chamber.

Q. The pressure would be such that it would keep the spark away from the fine dust?

A. Yes, you could not get a brick-bat in there.

Q. If it came in contact with sparks it would explode, wouldn't it, that fine dust?

A. No, sir, not ventilated with the air in that shape?

Q. Why?

1826 A. Why, I don't see how it could possibly. It would have to be under pressure to explode it.

Q. If the fire ignited it, wouldn't that explode it?

A. You are not confined there at all, you see, and the pressure is so great there you would get no chance to fire it, it could not run back.

Q. There is a great pressure in your dust-arrester, throwing the fine dust out into the open air. Does that dust fall down on anything afterward or keep going up?

A. We do not have any such trouble with it, its settling on the roof.

Q. Does it come down and settle on everything around?

A. We do not have any such occasions, we do not have any grumbling about such things.

Q. Do you mean by that you never have seen anything going up, that nothing escapes?

A. What little dust gets away is scattered around in the air somewhere.

Q. I suppose it goes up to heaven?

A. Well, I don't know particularly about that; there is never enough of it in any machine I ever saw, of anybody's make.

Q. What is your honest opinion, does it remain in the air or come down somewhere?

A. We do not pretend to make enough of it to bother us.

Q. There is not enough to come back to earth?

A. We are not bothered with it.

Q. Do you mean now to tell us that none escapes, or do you mean that some escapes and you do not think it ever comes back to the earth?

A. It would be impossible to say that of a machine, that none escapes.

Q. Does that come back and settle down?

1827 A. You would naturally think so.

Q. Isn't it explosive?

A. Not in that condition; no, sir.

Q. After it comes back and settles down on the roof, say that a spark touches it?

A. If it should settle on the roof it would cause a fire quick enough, but not explode.

Q. I suppose in all dust-arresters, the dust is brought back to the earth, isn't it, somewhere?

A. We do not pretend to have any to bring back. We deliver it in the bin or boiler.

Q. What do you arrest? Isn't it dust that is arrested by this machine?

A. That is dropped below into the shavings bin.

Q. Where?

A. Into the shavings bin or boiler; just as you see fit.

Q. After it is back in the shavings bin, is it explosive?

A. Why, I suppose it might be under certain circumstances, but we do not consider it so.

Q. Under what circumstances would you consider it explosive?

A. With the bin made perfectly tight and perhaps the machine choked up and not working properly it may give a little back pressure into the bin, and in that case it is explosive?

Q. After it goes back into the bin, isn't it explosive?

A. I would not consider it so; I would not think so. Not in the way we ventilate it.

Q. Have you ever had any practical management of a planing mill?

A. Yes, sir.

Q. Where?

A. At the Smith Purifier Company.

Q. The Smith Purifier Company was not a planing mill, was it?

1828 A. Building flour-mill machinery at Jackson.

Q. Well, that was a machine shop, but not a planing mill?

A. And it is a large planing mill, perhaps as many machines as you have in this factory.

Q. The George T. Smith Middlings Purifier Company factory you would class as a planing mill?

A. Yes, sir.

Q. Did you have charge of the planing mill?

A. Had charge of the whole factory.

Q. Now, you say you used burlap there at first, and that you burned that out and once blew it up?

A. Burned up three times—blown up the third time.

Q. What was the cause of the explosion?

A. One of our men went in there with a broken globe, accident-

ally raised the door and some of the fine dust came down, ignited from the globe and exploded.

Q. Took a globe in?

A. A broken globe lamp.

Q. It exploded, then, because it came in contact with fire of some kind?

A. Yes, sir.

Q. Wouldn't that dust explode no matter what the arrester was if it came in contact with fire?

A. I don't think the arrester would have much to do with it. When you get it down in the bin, if the bin was closed up tight, under certain circumstances you might——

Q. The arrester had nothing to do particularly with the explosive quality of the dust?

A. Why, no.

Q. Is it on account of the machine that this explosion occurred, or would it explode regardless of what machine was being used if it came in contact with fire?

A. I have yet to hear of an explosion where they had a machine and no tight bins.

1829 Q. Then you think if this dust had been arrested by a metallic instead of a burlap machine, when it came in contact with the blaze of the lamp, it would not explode?

A. It would have been all ventilated, and you would not have had any tight bin there to explode.

Q. Then one of the merits of your dust-arrester is that it keeps air in the bin?

A. No, sir, we have no air in the bin. We would leave the doors all wide open.

Q. What effect has the machine on the dust after it comes back and settles into the bin? Has it any?

A. We take the back pressure off to relieve any chance of fire or anything of that sort, so that we can ventilate the bin. If you do not ventilate the bin, of course you get a tight chamber there, and that is explosive, the same as gunpowder.

Q. Then one merit of your machine is that it ventilates the bin?

A. Well, you can ventilate the bin by having our machine.

Q. What I want to get at is this——

A. Or any other machine that takes back pressure off.

Q. If I understand it right, there is a bin down there for the dust; after it comes down and after it has been stopped and falls to the earth. Now, it seems to me that it would make no difference what machine stops it, it would be just the same dust after it came down into the bin, and it would be just as explosive if stopped by a metallic arrangement——

A. Oh, no.

Q. As it would if stopped by a burlap after it came down into the bin?

Mr. BAKER: Just explain that.

Q. Then you mean to say that because it was stopped by your

metallic machine it would not explode after it has come back
1830 to the bin. Please tell us so if you do not, and relieve us of the anxiety?

A. That is not the idea exactly, at all. If your burlap machine will relieve the air from your bin, relieve the air so that you can ventilate your bin, let your air escape freely without carrying the dust away that you have—without feeding—the same machine as we have, so as to relieve the pressure of the bin, it would stop explosions.

Q. Then it is this exhaust of the air in the top of your machine that creates the safety in the bin?

A. Why, it relieves the fan of the back pressure you would have in the bin, if it were not for that.

Q. Do you recollect the explosion at Lee, Hollands & Company's at Buffalo?

A. No, sir, I never traveled east and I don't know anything about that.

Q. Buffalo is not exactly east.

A. Well, it is further than my territory has ever been.

Q. It is where the president went when he went west?

A. It is out of my territory.

Q. Your judgment after looking this property over, as I understand you, is that this railroad there, or because of its being there, there is a danger of fire which could be lessened somewhat by changing the dust-arrester?

A. There is no question about it in my mind.

Q. What danger do you find from fire there?

A. Why, you certainly have air coming out of your bal-oons.

Q. What is the danger of fire?

Mr. BAKER: He is trying to tell you.

Q. I understand that there is combustible material there that will burn?

A. Yes, that is the idea.

Q. There is danger of fire coming from what source?

1831 A. There is danger of it coming from your smokestack, the same as there is always to any mill or place that is alongside of the track; it would be hard to get away from that fact.

Q. Danger from the railroad?

A. There is no question but what there is some danger there, yes, sir.

Q. Not much from the railroad, is there? Isn't it almost as good as a fire department? Do you mean there would be sparks from the engine or anything of that sort?

A. You would have the same chance of a spark from there as you would from anywhere else, of setting fire to anything in that line, wood—perishable by fire.

Q. You never heard of a railroad setting fire to anything next it?

A. I have occasionally, that is, their claiming they set fire to buildings and one thing and another, dry fields and hay and so forth. They have made those claims; whether they substantiated them or not I don't know.

Q. How often do you think this burlap dust-arrested of Backus' would clog up and have to be cleaned out?

A. That would be hard to tell without seeing it in operation.

Q. That is one of the objections to it?

A. That would be an objection; that was our objection. There is one thing I would like to say there, that there is no question but what Backus has a very large machine there with plenty of area which will last him perhaps long enough until he stops, to clean it. He would not have to *claim* it until he stops.

Q. As he has it constructed it is very large so that it would avoid much more trouble than a small one covering the same area which yours would cover?

A. Figuring the same as ours would cover, yes, the same area.

Q. How often in your judgment would this dust-arrester
1832 of Backus' require cleaning?

A. That would be impossible for me to state without seeing it run. I don't know what the area of it is.

Q. That is the objection to burlap, that it requires cleaning?

A. That is one of the severe objections, and the cost is another.

Q. It is more expensive to construct, to begin with?

A. O, yes, and to maintain.

Q. And then it clogs up so that it has to be cleaned often?

A. Yes, that has been my experience.

Q. It is dangerous when it is clogged, is it?

A. It is when it clogs, because it comes back to the old theory of back pressure again.

Q. You cannot give us any idea of how often this machine would clog up?

A. This special machine, no, sir.

Q. Would you be willing to swear that it requires cleaning once a year?

A. I would not say anything about it. I don't know on what principle it is built, as far as the area is concerned. It is a matter of area with this machine with me, it is a very large machine.

Q. You never have seen a machine like this, as I understand you, in operation?

A. We built one there at the Smith Purifier Company's like it, made of burlap.

Q. That was cheese cloth?

A. Burlap.

Q. Who built it?

A. We built it ourselves.

Q. Had you had any experience in building them?

1833 A. We built it after the plans of Kuche—put in the shavings and dust——

Q. You never saw one like Backus' anywhere?

A. Yes, the same principle as Backus'. I saw the same principle, as near as I can tell. They are V-shaped balloons, as I understand it.

Q. The same principle, but as to the construction?

A. There may be a difference in the cloth, or a difference in something of that sort, but the shape of the machine is the same.

Q. Now, in the way in which the air rises in the two machines, they are different, are they not?

A. All we do, saw a slot in the floor between each V-shaped balloon.

Q. How wide were they?

A. The slot—I should say the machine was about a foot to sixteen inches, and the slot about two-thirds that size in width; say ten inches, by the whole width of the machine.

Q. Do you know how it is in the Backus machine?

A. I do not, of course. I have not looked at this special machine.

Q. Have you ever been in Mitchell & Roland's, of Toledo?

A. No, sir.

Q. So that you have never seen a Backus dust-arrester in operation?

A. Only the one we built there, that was not built by Backus. No, sir, I never have.

Q. One built on the plan on which his is built—that is what you mean?

A. Exactly like his. I never have.

Q. Have you ever been in Cadillac?

A. Yes, sir.

Q. Do you know Comer & Son?

1834 A. I know of the people.

Q. Did you ever look at their establishment?

A. I did not.

Q. You say you have not made any estimate of the cost to say what it would cost these people to change their property?

A. Well, it would mean something else besides the arresters, you understand.

Q. About how many dust-arresters of that kind would you have to put in there?

A. You could put it all into one, or into four or five, if you pleased.

Q. You could make one large enough?

A. Yes, but you would have to raise your bin in order to get the same storage room, if that is any object.

Q. You would have to increase the size of the building?

A. Yes, sir.

Q. And you would increase it by raising it higher?

A. Whichever way would be the best.

Q. Would it have to be enlarged on the earth?

A. No, sir.

Q. Did you sell Mr. Widman, of this city, his machine?

A. No, sir, unless that is the—that is not the novelty works, is it? I don't remember the name of the novelty works.

Q. Picture-frame factory.

A. Where is it situated, what part of the city?

Q. Up in the northeast part of the city.

A. No, sir.

Q. You have five machines, as I understand, in operation here in Detroit?

A. We have more than that, but this is what I have sold myself. We have two at Murphy & Wasey's, one at the house of cor-
1835 rection, two at the Dwight Lumber Company, and the novelty works, and two at the McGraw shoe factory, that I know of.

Q. What ventilators are these that you speak of, where a pipe could be put in to carry the air to the earth?

A. Why, it would be inclosing the extra building you have on top of the shavings bin further, if you want to make that system safer than it is now.

Q. There are ventilators there now, are there?

A. Yes, sir.

Q. What is the object of them?

A. To let the air out, I suppose. You would not want to confine it in there.

Q. To let the air out or in, which?

A. The air out.

Q. How does it get in?

A. Gets in, I should judge, from the under side where you have the fans, under the V-shaped balloons.

Q. It is blown in and goes out through the ventilators?

A. Yes, sir.

Q. Your plan would be to carry it down to the earth by pipes?

A. Oh, no—you mean to carry the air?

Q. Yes.

A. I should think that would do. There may be better plans; I have not thought of it enough to say how you would protect that system.

Q. Have you ever seen anything constructed on that plan?

A. Not as large as that, with this principle.

Q. With pipes to carry from the ventilators down to the earth?

A. No, sir, it is just a thought of getting rid of the air without having it come up.

Q. Do you know why the slats are put on both sides there?

1836 A. I should judge for ventilating, letting the air out freely.

Q. Is there any advantage of having them on both sides; couldn't they be ventilated from one side?

A. They could, but I would consider it better from both sides.

Q. So far as your own experience goes, you never have come across a Backus dust-arrester then, except this one.

A. No, sir, not in use for that purpose—or any other.

Q. In these circulars in advertising, you call especial attention to the fact that you have not any burlap in connection with your machine, don't you?

A. I don't know that I ever saw it on our circulars. It might have been in the old regime, on first starting into the business.

Q. Do you mean to leave us to understand that you are so well acquainted with the dust-arresters of the country that you know

that the Backus dust-arresters are not used to any considerable extent?

A. To this extent, that I never met any one selling them; I never heard of one being put in or figuring against any one putting one in.

Q. By that do you want us to understand that they are not used?

A. I should not consider they are in use at all for this purpose; I mean for shavings and dust.

Q. Do you know C. R. & J. C. Wilson, of Detroit, carriage manufacturers?

A. I think I have had a call there or something of that sort. I don't know now; no, sir.

Q. Do you know what kind they are using?

A. No, sir.

Q. Do you know the Clough & Warren piano factory?

A. No, sir.

Q. That is quite a large institution, isn't it?

1837 A. I could not tell you anything about it. You understand Detroit is not my territory.

Q. You only know, then, of your own territory.

A. My territory covers two-thirds of the United States at different times in the five years I have been in their employ.

Q. Now, don't be modest about it, but tell us whether you are willing to swear that no dust-arresters except what you have seen in that territory are used?

A. Oh, that would be very foolish to do anything of the kind.

Q. It seems so.

A. That would be very foolish.

Q. About all you know is where you have sold the machines yourself?

A. We have six other men and I know of their experience about sales; we meet together very often.

Q. Do you sell in Chicago yourself?

A. No, sir. I have sold in Chicago.

Q. Do you know Palmer & Fuller, of Chicago, a sash and door factory?

A. No, sir; I know very few firms there. There would be no use of calling my attention to concerns in Chicago.

Q. Do you know the Newall Piano Co.?

A. No, sir.

Q. Do you know Palmer & Fuller by reputation?

A. No, sir; I have had very little experience with Chicago.

Q. You do not do any investigating, then, do you, going through and seeing what dust-arresters are in the mills where you have no business transactions?

A. I do in everything where shavings and sawdust are handled, or anything in that line that we have a right to sell them—if I see anything that looks like a machine built on our plan.

1838 Q. Is Detroit in your territory?

A. No, sir.

Q. Did you ever investigate the Backus mill before you were asked to go and do so as a witness?

A. No, sir; I hav- not investigated it now. I stood on the sidewalk and looked at it, that is about all.

Q. What part of Michigan is in your territory?

A. No part. They give me a little bit of Michigan. I have sold in Michigan up as far as Marquette, when they think I ought to come back. It is just a matter of giving me a little work when I am home for a week.

Q. Any of your dust-arresters thrown out that you know of and replaced by others?

A. By other machines? I could not tell you of any. We have had machines taken out for being too small. I have taken them out myself.

Q. And other kinds put in?

A. No, sir; not to my knowledge. I have sold a great many larger machines and taken out small ones.

Q. Do you know the Smith & Huyett Manufacturing Co.?

A. Yes.

Q. Haven't they had to replace several of your dust-arresters?

A. I could not tell you anything about that. It would be really surprising if they had not.

Q. Haven't they replaced it by another machine?

A. I could not tell you anything about it.

Q. So that so far as you know, then, your machine has always worked to the entire satisfaction——

A. Oh, no, sir; not always. We have had trouble with our machines the same as anybody else has.

Q. Just the same as the others?

A. Well, we have had trouble with them.

1839 Q. You say in principle they are the same as the Vortex?

A. All those principles are the same; in all metallic machines the principle is the same.

Q. All practically the same.

A. I say all of them—about all of them.

Q. Are the shavings ever thrown out through the top?

A. Yes, when they get clogged up or anything goes wrong with the inside of them.

Q. They never clog, do they?

A. Oh, occasionally.

Q. Then they throw the shavings right out through the top?

A. They will throw the shavings, yes, sir, occasionally; any machine will.

Q. There would be danger of fire if they came in contact with sparks, I suppose?

A. Why, about as much as there would of anything else of that kind, any light material.

Q. Don't they throw when the door is opened below sometimes, when they are not clogged up, when you open the door?

A. To the bin?

Q. Yes.

A. That would have no effect on our machines or any other centrifugal I ever saw.

Q. No effect at all?
A. I would not consider it so; I do not see how it could.
Q. You never have been at Widman's, as I understand you, the picture-frame factory?
A. No, sir, I never have. I could very soon account for its doing so, had I seen it.
Q. How?
A. Well, the machine would be too small, for one thing,
1840 and there may be some part of the inner construction of it gotten out of place.
Q. If it was too small then it would work poorly?
A. Yes, clog below, and it has got to get out above.
Q. That would throw the shavings right out through the top?
A. Yes, sir.
Q. And the dust with them?
A. Why everything goes with it.
Q. How often have you seen that occur?
A. Once to my knowledge I saw it occur from a machine being overloaded, putting on two more fans after figuring it for one large fan. It did so until I called there and tore it out and put in a large one—at their expense, of course; it was no fault of ours.

Redirect examination:

Q. As I understand these machines called the Backus machines, the pipes through which the shavings or sawdust come open right into the bin?
A. Why, that is the way that ours was constructed.
Q. And the air is supposed to go up through the burlap that is spread upon frames, up and down, in V shape?
A. Yes, sir.
Q. Inverted V's?
A. Yes, sir.
Q. And the result is that the bin has to be air-tight, and when the mill is in operation it is full of air?
A. Yes, sir, it is full of air.
Q. And it will fill to the corners and all around, simply because the air keeps the bin full?
A. Yes, sir.
Q. In all its corners?
A. Yes, sir.
Q. Isn't that an objection where the bin is full of air with
1841 floating dust and shavings—isn't that more explosive than where it falls down and rests upon the bottom of the bin?
A. It certainly is.

Mr. DICKINSON: That is a theory.

Q. In the theory of the centrifugal machine, the air through the pipe is discharged into the machine itself, and the shavings fall into the bin from a small opening at the bottom of it?
A. Yes, sir.

Q. And the air goes out at the top?

A. Escapes at the top.

Q. So that the result is that the shavings and dust fall down in a pile and build up under the opening?

A. Yes, sir.

Q. And do not fill the corners of the room, simply because there is no way to whirl them around and shove them to the remotest part of the room?

A. They do not fall on the corners of the room, they build right up in a pile, the same as they would drop from anything.

Q. Like a cone?

A. Yes, sir.

Q. That is what you mean when you say it would be necessary to elevate?

A. Yes, that is what I mean, so as to have the same storage capacity.

Q. Now, you have assumed in your testimony that, although you did not go through the mill, that that was a planing mill—the Backus factory?

A. Yes, sir.

Q. Working in pine, ordinarily?

A. Yes, sir.

Q. The Murphy & Wasey Company is a chair factory, where they work mostly in hardwoods?

1842 A. Mostly in hardwoods and very dry woods.

Q. Thoroughly seasoned woods?

A. Yes, sir.

Q. And the dust is much finer and more difficult to handle than in an ordinary planing mill?

A. Very much so.

Recross-examination:

Q. Do you mean to say that Murphy & Wasey use more hardwood in their operations than Backus?

A. I do not mean to say anything of the kind. I can say that——

Q. That their lumber is drier than that of Backus & Sons?

A. I would naturally consider it was. We consider a chair and hub and spoke works the worst thing to handle in the country, on account of so much sandings.

Q. Did you, in making your estimate of the fineness of the dust, figure as though Backus & Sons did not use any kiln-dried hardwood?

A. That would not do it; they would use planers on that. They use nothing very hard.

Q. Don't you think Backus & Sons use any sand wheels?

A. Oh, yes.

Q. Precisely the same kind of machinery as Murphy & Wasey?

A. No, I would not consider it as fine.

Q. You never have seen either, have you?

A. Oh, yes, I have seen all the sanding machines there are made in the country, for chairs or anything else.
Q. Have you ever been through Murphy & Wasey's?
A. Yes, I have, a half dozen times.
Q. You have never been through Backus'?
1843 A. No, sir.
Q. But your opinion is that Backus' must be larger and the machinery larger than in Murphy & Wasey's?
A. Why, naturally they would have larger machinery.
Q. And not as small machinery?
A. Not as small machinery.
Q. Do you know what goods they manufacture?
A. Why, according to what I saw about there I should say it is a planing mill, box factory and so forth.
Q. What do you include in the "and so forth"?
A. I don't know, I am sure; they might make anything that is made of wood; they could make chairs there as well as not, for all I know.
Q. Supposing they do the finest work that is done in wood-working in this country, would that change your opinion any?
A. Not a particle.
Q. The dust would still be coarser than Murphy & Wasey's?
A. As long as they are conducting a planing mill at all in connection with it, it certainly would; they would have it mixed with the shavings and the heavier planings, and lighter planings.
Q. Isn't the dust separated from the shavings and stored in a different bin?
A. Do you mean over there?
Q. Yes, at Backus'?
A. I could not tell you anything about that.
Q. Would it under your system?
A. No, sir; they would go in together.
Q. What use would you make of the dust afterward?
A. Burn it. It makes the better fuel of the two.
Q. You have no other plan for disposing of your dust except to destroy it by fire?
1844 A. We always consider it the better fuel of the two.
Q. Suppose you had more than you need for fuel?
A. Put it into bin. Get rid of it in any way you please.
Q. It is an article of merchandise?
A. In some cities, not all.
Q. It is worth saving?
A. It is in some cities.
Q. There is a profit in it?
A. Yes, sir.
Q. Is it saved for fuel always?
A. Not that I know of. I have seen it used for bedding and packing.
Q. You did not look at the dust-room at Backus'?
A. I have not been in there at all.
Q. Isn't it used for cushions?

A. It might possibly be.
Q. For making fireproof covering?
A. I could not tell you anything about that.
Q. You don't know anything about mixing it with asbestos?
A. I have seen it mixed with asbestos.
Q. Then it is an article of merchandise of considerable value?
A. I would have to be in the business to know how profitable it was.
Q. But your dust-arrester brings it down and leaves it unseparated from the shavings?
A. Leaves it with the shavings; we generally put them right in the boiler, eight cases out of ten, to save for fuel.
Q. While it is mixed with the shavings, of course it could not be used as an article of merchandise?
A. We put in a separate plant for that very often where
1845 we want to save the dust entirely, for nail-scouring or anything of that kind; put in a separate machine; it is no trouble to do that.
Q. Shavings are also an article of merchandise?
A. Yes, in some places.
Q. Wouldn't they be worth a great deal less if the dust is mixed with them?
A. I could not tell anything about that. I don't know what they use them for; they would, perhaps, in a great many things.
Q. For horse bedding would you consider them as good with the dust in?
A. I don't know anything about horses or their bedding. I have seen the shavings used for bedding.
Q. What use would you make of the shavings with the dust mixed?
A. After getting through with the boiler we would have to find a use for them; it is something out of my line.
Q. You don't know what use they can be put to?
A. No, sir.
Q. Have you consulted with the agent of the Vortex Company? Was he with you when you made your examination?
A. I did not make any examination, only on the outside.
Q. Was he with you?
A. Yes, he was with me this morning.
Q. Any other dust-arresters represented?
A. No, sir, I have not met any other dust-arrester man.
Q. You and the Vortex, then, are the only ones that were represented?
A. I don't know, I am sure. It is something new to me.
1846 Q. Your company is in litigation with the Vortex Company?
A. We are.
Q. But you are making a common cause against Backus?
A. Why, no, not making any common cause against Backus. I knew nothing about your trial until last night here.
Q. How did you happen to come here?

A. I came here on the Michigan Central train last night.
Q. Just to see the city?
A. No, sir, I came here——
Q. What did you come for?
A. I came here, I supposed, on a little business of selling some goods.
Q. You came down to sell goods, then?
A. That was the supposition.
Q. I thought this was not in your territory?
A. It is not my territory.
Q. You came down to sell goods?
A. Thinking I was coming to sell goods, yes, sir.
Q. Did you have any one in view to sell goods to?
A. No, sir.
Q. You came down to look over the field?
A. No, sir; I didn't come down to look at the field; I came by telegram.
Q. In response to a telegram?
A. Yes, sir.
Q. From whom?
A. Miller, of the Vortex Company, or of the United States Blow Pipe Company.
Q. He telegraphed you to come down to sell some goods?
A. That was the supposition. We had had some talk here
1847 a couple of weeks ago, and some letters passed between us about selling goods.
Q. When you got here what did he want of you?
A. To look up this matter here, not knowing anything about the Backus dust-arrester. In fact, I had not heard of it for five years.
Q. So you have come here as a witness through the indirect agency of the Vortex?
A. No, nothing of the kind.
Q. They invited you down here?
A. No, sir, I didn't come down for that purpose. I don't know that I would have come for that purpose. I didn't know anything about what I did come for when I came down here, any more than some talk we had had before, but not about this.
Q. When did you get the telegram?
A. Yesterday noon.
Q. Have you got it with you?
A. No, sir.
Q. Will you tell us what it said?
A. It said, Can you come to Wayne house tonight—can you be at Wayne house tonight, expenses paid?
Q. Signed by whom?
A. P. C. Miller.
Q. Did you expect to sell any goods to Miller?
A. I expected to either sell goods to Miller or for Miller, I didn't know which one.
Q. When you go out selling goods generally, are you sent word your expenses will be paid?

A. No, sir.

Q. Did you expect to sell goods for Miller—sell the Vortex?

A. I might have done so, yes, sir; I have a perfect right to do so.

Q. You are the agent of a company that is at——

1848 A. I have been, supposed to be, until the first of this September.

Q. Then you are not an agent now of this company?

A. I have been out several trips for them, yes, sir; I am not off their list.

Q. Are you their agent now, or are you not?

A. Yes, I am selling their goods.

Q. Then you are not in their employ?

A. Not as a salaried man.

Q. Do you sell on commission?

A. Yes; that is, if I do sell at all. I am supposed to sell on commission for this month.

Q. You are selling their goods as well as others?

A. Just as soon sell their goods.

Q. So you are not strictly their agent; you do not owe them allegiance any more than anybody else?

A. Not at all.

Q. You thought you were coming down to sell goods when you got this telegram?

A. I did not know what I was coming for, to tell the truth.

Q. When you got here whom did you meet?

A. Mr. Miller.

Q. What did Miller tell you he wanted of you?

A. He said they were having a suit over the Backus dust-collector, and of course it was something new to me; I had not heard of the Backus dust-arrester in years, and I said "What for?" "Why, something about the qualities between the Backus dust-collector"—and he had to explain to me what it was, what the dust-arrester was. Of course, I knew as soon as he began to talk about it—over this difference between that and the——

Mr. DICKINSON: Cyclones.

A. Or the same principle as the Cyclone. They are all the

1849 Cyclone principle. My idea was to give evidence as to the difference between the two machines, which I considered the safest.

Q. He told you that he wanted you to give evidence?

A. He told me I would be expected to be called on.

Q. And that is the way you happen to be here?

A. Yes, sir.

Q. And the Vortex Company, then, are paying your expenses?

A. No, sir, they are not paying my expenses that I know of. There has not anybody promised to pay my expenses yet.

Q. You expect to get your expenses under this telegram?

A. I certainly would expect to.

Q. From whom?

A. I don't know, I am sure; I have not the slightest idea.

Mr. BAKER: He may not get them at all.

Q. So that you don't know that Mr. Miller in any way represented the union depot company in sending for you?

A. No, sir; I certainly do not.

Q. Did he take you to talk with anybody before you——

A. No, sir; I had not talked with a man since I came here.

Q. Not even with Mr. Baker?

A. No, sir. I saw Mr. Baker about five minutes, and he asked us to be down here at half past nine.

Q. Did he talk to you about what testimony you would give?

A. Not any more than introducing me, and my knowing about this machine and using it years ago.

Q. He did not know what you were going to testify about?

A. No, sir.

1850 Q. That explains his putting you on the stand. That is all.

Redirect examination:

Q. You have no interest in this litigation in any way?

A. Not the slightest.

Q. You came here at Mr. Miller's request because you were acquainted with him, and supposed he had some business with you?

A. Yes, sir.

Q. And you simply found out that you were wanted to testify in this case upon this subject?

A. Yes, on the subject of the difference between the two separators. Mr. Miller and I used to be in the same company together.

Q. How many other men travel for the Allen & Curtis Company?

A. I think we have six other men beside myself; I won't be sure. We had until the first of this month; up to that time.

Q. And Mr. Miller has been traveling for four or five years for the Vortex?

A. No, I think he has been running his own business. He uses the Vortex machines.

Q. All you endeavored to do was to simply explain the state of the art and to give your testimony in a disinterested way?

A. That is all.

Col. ATKINSON: You got an idea that this was a suit in which the merits of the Backus dust-arrester and the one you had been selling yourself were involved?

A. That is the only thing I could think of.

Q. Of course you are interested in maintaining the reputation of your own goods?

A. Why, certainly.

1851 Mr. BAKER: I have only one other witness, but he is not prepared, and I would ask that your honor let the case stand over.

The COURT: I think I will let the matter stand over till morning.

Col. ATKINSON: Well, one of the jurors, I understand, said something about wanting to go away tomorrow.

Mr. DICKINSON: This matter has been suggested by me before, and I think at least the jury ought to be consulted, because they are an independent tribunal.

The COURT: I am always quite willing, Mr. Dickinson, to conform to the wishes of the jury as long as they are reasonable, but I think I will hold this jury to the same strict lines that I would hold any other jury.

Mr. DICKINSON: To that statement——

The COURT: The reason I make this remark at this time is that you may have an opportunity to take an exception to the ruling.

Mr. DICKINSON: Yes, and we do take an exception to the ruling and the remarks of the court. We make the claim that under the constitution of the State the jury is an independent tribunal, specially constituted, independent of any court or judge, and that that has been the construction of the constitution put upon the clause by the court of last resort, and by all other courts of the country having similar constitutional provisions.

The COURT: I shall regard this jury as a common-law jury and shall control them as a court, and they will have to submit to all the orders of the court. I do not know as I can state it any more fairly or any more concisely. I want to give you the benefit of an exception. I know there is some question about it, and I will say that the jury will have to conform to the orders of this court.

Mr. DICKINSON: Then your honor better direct a verdict now.

The COURT: No, sir.

1852 Mr. DICKINSON: Your honor is familiar with the case, although you have not heard the testimony——

The COURT: That remark is entirely uncalled for, Mr. Dickinson, and must not be repeated.

The jury were then excused by the court till Monday, October 9, at 2 p. m.

Mr. BAKER: Under the circumstances, I would like your honor to advise the jury again about talking.

The COURT: You want to understand, gentlemen of the jury, as I stated before at the beginning of the trial, that you are not to hold any conversation, either among yourselves, or permit any conversation with any outsiders, in reference to the matter here pending. You want to listen to the testimony as may be offered and as it may be admitted by the court, and the arguments of counsel. I don't know whether I shall give you any charge in this case or not. I possibly may. If I do, you want to reserve all discussion in regard to this case until after you are seat to the jury-room.

Adjourned.

MONDAY, *October* 9, 1893—2 p. m.

Mr. BAKER: I produce the two agreements referred to in the testimony of Charles M. Heald, and will read them in evidence, as follows:

"Whereas, the Detroit, Lansing & Lake Michigan Railroad Company owns the following-described tract of land, to wit: The southwest corner of the Woodbridge Street farm, so called, private claims twenty-two (22) and two hundred and forty-eight (248), being one hundred and fifty feet (150) on Woodbridge street or the River road and running back the same width to the Detroit river, and also ten
(10) feet on the westerly side thereof, running from said street
1853 or road to the river, making a width of about one hundred
and sixty (160) feet by about three hundred and fifty (350) feet in depth; and whereas, it has been deemed best to use the said depot grounds in common between the Michigan Central Company and the Detroit, Lansing & Lake Michigan Railroad Company, and,

Whereas, it was absolutely necessary that this should be done in order that the Michigan Central Company should be able to use all of its grounds, and also that this company should be able to make available its own grounds, and therefore the tracks are laid all over the said tract in pursuance of a plan for the common occupancy of the said grounds, and make all the station grounds of both parties available to the greatest extent possible, and,

Whereas, also, the D., L. & L. M. R. R. Co. desire to use the track of the M. C. R. R. Co. from the point of junction of the tracks of the two companies to the common station grounds in the city of Detroit,

Now, therefore, this indenture, made and entered into by and between the D., L. & L. M. R. R. Co., of the one part, and the M. C. R. R. Co., of the other part, this sixteenth day of August, 1872,

Witnesseth, that the said party of the first part agrees that the said tract of land described above shall be included in the station grounds of the M. C. R. R. Co., to be improved and used as a portion of the same and in such a manner as will best accommodate the business of the station, but to be used by both companies as the business of both may require, and as may be expedient, and the said second party agrees that the trains of the said first party may and shall have the right to run over the road and tracks of the M. C. R. R. to and from the said junction of the two roads to and from the said station grounds, and shall also have the right to use the said
grounds for its business, and trains and switching, and mak-
1854 ing up trains, and the passenger-house, upon the terms herein
set forth, such usage to be under the rules and regulations of the M. C. Co., which shall be made for common convenience, and not to discommode the business of the said first party. The stipulations and agreements above specified shall be in force until changed by common consent, the title of each party to its land not being affected hereby, except in so far as this instrument provides for a common use of the same, and

Whereas, the use of the said party of the first part of the said grounds and tracks will be small as compared with that of the second party, probably forever, though it is hoped it will be much larger than at present, and

Whereas, it is not possible to fix a compensation at the present time which shall be fair in the future, and

Whereas, the business of the said first party is now in its infancy, and its road is new and yet to be completed, and its business de-

veloped, and therefore cannot afford to pay for the use of grounds such rent as by and by it may do.

It is therefore agreed, that it shall pay the said second party all the amount which its own land put into the common station grounds may be worth, that is, it shall receive no compensation therefor, and the use of said grounds by the M. C. R. R. being considered a part of the rent which the said first party shall pay for the use it may make of said tracks and grounds of said second party.

It is further agreed, that in addition to the contribution of the use of said land, the said first party shall pay to the said second party one-half the gross earnings from all its business of every kind upon the tracks of the said second party between the junction of the two roads and the said station grounds, prorating all of said business, both local and through, of every description, and fixing said
1855 amount of gross earnings by dividing it *pro rata* according to the distance it may be carried on each road; and it is further agreed that the said grounds shall be under the general control of the M. C. R. R. and that the said company shall have the right to admit other companies to the use of said depot and station grounds, upon such terms as it may think reasonable and proper, but so as not in any way to embarrass the business or limit the grounds to be occupied by the D., L. & L. M. R. R. Co., so that it cannot conveniently do its business.

This contract shall continue so far as the clauses relative to compensation are concerned for a period of five years at or after which time the compensation to be paid for the occupancy of the station grounds, over and above what may be the fair value of the use of its own grounds shall be, the question of compensation shall be revised and such new basis fixed as shall be deemed fair and reasonable, and which may be a permanent basis; but if a permanent basis is not agreed upon, the basis shall be revised once in ten years, or afterwards at the request of either party, and in case the parties cannot agree upon the compensation to be paid permanently, the compensation for ten years shall be agreed upon if possible, and if that cannot be agreed upon, then the matter shall be referred to three men, one of whom shall be selected by each party, and they two shall choose a third, and the award of the three or a majority of them shall settle the compensation to be paid for the next ten (10) years, and the amount fixed by them shall be the amount of rent which shall be due and payable under this agreement, and

Whereas, the said D., L. & L. M. road is new and the construction is not yet complete, and its value is yet unsettled, it is mutually agreed that the time for the payment of the said rent shall commence July 1st, 1872.

In witness whereof, the said parties have hereto respect-
1856 ively affixed their respective seals and caused the official signatures of their respective presidents to be appended this, the day and year above written.

(Signed) H. H. SMITH,
President D., L. & L. M. R. R. Co.
JAMES F. JOY,
President M. C. R. R. Co.

Whereas, under the provisions of the above agreement, bearing date of August 16th, 1872, entered into between the D., L. & N. R. R. Co. and the M. C. R. R. Co., by which entrance to certain station grounds of the M. C. R. R. in Detroit and other facilities were granted to said D., L. & L. M. R. R. Co., it was therein stated that the compensation to be paid by the D., L. & L. M. R. R. Co. to the M. C. R. R. Co. for the facilities above referred to should be fixed at the end of five (5) years from July 1st, 1872; and

Whereas, certain questions have arisen under said contract which it is deemed for the interest of both parties thereto should be more clearly defined; and

Whereas, the D., L. & L. M. R. R. Co. has been organized under the name of the Detroit, Lansing & Northern Railroad Company; now, therefore, this agreement,

Witnesseth, that the said M. C. R. R. Co., in consideration of the stipulations set forth in the contract above referred to between the D., L. & L. M. and M. C. R. R. Co's by which the use of certain grounds at Detroit belonging to the Detroit, Lansing & Lake Michigan Railroad Company should at all times be open to the use of and constitute a portion of the yards of said M. C. R. R. Co., as provided in the contract above referred to, and in consideration of the performance of the other articles of this agreement does hereby grant to the D., L. & N. R. R. Co. the right to enter and use its main tracks from Grand Trunk Junction to Detroit; No. 3 track at Grand Trunk Junction, used in transferring freight traffic to and from the Canada Southern and Lake Shore & Michigan Southern Railroad Company's; the tracks leading to the Michigan Car Company's shops to Detroit, bridge & iron works, to Dwight's lumber yard, to the stock yards, to Shultz's stave mill, to Hammond, Standish & Co. and Willard Parker & Co.'s packing-houses; also the north track from Tenth to Fourteenth streets, as well as the tracks leading to the elevator and the dock property referred to in the agreement of August 16th, 1872.

1857

Said M. C. R. R. Co. also agrees to make up the passenger trains of the D., L. & N. R. R. Co. and to sell their tickets at its passenger depot in Detroit and its Detroit city office, and to check baggage at its depot in Detroit of passengers desiring to go via the Detroit, Lansing & Northern railroad from its depot at Detroit.

In consideration of the foregoing the D., L. & N. R. R. Co. agrees to pay to the M. C. R. R. Co., in monthly payments the sum of $9,200 per annum, bills for same to be rendered monthly and payments to be made on or before the fifteenth day of each month for the preceding month.

It is hereby agreed and understood that in consideration of the above and other agreements herein set forth, and the performance of the same, the employees of the said D., L. & N. R. R. Co., while working upon any of the grounds of the said M. C. R. R. Co., shall be subject to and under the control of the said M. C. R. R. Co., and shall comply with the rules of the same, and for violation of such rules shall be removed upon complaint of the managing officer of said Michigan Central Railroad Co. And further, that in selling

the tickets and checking the baggage of said D., L. & N. R. R. Co. and making up the trains of said D., L. & N. R. R. Co. the M. C. R. R. Co. shall not be held responsible for any errors or damages which may arise from carelessness on the part of its em-
1858 ployees or from any other cause; and said D., L. & N. R. R. Co. will hold said M. C. R. R. Co. harmless from any suits for damages which may be brought against said M. C. R. R. Co. by reason of any injuries which any employees of said D., L. & N. R. R. Co. may receive while working in or upon any of the station grounds of said M. C. R. R. Co., whether such injuries may arise from carelessness on the part of said employees of the M. C. R. R. Co. or otherwise; and, in further consideration of the agreements above set forth and the performance of the same, the said Detroit, Lansing & Northern Railroad Co. hereby agrees that they will not in any way, directly or indirectly, compete with said M. C. R. R. Co. for any business whatever, whether such business may be destined to or through or consigned from or through a point common to said M. C. R. R. Co. and said D., L. & N. R. R. Co., or whether such business shall originate on or be consigned to, from or through points competitive to said M. C. R. R. Co. and the Chicago & Lake Huron or Chicago & Northeastern Railroad Companies, including Detroit and Chicago; and further provided that neither of the above clauses are to be construed so as to prevent the D., L. & N. Co. from taking business, both freight and passenger, to or from Detroit, from or to any station on the line of its present railroad, whether such business be competitive with said M. C. R. R. Co. or otherwise; and provided further, that they shall not be construed to prevent the D., L. & N. R. R. Co. from taking business to or from Detroit, from or to any other railroad with which it may connect for such points or stations on said other railroads as are not reached or touched by the said M. C. R. R., its branches or leased lines.

And it is further agreed that the pooling agreement at present existing between the two companies, parties hereto, relating to competitive business to and from Detroit, Grand Trunk Junction
1859 and Lansing and North Lansing, copy of which is hereto attached, shall be maintained on the present basis for a period of ten years from the date of this instrument.

And it is further agreed that the facilities given as above set forth are all the facilities to which said D., L. & N. R. R. Co. are entitled to under this agreement; provided, however, that in case any necessity should arise during the ten years next following the date hereof requiring additional facilities at Detroit, or between Detroit and Grand Trunk Junction, belonging to the M. C. R. R. Co. to be granted to the D., L. & N. R. R. Co., the same shall be subject to further just and equitable negotiations between the parties hereto.

At the end of every ten years from the date hereof the terms upon which said D., L. & N. R. R. Co. are admitted to the tracks and grounds of the said M. C. R. R. Co., and the facilities to which the said D., L. & N. R. R. Co. shall be entitled for the next ten years, as above set forth, shall be subject to readjustment, and if the parties hereto cannot agree, shall be left to arbitration, each party

selecting one person and the two so chosen to select a third, and a decision of a majority of the three to be final.

In witness whereof, the parties hereto have set their official seals and caused the signatures of their respective presidents to be hereto attached on this, the first day of November, A. D. 1877.

This contract to relate back to the first day of September, A. D. 1877.

[SEAL.] MICHIGAN CENTRAL R. R. CO.,
By SAM. SLOANE, *President.*
R. G. ROLSTON, *Secretary.*

[SEAL.] JAMES F. JOY,
President D., L. & N. R. R. Co.
CHAS. MERRIAM, *Secretary.*

1860 I hereby certify the foregoing to be a true and exact copy of the agreement on file in the office of the auditor of the D., L. & N. R. R. Co., at Grand Rapids, Mich., between the M. C. R. R. Co. and the D., L. & N. R. R. Co., of August 16, 1872, and November 1, 1877.

CHARLES M. HEALD,
General Manager D., L. & N. R. R. Co.

October 6, 1893.

Subscribed and sworn to before me this sixth day of October, 1893.

ERNEST N. WELLER,
Notary Public, Kent Co., Mich."

Mr. BAKER: Mr. Heald desired me to state that when he testified that the rent was $10,000 he was mistaken slightly, that it was only $9,200, as shown by this next agreement which I will read, as follows:

" Memorandum of agreement, made between the Michigan Central Railroad Co. and the Detroit, Lansing & Northern Railroad Company, March 31, 1891.

Witnesseth, whereas, the Detroit, Lansing & Lake Michigan Railroad Company, being the owner of certain property described in an agreement entered into between the aforesaid company and the Michigan Central Railroad Company, bearing date August 16, 1872, the use and occupation of which by the latter company under said agreement, was in part consideration of the joint use by the parties thereto of the tracks, depots and terminal facilities of said Michigan Central Railroad Company between West Detroit and Detroit; and

Whereas, said agreement was afterwards supplemented by an agreement (between the same parties, dated November 1, 1877, the said Detroit, Lansing & Lake Michigan Railroad Company being
1861 then reorganized as the Detroit, Lansing & Northern Railroad Company), providing certain limitations, privileges and conditions as the basis of the tenancy enjoyed by the said Detroit, Lansing & Northern Railroad Company of the tracks,

passenger stations and terminal facilities of the said Michigan Central Railroad Company between West Detroit and Detroit; and

Whereas, differences having arisen between the said Michigan Central and Detroit, Lansing & Northern Railroad Companies as to the rights, privileges and responsibilities existing under said agreements, said differences have been fully, fairly and satisfactorily adjusted by the parties in interest, H. B. Ledyard, president, acting for and in behalf of said Michigan Central Railroad Company, and Charles M. Heald, general manager, acting for and in behalf of said Detroit, Lansing & Northern Railroad Company, both of said persons being duly authorized thereto:

Therefore, be it understood and agreed by and between the parties hereto that for and in consideration,

First, of the sale and transfer by said Detroit, Lansing & Northern Railroad Company to said Michigan Central Railroad Company of certain lands in a deed heretofore executed and this day delivered to said Michigan Central Railroad Company at an agreed valuation of ninety-six thousand dollars ($96,000).

Second, of the payment by said Detroit, Lansing & Northern Railroad Company of the sum of twenty-five thousand dollars ($25,000) to said Michigan Central Railroad Company, the receipt of which is hereby acknowledged;

That the agreements above referred to, dated August 16th, 1872, and November 1st, 1877, are hereby discharged and canceled, and all the rights and obligations, privileges and responsibilities of both parties thereto are hereby declared to be canceled and at an end; and that the said Detroit, Lansing & Northern Railroad Company shall have the right to occupy and use the tracks, station and terminal facilities heretofore used by it, and upon the same terms and conditions as heretofore for the period of two years from and after March 1st, 1891, at an annual rental of thirty thousand dollars per year, payable quarterly, it being especially understood and agreed between the parties hereto that the said Detroit, Lansing & Northern Railroad Company shall have the right to terminate the said tenancy upon giving thirty days' notice of their intention so to do, directed to said Michigan Central Railroad Company, its successors or assigns, at any time within the said period of two years, above specified.

1862

In witness whereof, the parties hereto have caused the names of their respective companies to be signed the day and year first above written. In duplicate.

THE MICHIGAN CENTRAL RAILROAD CO.,
By H. B. LEDYARD, *President.*
THE DETROIT, LANSING & NORTHERN RAILROAD COMPANY,
By CHARLES M. HEALD, *General Manager.*

I hereby certify the foregoing to be a true and exact copy of the agreement between the Michigan Central R. R. Co. and the D., L.

& N. R. R. Co., entered into March 31, 1891, as filed in the office of the auditor of the D., L. & N. R. R. at Grand Rapids, Mich.

CHAS. M. HEALD,
General Manager D., L. & N. R. R. Co.

October 6, 1893.

Subscribed and sworn to before me this 6th day of October, 1893.

ERNEST N. WELLER,
Notary Public, Kent Co., Mich."

The jury will remember the testimony of Mr. Heald, that
1863 this consideration of $96,000 included two parcels, a smaller parcel in another part of the city, being put in at $16,000, and the strip through the Michigan Central grounds at $80,000. Mr. Heald did not know exactly where that strip was located, but it appears by this description that it was on the line of the Woodbridge farm, and you who are familiar with the map of the city will know where that is. It is in the vicinity of the crossing just this side of the Michigan Central crossing.

HENRY SPITZLEY, sworn on behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. In Detroit.
Q. How long have you lived here?
A. It is now about 28 years.
Q. What is your business?
A. Carpenter and builder.
Q. How long have you been in that business?
A. About 45 or 46 years.
Q. Have you recently made an estimate in company with Mr. Dee and Mr. Finn of what it would cost to duplicate the Backus planing mill and box factory?
A. Yes, sir.
Q. Mr. Finn and Mr. Dee did the masonry work, I believe?
A. Yes, sir.
Q. And you have personally made an estimate of the wood-work and of the machinery?
A. Yes, sir.
Q. Can you tell us what it would cost to duplicate the building, all the wood-work that was included in Mr. Dee's estimate, separate from the machinery?
A. Yes, sir. (Referring to paper.) The wood-work outside of the machinery is $22,612.09.
1864 Q. That does not include any of the mason-work?
A. No, sir.
Q. But that includes all the wood-work, outside of the machinery?
A. All the wood-work and the painting and glazing and such as belongs to the building, outside of the mason-work and plastering?
Q. So that with Mr. Dee's estimate or Mr. Finn's estimate of $27,000

or $28,000, and $22,000 that you have there, that would cover the cost of the building?

A. Yes, sir.

Q. Can you duplicate the building for that?

A. Well, I would take a contract for these prices to do it, if anybody wanted to give me the contract.

Q. In your judgment and according to your estimate can the building be duplicated for that? Is that what it would cost at the present time to duplicate it?

A. Yes, sir.

Q. I suppose you are familiar with the kind of machinery they have down there?

A. Yes, we have a good deal of it in our shop, the same.

Q. You have a planing mill yourself?

A. Yes, sir.

Q. Have you made an inventory of the machinery down there?

A. Yes, sir.

Q. And have you estimated what it would cost to buy that machinery all new and set it up there today?

A. Yes, sir.

Q. Does that include the engine and boilers and everything connected with them?

A. Yes, sir, the engine and boilers and all the shafting and everything that belongs to the machinery work; outside of the machinery themselves, I take, wood-working machinery. Mr. Kramer estimated it with me.

1865 Q. Will you tell us what the total estimate of the machinery, including the wood-working machinery and shafting and engine and boiler and all those things, amounts to?

A. $67,748.09.

Q. In making this estimate, state whether you have made any distinction as between the prices of 1892 and the prices of this year, whether there is any substantial difference?

A. I base it all on the prices now.

Q. How much more, if anything, would it have been in 1892, last year?

A. Oh, there would not be much difference. The wood-work and carpenter-work is a little less now on account of there being so little work. We are figuring it closer now than what we did in 1892.

Q. There is no substantial difference, then, between the two years?

A. No, sir.

Q. And, as far as Mr. Kramer's estimate is concerned, I suppose he is here to testify to that?

A. Yes, sir.

Q. You have made the estimate in detail, just as if you were going to take a contract?

A. Yes, sir.

Q. And spent a good deal of time over it?

A. Yes, spent time; and I was very sure to make it as near correct as I could.

Cross-examination.

By Mr. DICKINSON:

Q. Have you included the sewers to the river?
A. Mr. Kramer figured all those connections to the river.
Q. Have you included them in your statement?
1866 A. Yes, I have Mr. Kramer's statement included with this building.
Q. And you included the girders and iron-work over the boiler?
A. Yes, sir.
Q. Have you there with you your inventory on which you have made your estimate of the machinery?
A. I have got the inventory right here.
Q. May I see it?
A. Yes, sir.
Q. Do you think you have got in all the machinery?
A. That is the wood-working machinery.
Q. I mean the wood-working machinery. Do you think you have it all in?
A. Yes, sir.

Paper referred to marked "Exhibit Spitzley, 1."

Q. Have you ever been yourself engaged in a business such as the Backus planing mill carries on there?
A. We have a planing mill ourselves.
Q. Where is your planing mill?
A. It is at the corner of Gratiot and Antoine.
Q. What is the capacity of your mill?
A. Well, our planing mill is for doing all kinds of builders' work, what belongs to a building.
Q. Hard and soft woods?
A. Yes, sir.
Q. Do you do anything else besides builders' work?
A. No, sir.
Q. Have you been engaged in any other planing mill?
A. No, sir.
Q. Nothing except that, and what you make in your planing mill is what is used in buildings?
A. Yes, sir.
Q. And did you tell us the capacity of your planing mill,
1867 how many thousand feet of lumber it could cut?
A. Well, I have not set up our work in comparison with any other mill. We do not work up so much lumber as mills like Backus' do, because they dress lumber and ship lumber, for sale. We only make such as we are using ourselves in buildings.
Q. Then you carry on your planing mill in connection with your business as a builder?
A. Yes, sir.
Q. Then you do not do this ornamental and inside work for sale?
A. Not for sale. We do the same kind of ornamental work for the inside of houses.

Q. For what you use yourself?
A. Yes, sir.
Q. Do you make any cloth or winding boards; do you know what they are?
A. I don't know what they are.
Q. Known in the trade as cloth or winding boards?
A. Sometimes we are getting out boards for tailors, for cutting on and such.
Q. Do you make flat and square pickets for pailings in your place?
A. Yes, sir.
Q. Fancy pailings?
A. Yes, sir.
Q. Do you make what is called the pilaster finish?
A. Yes, sir.
Q. Mouldings and casings and baseboards and stair railings?
A. Yes, sir.
Q. Shelving?
A. Yes, sir.
Q. Do you make printers' type-case bottoms?
1868 A. Oh, we can make any kind of bottoms or any kind of boxes.
Q. I only ask you whether you are engaged in that?
A. Not as a specialty.
Q. Do you make them at all?
A. If they are orders, we will make them.
Q. Do you make fancy and plain trays?
A. Yes, sir.
Q. Do you use those in building?
A. If they are used we will make them.
Q. But have you made any?
A. We make some trays sometimes, when they are ordered.
Q. Let me see if I understood you. Do I understand you correctly that you only have made them for your own uses in your building business?
A. For such buildings as we are building.
Q. Then you do not make printers' type-case bottoms, do you?
A. Sometimes printers or other mechanics or other businesses come to our shop and order things.
Q. You do not make a business of manufacturing them to sell?
A. No, sir, we do not make any special business out of them.
Q. You only do any job work or by order?
A. Yes, sir; anything else, ordered.
Q. You do not make them to sell out around the country?
A. No, sir.
Q. Do you make drawer bottoms and drawer slides and fronts?
A. Yes, sir.
Q. You do make them for your own business?
A. Yes, sir.
1869 Q. Shelf boxes?
A. Yes, sir.

Q. Do you make hat-drying frames for the hat business?
A. I don't know whether we have ever made any; we can make them.
Q. I am only asking you whether you do make them?
A. I cannot remember that we have made them.
Q. Do you make tobacco-drying racks there?
A. I cannot remember if we made any of them.
Q. Of course you are a carpenter and joiner and you can make any such thing?
A. We can make anything made out of wood-work.
Q. How many men do you employ?
A. According to business. In the summer time from 100 to 150; now it is dull and we have only between 45 and 50.
Q. How many machines are there in your shop?
A. Somewheres from 15 to 18.
Q. Do you make oilcloth rolls?
A. If they are ordered yes, sir.
Q. I ask you whether you make them in stock, for sale?
A. No, sir; we do not make anything in stock.
Q. Wire-cloth rounds?
A. No, sir.
Q. Picture-frame mouldings?
A. No, sir.
Q. Picture mouldings?
A. Yes, sir.
Q. In stock?
A. Not in stock.
Q. You do not use them about buildings, do you?
A. Yes, sir.
1870 Q. Don't you think picture mouldings and picture frames require special machinery?
A. No, sir. We have got the same kind of machinery as they are using.
Q. In that regard?
A. Yes, sir.
Q. You, of course, make all kinds of ceiling and flooring and finishing?
A. Yes, sir.
Q. And matched boards for all purposes?
A. Yes, sir.
Q. Do you make decking and boat-work?
A. No, sir.
Q. Do you do any marine-work at all?
A. No, sir.
Q. I suppose if any one wanted to build a boat or a deck he could not go to you to get it without having it made?
A. No, sir. We do not keep it in stock.
Q. Have you any machinery such as is required to make it?
A. We can make anything with our machinery.
Q. Do you make car siding?
A. Yes, we can make them. We do not keep them in stock.

Q. I simply want to know whether you make them?
A. No, sir.
Q. Do you make car roofing?
A. We do not make it.
Q. Car flooring?
A. No, sir.
Q. Do you make in stock specialties of step plank?
A. Do you mean for stairs?
Q. Yes?
A. We do not make a specialty of it.
1871 Q. Do you make cedar moth chests?
A. We make them if they are ordered.
Q. You do not make them, do you?
A. Not in stock.
Q. Have you made them?
A. Yes, sir.
Q. Stove boards?
A. Yes, sir.
Q. Do you make cutting boards?
A. Yes, sir.
Q. Maple flooring?
A. Yes, sir.
Q. Red and white oak flooring?
A. Yes, sir.
Q. Red and white quartered-oak flooring?
A. Any kind of flooring that is made.
Q. Do you make stock for furniture and piano factories?
A. We do not make any stock.
Q. Do you make panels?
A. Yes, sir.
Q. Veneers and all fancy woods?
A. No, we do not make veneers.
Q. Have you any machinery to make veneers?
A. Yes, sir.
Q. But you do not make them?
A. No, sir.
Q. Yet your machinery would make them?
A. We have got machinery to make them.
Q. Pattern stock?
A. No, sir.
Q. Water and liquid tanks?
A. Not in stock.
Q. Heading?
A. No, sir.
1872 Q. Battens?
A. Do you mean battens for doors and houses?
Q. Yes.
A. Yes.
Q. Store tables?
A. Yes, sir.
Q. Rollers?

A. Yes, sir.
Q. Tub and pail stock?
A. No, sir.
Q. Do you make them at all?
A. We have no machinery for tub and pail stock.
Q. Stretcher stock?
A. What kind of stretchers?
Q. Stretcher stock?
A. There are different kinds of stretchers.
Q. It is artists' material, called stretcher stock?
A. I cannot remember.
Q. Such as they use with oil paintings and all that sort of thing?
A. We do not make anything of the kind in stock. We can make it, but we don't.
Q. You do not make vats, I suppose, as you do not make tanks?
A. We have made some; yes, sir; but we do not make it in stock.
Q. There could not any one come and get it of you now without having it made?
A. No, sir. We would have to make it first.
Q. Coffee cabinets?
A. No, sir.
Q. Cornices?
A. Yes, sir.
Q. Blinds?
A. Yes, sir.
1873 Q. Do you make blind slats to sell?
A. Not to sell.
Q. Brush backs?
A. Not to sell.
Q. Do you make them any way in your business?
A. Sometimes there is such stuff ordered from brush-makers.
Q. Do you make trunk stock?
A. No, sir.
Q. Do you make trunks?
A. No, sir.
Q. Have not made them?
A. No, sir; only there is some specially made, then we will make them.
Q. Do you make curtain poles?
A. Yes, sir.
Q. I have no doubt you can go to work and make a trunk?
A. We can make anything that is made of wood.
Q. Whether you make them in stock, as a part of your business?
A. We have the machinery to make them with, and hands.
Q. You make lath, of course?
A. Not plaster lath. There are different kinds of lath, you know.
Q. Have you the machinery to make it?
A. No lath machine; no, sir.
Q. Do you make any fancy shingle stock?

A. We cut our own shingles, and if there is any fancy shingling we make it. We do not make them in stock.

Q. You do not manufacture fancy shingles?

A. We do not keep them or make them for sale unless they are ordered or we have some of them to use ourselves. We make them ourselves, then.

1874 Q. Do you make car-door stock?

A. It is about the same as the other match stuff.

Q. Do you make car-door stock?

A. We do not keep it in stock.

Q. Have you made any?

A. We built a car, yes, last year for the electric company.

Q. The electric road?

A. Yes, that is the only car we ever built.

Q. Which road?

A. It is not for the road; it is for the shop up here making these motor cars. We made it once to try their motor. I think it is the Standard Company.

Q. Where is it running?

A. I don't know where it is running.

Q. Do you make the fine car linings?

A. We do not make anything of that kind in stock.

Q. Coffin cases?

A. No, sir.

Q. Carboys and carboy heads?

A. I don't know what that means.

Q. You don't know what a carboy is?

A. No, sir.

Q. Do you make piano and organ cases?

A. No, sir.

Q. Do you make cigar-box lumber?

A. No, sir.

Q. You make partitions, of course?

A. Yes, sir.

Q. Ready to set up?

A. Yes, sir.

Q. Lattice-work?

A. Yes, sir.

Q. Sash-covering stock?

A. Well, sashes might be covered with a great many dif-

1875 ferent things. I don't know what you mean by that.

Q. Do you make it, have it in stock, or except as you need it in your building?

A. (Referring to window.) Well, this is a sash, and I do not see what sash covering——

Q. Sash covering—to put over the sash.

A. I don't know anything about that.

Q. Do you make wire spools?

A. No, sir.

Q. Do you make cove and bed moulding?

A. Yes, sir.

Q. Fence rails?
A. Yes, sir.
Q. Tank and vat plank?
A. We make them if we happened to have it ordered, not otherwise.
Q. Do you make staves and stave stock?
A. No, sir.
Q. Moulding boards?
A. Yes, sir.
Q. Cracker cases?
A. Not unless they are ordered.
Q. Crating stock?
A. We do not make anything in stock.
Q. Do you make it?
A. We have made crates, but we do not keep it in stock.
Q. Churn stock?
A. No, sir.
Q. Bridging?
A. No, sir.
Q. Crating heads?
A. I don't know what you mean by that. I suppose those are crates for eggs and such?
Q. Yes.
1876 A. We do not make them.
Q. Voting booths?
A. No, sir.
Q. Wagon boxes?
A. No, sir.
Q. You have not made wagon boxes?
A. Not unless we use one. Not for anybody else.
Q. Well, you do not make them, do you?
A. No, sir.
Q. Carriage and sled bottoms?
A. No, sir.
Q. Gun stocks?
A. No, sir.
Q. Do you make plug-tobacco butts?
A. I don't know what it means.
Q. Do you make tobacco caddies?
A. No, sir.
Q. Reaper platforms?
A. No, sir.
Q. Do you make balusters and table legs?
A. Yes, sir.
Q. Lap boards?
A. Yes, if they are ordered we will make them.
Q. You have not made them, have you?
A. Yes, sir.
Q. Candy trays?
A. Yes, sir.
Q. Shoe racks?

A. Yes, sir.
Q. Stovepipe racks?
A. Yes, we made some of them, too.
Q. Bulletin boards?
A. Yes, sir.
Q. Window stools?
A. Yes, sir.
1877 Q. Scrub and shoe blocks?
A. Well, we don't make them in stock.
Q. Do you know what they are—known to the trade as scrub and shoe blocks?
A. Scrub blocks—if there is a block a woman uses for scrubbing——
Q. Do you know the name of the thing known to merchandise as scrub and shoe blocks?
A. I don't know what it means.
Q. You would not know what it was if they were ordered?
A. If somebody would order it and show me what it means, I could tell you.
Q. O, yes, you are a carpenter and you could make most anything, I have no doubt. Do you know what window sticks are?
A. Yes, sir.
Q. Do you make them?
A. Put a stick in under a window.
Q. Do you make them?
A. Yes, sir.
Q. Do you make trip-hammer handles?
A. No, sir.
Q. Typewriter cases?
A. Not unless they are ordered.
Q. Do you make bed slats?
A. No, sir, not now, we used to make them.
Q. Do you make rab-ited siding?
A. Sometimes, not always.
Q. Square siding?
A. Yes, sir.
Q. Do you make it right along?
A. Sometimes, I say, not right along.
Q. When it is ordered?
A. Yes, sir.
1878 Q. Tub plank?
A. Yes, sir.
Q. Car-door battens?
A. Yes, we can make them.
Q. Do you make them?
A. We can make them if they are ordered; we do not make them in stock.
Q. Now, to make all these things with facility, don't you think that you would have to increase your machinery at all?
A. We might have to have some more machinery, if you wanted to make those in stock.

Q. Do you make spool trays and condensed-milk trays?
A. No, sir.
Q. Door and screen stock?
A. We can make it, but we don't.
Q. Wagon axles?
A. No, sir.
Q. Fancy-pattern shingles?
A. We don't make them in stock. We make them only when we are ordered.
Q. Tobacco cases?
A. Yes, sir.
Q. Single and double novelty siding?
A. I don't know what that means.
Q. Well, if it was ordered of you by that term, you would not know what it meant?
A. Unless a man tells me what it means. The expression I have never heard.
Q. Do you know what is called Philadelphia fencing?
A. I don't know what they mean by that.
Q. Do you make a step and riser plank?
A. Yes, sir.
Q. Do you know what it is?
A. Yes, I ought to know that.
1879 Q. Do you make German siding?
A. No, sir.
Q. You know what it is?
A. Oh, yes.
Q. Do you make such articles as these as you do make of them from air-dried and kiln-dried lumber?
A. Yes, sir.
Q. Chestnut?
A. Yes, sir.
Q. Butternut?
A. Yes, sir.
Q. Black walnut?
A. Yes.
Q. Mahogany?
A. Yes.
Q. Tennessee cedar?
A. Yes, sir.
Q. Florida red cedar?
A. Yes.
Q. Norway pine?
A. Yes, sir.
Q. Soft elm?
A. Not soft elm; we don't use any of that.
Q. Black ash?
A. Yes, sir.
Q. White ash?
A. Yes, sir.
Q. Red and white oak?

A. Yes.
Q. Sycamore?
A. Yes, sir.
Q. Hard and soft maple?
A. Yes, sir.
Q. Black birch?
A. Yes.
1880 Q. Red birch?
A. Yes, sir.
Q. Beech and cherry?
A. Yes, sir.
Q. Georgia, Florida, Arkansas and Mississippi pine?
A. Yes, sir.
Q. Do you have it in stock?
A. We do not keep it in stock, only a little. We will get some of it, not much.
Q. California redwood?
A. Very seldom we use that.
Q. Gumwood?
A. We do not use any of that.
Q. White mahogany?
A. Yes, sir.
Q. Got it in stock?
A. We do not keep it in stock, but we work it.
Q. Where would you get it?
A. We can get it in New York and Philadelphia.
Q. White holly?
A. No, sir.
Q. Bird's-eye maple?
A. Yes, sir.
Q. Hickory?
A. No, sir.
Q. Do you work in hemlock and spruce?
A. Yes, sir.
Q. Do you make any cedar shingles?
A. No, sir.
Q. Cedar posts?
A. Cedar posts I very often use.
Q. Did you see the Preston improved combined power sawing machines, with extra saws, tools and attachments?
1881 A. I saw all the saws that were there. I don't know the name of every one of them, as they may call them.
Q. You didn't look at the names of them to see whether they were the improved or patented?
A. Yes, I seen a couple of saws there, they were improved.
Q. Did you take into consideration in looking at that machinery the improved machinery like this Preston improved combined power sawing machine, what you could reproduce it for or what it would cost in the market to get it?
A. Yes, sir.
Q. What it would cost in the market?

A. What it would cost in the market to get it.

Q. Did you take into consideration that these machines might be patented?

A. Yes; they are mostly all patented.

Q. Then, if you could not tell a Preston improved combined power sawing machine, how could you tell what valuation to put upon it?

A. Well, I went and inquired where we bought our machinery, at Jenks'. He deals in machinery, and he told me the prices of those things.

Q. So that you looked at the machinery. You had no such machinery in your shop?

A. No, sir.

Q. Then you would go around and inquire of the dealers?

A. I inquired of dealers in just such machinery. For instance, there are some of those planers where Backus got them from Boston. I wrote a letter to those people.

Q. Take this machinery at Backus', would you consider it pretty fine?

A. Good machinery.

1882 Q. Did you see any machinery that you knew the value of without making an inquiry?

A. I knew the value of them from what we bought of some of them; what we have in our shop ourselves.

Q. You say you inquired as to the others?

A. Yes, sir.

Q. How many machines did you see in Backus' shop that were such as you had?

A. In Backus' shop they have got a sticker, two stickers, such as we have; that is, ours is a different patent; a different pattern.

Q. As to those, did you inquire the price of them that you found in Backus' of a different patent from yours?

A. Yes, I inquired.

Q. I have asked you to tell us, if you please, what you found in Backus' shop, the value of which you knew anything about without inquiring of anybody?

A. There was all these small saws. For instance the cut and rip saws.

Q. Oh, those things that are not patented?

A. Well, there are some of them patented and some not—all run about the same price.

Q. About how many did you see?

A. I cannot remember unless I look at my list.

Q. You can have your list. (Handing Spitzley Ex. 1 to witness.) Let us see what you saw there in that shop in the way of machinery that you were so familiar with you could tell its value without inquiring from anybody. You understand that?

A. Yes, sir.

Q. Without going out to anybody and asking the price, that you are familiar with in your own shop?

A. We have one large moulder and matcher that I knew the price of by our own machine.

Q. What did you set it down at?

1883 A. $470. And then they got a small one, $130.

Q. That you know of yourself?

A. Yes, sir. Then there was a band-saw filer; we have one also, $75; then there were 17 rip and cross-cut saws which I know the prices of.

Q. What did you put those down at?

A. Some at $45 and some at $44 apiece.

Q. How many at $45?

A. There was six of them.

Q. How many at the other price that you knew about yourself?

A. Eight at $44. Then there was another saw at $44, and then there was a gig-saw, $72.

Q. Eagan gig-saw?

A. I think it is Eagan. I didn't put down the name of that.

Q. Patented one?

A. They are mostly all patented. That was a patented one.

Q. Was that an Eagan saw you put down?

A. I cannot tell. I didn't put the name of that saw down. There is a machine here—three rip-saws and three more of these cross-cut saws of the same price.

Q. What is the price?

A. $44 and $45, three of each.

Q. What else that you were familiar with?

A. There was a couple of cut-off saws, some swing cut-off saws, which I know; we were going to put one up.

Q. What was the price?

A. $50.

Q. Did you inquire about that?

A. We would have to inquire about all this machinery; we get a book or price-list from the different factories, we generally get the prices of these machines.

Q. Did you look at them?

1884 A. Some of them; yes, sir.

Q. You think you could get at the price, what you have put it at, the way the books put it down?

A. That is what we call the swing cut-off saw.

Q. Did you see how it was set up by the Backus-?

A. I seen where it was put up; yes, sir.

Q. Didn't you notice that a table was put on there at right angles with the saw frame 32 feet long?

A. Yes, they had some long tables there, but they had nothing to do with the machine itself; wooden tables.

Q. The table was in connection with the machine?

A. Yes, sir.

Q. Did you take that into consideration in estimating its value?

A. Not in this price; no, sir.

Q. Did you, then, in estimating the values take into consideration the cost of setting up and the material for setting up?

A. Yes, sir.
Q. I understand you did not take into consideration this table?
A. Not this long table. There are about four or five wooden tables which we generally put up ourselves; don't belong to the machines really.
Q. Did you estimate those separately?
A. No, sir.
Q. Didn't estimate them at all?
A. No, sir.
Q. Well, go on with whatever you saw there that you knew something of the value of without making an inquiry.
A. I think those were all the machines that I knew the prices of without inquiring.
Q. And your estimated value of all the machinery in the shop was how much?
1885 A. $16,891.
Q. And on that estim[illegible], the only articles in the shop of which you had knowledge you [illegible]f without making inquiries you have just stated?
A. The other machines, exce[illegible]. those I stated just now, I had to inquire about. I went to Jenks and got the prices.
Q. And you didn't take into consideration any peculiarities in the setting up or the value of those?
A. Mr. Kramer took the settings in, as I understood him.
Q. Did you see a blacksmith forge there?
A. Yes, I seen a small blacksmith forge, but it was standing loose there.
Q. Did you take that into consideration?
A. No, sir.
Q. Did you estimate it at all?
A. No, sir.
Q. Of the total machinery you estimated at $16,000 you knew the price of about $1,400 worth. We have figured it up.
A. I didn't figure it up; it might be.
Q. That is what it amounts to. Did you see on the Eagan scroll-saw any extra attachments?
A. No, sir.
Q. Did you take those into consideration, any extra attachments?
A. I have not seen any on that saw.
Q. Did you see a power wood-cutting machine there with extra saws?
A. I don't know what kind of a wood machine is meant by that name.
Q. You would not know it by that name?
A. No, sir; I seen all the machinery, but I would not know.
1886 Q. Have you got any power wood-cutting machines in your shop?
A. As I say, I don't know what you mean by that name.

Q. Did you see any emery grinders there for sharpening tools, and knives and so forth?

A. Yes, sir.

Q. Are those estimated?

A. No, sir.

Q. You didn't put them in at all?

A. I ain't got them in, no, sir. I seen one there, but I didn't put it in.

Q. How many rip and cross-cut sawing machines have you got in all told?

A. 28.

Q. You didn't see enough to make up 30 sets, did you?

A. Well, there are some saws here I did not count in for what you say, there are some cut-off saws I didn't count in in those 28.

Q. Did you see any of Backus' patented or improved box trucks?

A. I seen a good many trucks standing around there, yes, sir.

Q. How many?

A. You mean these small hand trucks?

Q. Yes.

A. I didn't count them.

Q. Did you estimate them?

A. No, sir.

Q. Did any one estimate them?

A. I know nothing about that.

Q. Did you see what is known as any New York single-surface power pony planers?

A. I seen two pony planers there, what they call them. I
1887 have got two pony planers in my estimate, but what they call them I cannot tell.

Q. Did you put them in as New York power pony planers?

A. I don't mention the name here.

Q. Do you have anything like them in your shop?

A. No, sir.

Q. You inquired for the price of those?

A. Yes, sir.

Q. Did you call them that when you inquired?

A. I explained them to Mr. Jenks as well as I could.

Q. You didn't examine them to see what the patent was?

A. No, sir.

Q. Did you examine them to see what the patent was before you asked the price of the people that you inquired of?

A. Yes, sir.

Q. Did you see what the patent was before you inquired of the price?

A. Yes, I seen them on the large planers, and I have looked at them. They are all the wood machines.

Q. Well, did you see any patent——

A. There was no——

Q. You must answer the question. I want to ask you one thing at a time. The New York single-surface power pony planer?

A. I have not examined that pony planer through the name of it, as I stated before. I got it down on my price-list here.
Q. What did you get it down as, what name?
A. I just put down pony planer.
Q. When you ever made an inquiry as to what the cost of that was, did you ask the dealer what a pony planer would cost?
1888 A. Yes. I went and asked him what a pony planer would cost, and he has got some of the improved patent, and he told me what the price was.
Q. But you did not tell him anything about the patent?
A. I had not heard the name; no, sir.
Q. You know in your business, don't you, that you have to pay something more for a machine that is patented?
A. Well, they are all patented, pretty near.
Q. You know that you have to pay more than you can set up such a machine for yourself.
A. They are all patented, some of them are later.
Q. You know that you have to pay more for such a machine that is patented than you can set one up for yourself?
A. I cannot understand that. They are all patented.

Mr. BAKER: He cannot set it up himself.

Q. Suppose a machine is patented. Don't you have to pay more for it than you would if you set it up yourself?
A. We do not make machinery ourselves.
Q. I know you don't, but don't you have to pay for the thing being patented?
A. They are all patented. I don't believe there is hardly a machine that is not patented.
Q. How about the pony machine; is there no pony machine that is not patented?
A. Not that I know of.
Q. Isn't one machine worth more than another?
A. Yes, I have got the two prices down, too.
Q. Then in asking about the price of a pony planer without naming what patent it was——
A. Yes, I didn't——
Q. Do you think that the man you asked had the proper premises to give a correct answer?
A. He had the different kinds of ponies, and he told me
1889 the latest pony planer is worth so much more than the other one.
Q. What price did you take then; did you take the latest price?
A. Yes, sir, for that one. There are too many pony planers there.
Q. Were they double-feed or single-feed pony planers?
A. That I cannot tell.
Q. What did you tell the man you inquired of to get the price, whether it was double-feed or single-feed?
A. I didn't ask him that.
Q. Did you notice that the pony planers in the Backus mill had pull-out rollers?

A. No, sir.

Q. Is that any improvement from the ordinary pony planer?

A. I suppose so.

Q. You didn't notice whether the Backus one had it or not?

A. No, sir.

Q. Do you have them in your shop?

A. We have no pony planer in our shop.

Q. Did you see a lock-corner machine there—Backus' own patent?

A. Lock-corner machine?

Q. Yes, a lock-corner machine.

A. I don't know what it is.

Q. By means of which they may make a corner with that machine. Did you see any such thing as that?

A. No, sir.

Q. Did you see a Rogers rounding machine and counter?

A. I don't know what kind of a machine that is; not by the title of it.

Q. Do you know what a rounding machine is?

1890 A. Well, they are making a great many kinds of rounding machines; but what kind of rounding machine do you mean?

Q. At all events, you didn't see the Rogers machine to know it?

A. I cannot remember that I seen a rounding machine; what they call it, or what they would be. I thought I seen all the machines in the whole building.

Q. Well, have you got any machine set down as one? There is only one in the shop, a pretty large machine, that is used for rounding.

A. It might be. It is none of these other machines here—grinders and such. I have got several machines marked down, one machine at a time, but whether those are the rounding machines I cannot tell.

Q. Did you see any that appeared to be of Backus' patent in that shape?

A. Backus told me that one of his planers——

Q. Not what he told you. Did you see anything that appeared to be patented by Backus?

A. No, sir.

Q. Did you see a dado and groove cutting machine, with attachments?

A. No, sir. They had some machines there where they made grooves; what I called matchers.

Q. You call them matchers?

A. Yes, small machines, where they match the box stuff—short box stuff. I don't know whether they call them that way or not.

Q. Did you examine to see whether they were patented?

A. No, sir.

Q. How many were there there of that style?

A. I think there was four.

Q. Two of those small ones?

1891 A. One—two. Yes, small ones.

Q. Two what? Describe your own description?

A. Small matching machines, which I thought maybe you allude to as dado and groove.

Q. No, this is a large machine I am speaking of, a dado and groove cutting machine, Backus' improved power dado and cutting machine?

A. I have not seen them if there is any such there.

Q. Then you have only two of the matching machines?

A. Yes, sir.

Q. Would it surprise you to know there were ten in the shop?

A. If there are, I have not seen them.

Q. Now, in your estimate of the machinery, did you find any of them with extra heads and extra knives, and extra tools about them?

A. Whether I found any machines with extra——

Q. Yes, so that in case of breakage or disorder they could supply them immediately?

A. Oh, I suppose they kept them in a separate place.

Q. Are they estimated?

A. No, sir.

Q. You have not taken them into consideration?

A. No, sir.

Q. Has any one so far as you know?

A. None of these extra ones.

Q. Did you see any extra moulding knives where you saw the moulding machines?

A. I have not seen them; they have got things laying around there loose that very likely I have not noticed.

Q. But didn't you see about these machines racks which contained extra moulding knives and extra tools, to the number I have no doubt through the mill of hundreds, in racks, ready to be supplied instantly?

A. Yes, I remember now I seen them.

1892 Q. Did you take them into consideration?

A. No, sir. I remember now I seen them.

Q. But you have no inventory or appraisal of them?

A. No, sir.

Q. Where they have material to instantly supply any part of a machine, you have not taken those into consideration?

A. I remember now there is a little room off in one corner.

Q. No, but in racks near the machine?

A. Well, that is in racks.

Q. And you didn't take them into consideration?

A. No, sir.

Q. Did you ascertain from your examination that if any part of any machine gave way they could instantly supply the defect?

A. That is what Backus said; he had them. I suppose they have them.

Q. What was this little room you saw used for?

A. There is a little room on one end of the building, on the second story, where they have such——

Q. In racks?

A. Yes, sir.

Q. Extra saws?

A. Yes, sir.

Q. Cross-cuts and rippers, and all that?

A. Yes, sir.

Q. And you have only put down in your inventory the saws that are in actual use?

A. Yes, sir.

Q. You did not put in a single extra saw or moulding knife or extra part of a machine of any kind?

A. No, sir.

Q. You have not got it in your estimate?

1893 A. No, sir. I can remember I seen that room with these extras, but I forgot to put it in.

Q. I want to know if you saw an Eagan heavy power upright boring machine?

A. Yes, sir.

Q. You got that down?

A. Yes, sir.

Q. You inquired the price of that?

A. There is a boring machine, or drill, I called it.

Q. Did you notice whether it was patented and whose it was?

A. As I say, they are all patented.

Q. Did you notice whose this was?

A. I didn't.

Q. Have you got any such machine in your shop?

A. No, sir.

Q. Ever have anything to do with one?

A. No, we don't use them.

Q. Did you see mill or factory wagons and carts around there?

A. Yes, sir.

Q. Did you estimate them?

A. No, sir. I didn't know that I was asked to do that.

Q. You didn't know that Backus had 28 of those of his own make?

A. They had quite a number of wagons around there and light carts.

Q. Did you estimate the grinding stones?

A. No, sir.

Q. For the knives, peculiar stones?

A. No, sir.

Q. You didn't put them into your valuation?

A. No, sir.

Q. Did you see them?

A. Yes.

1894 Q. Do you know anything about the value of those stones?

A. Yes, we have a couple of them in our shop.

Q. The same kind?
A. Yes, sir.
Q. And you only saw one?
A. No, I think there were two, one in the lower story and one upstairs. There is one small one and one bigger one.
Q. Did you see what is known as a picket heading or sharpening machine, a pretty large one?
A. No, sir.
Q. Used for that exclusively, for sharpening?
A. I see the saws; I thought they were doing that with those saws, what they had there.
Q. Used for picket heading exclusively, and sharpening?
A. No, sir; I cannot remember seeing an extra machine for that purpose.
Q. Did you see one of Howe's very large platform loading scales?
A. Yes, there are two of them.
Q. Did you put those in your estimate?
A. No, sir.
Q. Or any one so far as you know?
A. I think that Mr. Kramer has got them.
Q. (To Mr. Kramer.) Mr. Kramer, have you got those?
Mr. KRAMER: No, I didn't take any scales.
Q. You didn't put them in?
A. That is right near the elevator?
Q. There are two of them. You didn't get them in?
A. No, sir.
Q. Did you see a knife balancing, grading and weighing machine?
A. A what?
1895 Q. A knife balance; a very fine, delicate weighing scale.
A. Weighing scale?
Q. Weighing scale for knife balancing in order to get at the weight?
A. No, sir.
Q. You didn't put that in?
A. No, sir.
Q. Well, it sometimes is a matter of some importance, isn't it, to get the weight of your knives accurate for the use on these machines?
A. Well, we never weigh them in our shop.
Q. But in the finest work, isn't it a matter of a good deal of importance to get the same weight and same kind of work?
A. There is always the same size; we take the size of them. If we have newer planer knives—we generally keep them in the same size, and unless they are worn off, one more than the other, of course then we can get another.
Q. You know it is necessary to get them the same size and weight in order to get uniform work in a mass of work?
A. I suppose so.

Q. And you didn't see those two knife balancing, grading and weighing scales?

A. No, sir.

Q. Did you see an S. A. Woods power single-surfacing pony planer?

A. There were only two pony planers there, which I have down.

Q. Oh, yes, those two you have told us about. Those were single-surface power pony planers?

A. There are only two in the whole shop that I can see.

Q. Then, if there was one S. A. Woods single-surface
1896 pony planer in addition to the two power pony planers, you didn't see it?

A. Not if there was a pony planer.

Q. You saw only two of any kind?

A. That is all the pony planers I seen in the shop.

Q. Do you know the S. A. Woods single-surface pony planer?

A. No, sir, I seen a lot of Woods planers there, but I have never seen a Woods pony.

Q. You did nothing with the steam-engine?

A. No, sir. Mr. Kramer has that.

Q. How about the ventilator?

A. Mr. Kramer took that.

Q. With the belts and blowers, and all that?

A. Yes, sir.

Q. And the heaters he took?

A. Yes, sir.

Q. Did you see the patent steam sand-blast file-sharpener?

A. I seen a file-sharpener there—oh, no, that was a saw-sharpener.

Q. Did you see a steam sand-blast machine for sharpening?

A. No, sir.

Q. Mr. Kramer would not get that, would he?

A. I don't know.

Mr. KRAMER: Yes, I have got that.

Q. Did you get the patented automatic Springfield emery knife-grinding machine?

A. No, sir, that is what you were asking me before; I did not have that.

Q. No, I have not asked you that before; this is another one?

A. No, sir.

1897 Q. For the grinding of long planer cylinder knives—did you see that?

A. No, sir.

Q. Did you see the improved oil tanks with pumps?

A. I seen some oil tanks standing there.

Q. Are they included?

A. No, sir.

Q. Has any one included them?

A. No, sir.

Mr. KRAMER: I have got the oil tanks.

A. Mr. Kramer has got a lot of these tools and one thing and another which I thought he was taking in.

Q. I suppose he has got the engine; I am passing that. You did not take the extra saws for the small machines?

A. No, sir.

Q. Didn't include them at all?

A. No, sir.

Q. How many saws did you take in the first floor, do you remember?

A. You mean on the ground floor, on the basement floor?

Q. There is no basement; I mean on the ground floor?

A. That is what I mean. There was four large saws on segment, and three other large ones and a large band saw.

Q. That makes seven?

A. And then four rip-saws and three swing cut-off saws and a circular saw—that is 13.

Q. How many on the second floor did you take?

A. I marked the second and third floors together.

Q. Take them on the second and third together, how many did you get?

A. Twenty saws.

Q. Clear to the top?

1898 A. Yes, there is only two more floors; there is the first floor.

Q. Now, would it surprise you to know that there were up there 347 saws, above the first floor?

A. Well, they must have them in a corner stored away, where I didn't see them.

Q. In your estimate of value you have estimated the single saws you saw at work?

A. I suppose in this you say 347, it must be those that are not in the machines.

Q. But the saw is worth just as much out of the machines as it is in?

A. As I said before, I have only the saws in the machines.

Q. You didn't estimate the others?

A. No, sir.

Q. They are worth just as much outside as in?

A. Yes, sir.

Q. Did you go into the filing-room to see where they were filing saws?

A. I seen the band-saw filer on the first floor.

Q. Did you see a filing-room where they were filing saws on the second floor, specially?

A. I seen a little room, as I stated before, in one corner, where there were saws on the shelves.

Q. Did you see what is called the filing-room?

A. I suppose very likely that must be the filing-room.

Q. Did you see——

A. Yes, I seen it, but I forgot. I was going to make a memorandum of it, but I forgot.

Q. There is a filing-room down there without a single shelf in the room. That cannot be the one that is in your head. Did you see it?

A. I cannot remember any other room for filing saws specially.

1899 Q. Then you did not see it or don't remember? Isn't that so?

A. That is so; yes, sir.

Q. Did you take into consideration the planing-mill office with the factory?

A. I was in the planing-mill office if it is a little office what is on the sawdust room.

Q. The foreman's office?

A. I suppose that must be it. I was in there.

Q. Did you estimate anything inside of that office?

A. I estimated all what belonged to the building in that.

Q. What belonged to the building, but not the furniture or desks or fixtures in there, did you?

A. I didn't estimate any furniture in there.

Q. What was there in there?

A. A small desk in there; it is a small room, and some chairs.

Q. Did you find the electric-bell attachment?

A. I had nothing to do with that; Mr. Cramer had.

Q. Did you see any of the Backus hand-power matching machines?

A. There are two little matchers, what you asked me before. I suppose that is what is meant by that, isn't it?

Q. No, it is entirely different.

A. It is a little bench where a man shoved the short boards by hand through.

Q. Yes, that is it. How many of them did you get?

A. I got two of them, I think.

Q. Get at your maximum that you did actually get of those?

A. I only got two.

Q. If there were ten there would it surprise you?

A. That would surprise me. I remember there was four; I think there was a mistake made in the figures.

1900 Q. A bumping machine—did you see any of those?

A. No, sir.

Q. I think I can show you what I mean by it by this picture. Did you see any of those? (Showing witness a photograph.)

A. Yes, that is the saw-table.

Q. You called it a saw-table?

A. Yes, sir.

Q. How many saw-tables did you get?

A. There is quite a number of them.

Q. You estimated them separately?

A. No, they are not with the saws.

Q. I thought you said a little while ago those things you called tables you didn't estimate?

A. There is only two or three large ones, those swing cut-off saws, a long table.

Q. Didn't you tell us a little while ago that as to the table that was there with one of those large machines that you didn't estimate it?

A. Yes, that is what I say; the swing cut-off saws.

Q. You didn't estimate the table at all?

A. The large long table I didn't estimate, but I think there are tables on the estimate.

Q. How many. Those were with the rip-saws?

A. Rip-saws and cross-cut saws; each one has got a table.

Q. You estimated those?

A. Yes, sir.

Q. How many?

A. There is 18 or 19 of them.

Q. Those are in connection with the rip-saw?

A. Yes, each rip-saw or cross-cut saw has a table.

Q. Did you take into your estimate the rollers of those tables or gauges?

1901 A. The whole table, gauges and everything, is fastened to the table.

Q. What did you put in the cost of those?

A. $44 and $45.

Q. Each?

A. Yes, sir.

Q. Including the saw?

A. Yes, sir.

Q. And including the rollers?

A. Yes, that is the whole thing.

Q. Rollers and gauge-table?

A. Yes, sir.

Q. That was in connection with the rip-saws. Did you in addition to that see what I have shown you, eight bumping machines, operating separately from the rip-saw tables?

A. I thought they all belonged to the saw there. They have some tables there where there is no machine on; that may be one of those.

Q. That is what it is. It is not anything near any rip-saw; your rip-saw tables are all right?

A. They are smaller; they look like a saw-table.

Q. They were not near any saws?

A. No saws.

Q. That is what I call improved bumping machines, and there are eight of them and did you estimate them?

A. Well, there are no machines, they are just tables.

Q. So you didn't estimate them?

A. No, sir.

Q. And those in connection with saws you estimated as a part of the saw apparatus?

A. Yes, the saw-table.

Q. Did you see a large power joiner or buzz planer, with extra knives?

A. I can tell you all the planers I got.

1902 Q. No, but this buzz planer, a very large machine?

A. They have got some very large planers, three or four of them; but whether they call them buzz planers or not I cannot tell.

Q. Isn't there any difference? Do you know what a buzz planer is?

A. That is the first time I heard the name.

Q. Do you not make any distinction between the other planers you have told us about and what is called a buzz planer or joiner?

A. I have not seen any.

Q. Did you see any of the sanding wheels?

A. Sanding wheels—let's see. I cannot remember. I don't know what it means.

Q. Well, a sanding wheel is something that puts a fine finish on?

A. Sandpaper machine, you mean.

Q. Only it is a wheel instead of sandpaper?

A. No, sir, I didn't see them.

Q. Didn't estimate them, did you?

A. No, sir.

Q. The sanding of fine work is very important; this fine inside work?

A. It is with us.

Q. You sandpaper it in your shop, do you?

A. Yes, sir.

Q. Do it by hand?

A. Some by hand and some by machinery.

Q. Don't you have anything done by wheel?

A. No, sir.

Q. Does it occur to you that it would be a very great improvement if it could be done by machinery and a wheel?

1903 A. We have a sandpapering machine; we had wheels in the olden times. They used to have wheels altogether. There may be some of those there; I didn't notice.

Q. Well, you didn't see any, anyway, and you have not included any of these, have you?

A. No, sir.

Q. Did you see a large band resaw for splitting boards?

A. Yes, sir.

Q. Is that in your list?

A. Yes, sir.

Q. How many?

A. There is one.

Q. Did you see what kind of a resaw it was?

A. No, sir. I looked for it, but I could not see any name on it.

Q. How many extra saws with it?

A. No extras with it.

Q. They are not put down, you mean, on your list?

A. I have not put any extra saws down on my list.

Q. They were right there. Not in any room, but right there by it?

A. No, I have not put any down; only what was on the saw. I got a large band saw, $1,100.

Q. Have you got any extra parts down for that?

A. No, sir.

Q. Isn't there right there by it; right just back of it——

A. I might have seen a saw hanging near it.

Q. No, but with extra parts of the entire machine right near it and just back of it, so that any part of that big machine could be supplied instantly by the man working the machine if it broke. Did you see them?

A. No, sir,

Q. You didn't estimate the value of them?

A. No, sir.

1904 Q. Did you see standing right with it, also, in case of any warping of any of the machinery, an extra steel anvil, with hammers, standing right by that big saw?

A. No, sir.

Q. Didn't estimate them either?

A. No, sir.

Q. Did you see a Huntington four-sided moulding machine with the shavings connection?

A. As I said before, I didn't see all the names. I looked for several of them, but I could not find them. I have got a moulding machine down.

Q. What did you put down that resawing machine at, by the way?

A. $1,100.

Q. You didn't notice anything that would identify this Huntington four-sided moulding machine as different from any other moulding machine?

A. We have a four-sided moulding machine in our shop, and I have got one here, and I have got the price of it down.

Q. What did you put it down at?

A. $470.

Q. Is it the Huntington?

A. I don't know what name it is.

Q. You did not look to see what it was?

A. No, sir.

Q. Well, if they paid $650 for the Huntington within a short time, you would think they had been cheated, would you?

A. Oh, I would not think they had been cheated.

Q. Where did you get your information that that was worth $470?

A. I got my information from the machine we got and from Jenks—asked him besides.

Q. Did you put that Huntington four-sided moulding machine down from your own knowledge?

1905 A. Yes, sir.

Q. Where did you buy your machine?

A. We bought our machine from Fay.
Q. What is the name of the machine?
A. The Fay machine.
Q. Is it patented?
A. Yes, those machines are all patented.
Q. You put this in at $400?
A. No, sir, $470. Our machine didn't cost that much and I put $100 on top of our machine, because I thought it might cost more.
Q. Well, what you put down here as a large matcher and moulder you put down at $470—that is what you have just been talking about?
A. Yes, sir.
Q. But that is not the Huntington four-sided moulding machine?
A. Ours is a four-sided moulding machine; it is not a Huntington; it is a Fay.
Q. Now, you put down underneath that one small moulder and matcher at $130?
A. Yes, there is another one.
Q. Have you got one like that in your shop?
A. Yes, sir.
Q. You put that down from your own knowledge at $130.
A. Yes, sir.
Q. Did you make any inquiries as to the price of that besides your own knowledge?
A. As I said before, we have one of those large machines in our shop, and then I spoke to Mr. Jenks about it besides.
Q. You put it down at $130?
A. I mean the large one.
1906 Q. I am talking now about the one you put down at $130.
A. The small one?
Q. Yes.
A. No, I didn't ask any questions about that. We got one about similar.
Q. Now, that was a Huntington machine?
A. Well, that I don't know. Ours is not a Huntington.
Q. You did not see any Fay machine at Backus'?
A. No, sir.
Q. If they had purchased that machine you got down there at $130 and paid $550 for it, you would be willing to change your mind or think that they had paid too much?
A. I would think they had paid too much.
Q. Because you prefer the Fay machine to the Huntington?
A. I don't say I would prefer the Fay machine, because I don't know how good the other one is. Ours is a good machine.
Q. Did you see an S. A. Woods large moulding and matching machine, with shavings connections?
A. Yes, there is one large 24-inch matcher.
Q. I am not talking now about the S. A. Woods single-surface pony planer; that is another patent, but I am talking about the Woods moulding and matching machine?

A. Yes, there is one of those; a large one.

Q. How many did you see of the large ones, and how many did you put down?

A. I have got four.

Q. What did you put them down at?

A. Three of them at $1,600 and one at $1,900.

Q. That is $1,600 for the three?

A. Apiece—$4,800. There is three in one place and there is one upstairs. There are four.

1907 Q. Don't you think that you are getting the pony planers and matching machines and the moulding and matching machines somewhat mixed?

A. Well, I don't know the names of the different machines.

Q. Well, how can you tell the fact if you don't know the names?

A. All I know is these large machines there, I think, were all Woods' machines.

Q. You think so? If you do not know the names and you got your information as to prices by inquiring of Jenks, how did you tell Jenks what the machines were?

A. I did not get these prices of Jenks. I wrote a letter to where these machines are made.

Q. Where did you write?

A. To Woods, of the Woods Manufacturing Company, of Boston.

Q. Where is the letter?

A. I guess I have got it with me.

Q. Have you got a copy of the letter you wrote him?

A. No, sir. Here is the letter.

Q. We are certainly talking about different things. (Reading letter.) "Messrs. Spitzley Brothers—Dear Sirs: Answering your inquiry of the 27th instant, will say we do not now make machines the same as we sold A. Backus, Jr., & Sons some years ago. The price at that time for the one 24 planer and matcher was about $2,000, and for the 2-30 double-surfacer about $1,800. These machines were sold through our branch house, and we do not know here the exact prices. We are now furnishing new pattern machines, heavier, and of course more up to date, that take the place of these. The 1-24 machine would now be worth on cars here (Boston) $1,900, and the 2-30 double-surfacer from $1,500 to $1,600.

1908 This seems to be all we can say towards giving you values you ask for in your letter. Yours truly, D. A. Wood Machine Co. By E. N. Health, treasurer." Did you keep a copy of your letter?

A. I don't know. I told our book-keeper to write and I don't know whether he has a copy or not.

Q. On the strength of this letter you filled into your inventory and appraisal the price of $1,900 for one and $1,600 for another?

A. Yes, sir.

Q. And swore to that as a valuation?

A. Yes, sir.

Q. You could not tell yourself on any examination you made?

A. No, sir.

Q. And you wrote a letter down there, got this reply back, and then swore to the valuation?

A. Yes, that is so.

Q. And yet even on the machines you did inquire about, which seems to have been a planer and matcher and a double-surfacer, you put down $1,900?

A. For one, yes, sir.

Q. On this valuation against Backus?

A. Yes, sir.

Q. When they informed you that it would be worth $1,900 on the cars at Boston?

A. Yes, sir.

Q. Without adding anything for transportation or handling, did you not?

A. Yes, sir.

Q. And for the other you take the price at Boston without adding anything for transportation and put it on your inventory?

A. Yes, sir.

Q. Now, did you ask them the price of a matcher and planer, such as they use, in your letter?

1909 A. That is the answer; yes, sir.

Q. You used that term, did you?

A. Yes, sir.

Q. And, then, for the other machine you asked for a double-surfaces, did you?

A. Yes, sir.

Q. Kept no copy of the letter?

A. As I say, I don't know.

Q. Will you look and see just what you asked about?

A. I can inquire and see whether a copy is there or not.

Letter referred to marked "Exhibit Spitzley, 2."

Q. You put down four machines like that, did you?

A. Yes, I got four for $1,600 and one for $1,900.

Q. You gave on three of them the lowest prices and on the other the highest?

A. One of them was $100 and the other $1,600, and I have got four of those $1,600 and one $1,900. As they say here in the letter, the machines they are making now are heavier and more up to date, so I thought certainly that would be satisfactory, because those machines would be better what they are making now than at that time. They were bought ten years ago.

Q. How many of them are there all told—30-inch machines?

A. Four; and then there is one 14.

Q. That makes five?

A. Four 30-inch machines, yes, sir, and one 24.

Q. That makes five.

A. And one planer and matcher; that is six.

Q. And you asked him for a planer and matcher?

A. I asked the price of a planer and matcher and double-surfacer.

Q. What were they for? What did you ask him about; what for?

A. I say I asked him for the same machines that——

1910 Q. How did you explain to them?

A. I described them to him as the same machines he sold to Backus some nine or ten years ago.

Q. How did you know they were the same machines they made for Backus?

A. That is the answer to my letter. I could not tell any more than that.

Q. How did you describe the machines you wanted information about? What did you call them, the four machines?

A. I called them the 30-inch double-surfacer and the 24-inch planer and matcher.

Q. Now, you estimated three of those machines at $1,600, didn't you?

A. Four and one at $1,900, and one at $1,300—that is the 24-inch.

Q. Did you see there any 30-inch, eight-roll, broken-bar double-surfacers?

A. Well, I seen four 30-inch surfacers. That is all I got on my list.

Q. That is what you are talking about?

A. Yes, sir.

Q. What did you say as to the four S. A. Woods large moulding and matching machines—did you see them at all?

A. I didn't see a large moulding and matching machine—not four. I seen only one, a large one.

Q. Let us see if you would recognize the machine as to which you made the inquiry of Woods. (Showing witness photograph.)

A. I could not recognize it from this picture here.

Q. You would not know whether that was the machine as to which you wrote Woods or not?

A. No, sir.

1911 Q. (Showing witness another photograph.) Was that the machine you wrote about?

A. I think this looks like one of them.

Q. Well, that is like one of them?

A. That looks like one of them.

Q. Surfacer?

A. Yes, sir.

Q. Did you see or inventory five machines like that I now show you?

A. I could not recognize it from this here.

Mr. DICKINSON: Well, I will offer that in evidence; he says thi is the one as to which he wrote to Woods.

A. That is pretty hard for a man to tell exactly from a picture. It may be the machine, but I could not recognize it from the drawings.

Q I want to return and finish this. Does the picture I now show

you contain the machine such as you wrote to the Woods Company about?

A. I could not swear to it, not by the picture. I think this here is a smaller machine, that looks like that smaller machine; it looks so little from the end. Looking at it from the sides it don't seem to have so many rollers.

Mr. DICKINSON: I will have it marked as the one I made inquiry about. He says he cannot tell whether that is the machine he wrote to Woods about or not.

Photograph referred to marked "Exhibit Spitzley, 3."

Q. You can see by looking at that whether that looks like any of the machines you saw?

A. Yes, that looks like that; a good deal like that.

Q. Like what?

A. Like the machines they had down there.

Q. What do they look a good deal like? What on your inventory—what do you call them on your inventory?

A. I call them three large planers and one large planer.

1912 There are four of them, 30-inch, what they call double-surfacer.

Q. You did not write to him about those?

A. I wrote to him about those large double-surfacers, as the letter states. I don't know anything about the pictures.

Mr. DICKINSON: I will have this marked as the one I last asked about.

Photograph marked "Exhibit Spitzley, 4."

Q. I am going to ask you now whether "Exhibit Spitzley, 4," looks like the machine that you described to the Woods Machine Company in your letter as a 2-30 double-surfacer?

A. I don't say I can say it looks exactly like it. It looks some like it, but not exactly.

Q. This "Exhibit Spitzley, 3," looks like what you described when you inquired of the S. A. Woods Machine Company as a planer and matcher?

A. I cannot tell from these pictures; no, sir. When I wrote about these I asked them just for the same machines that they sold to Backus so many years ago. That is the best way I could ask them, because it is the same parties that sold them to Backus. Backus told me he bought them from him.

Q. Did you see an improved double eight-roller broken pressure-bar double-surfacer?

A. I seen a 24-inch machine there, but whether you call it that way I cannot tell.

Q. What did you estimate that at?

A. I estimated that at $1,300.

Q. Where did you get your information to get that?

A. I got that from the other one.

Q. From what other one?

A. When I had the conversation with Jenks about the machines

he told me first. I thought he had the prices of them. I
1913 went to ask him, and he said he could not give me any prices, because he didn't think there was any agency here in the city, and I said I guessed I better write them, and when I got the answer I went back to Jenks and showed him the letter.

Q. This letter?

A. Yes, and I told him I forgot to ask about that 24-inch one. And I said I suppose we will have to——

Q. So Jenks took a guess at it?

A. Of course he is an old machine man.

Q. So you both took a sort of guess at it and put it down?

A. We put it down because I know a 30-inch cost so much more than a 24-inch.

Q. You did not know, did you, that that especial machine, a double eight-roller broken pressure-bar double-surfacer was built between Woods and Backus, on Backus' own suggestion of improvements, and was the only one in existence?

A. I didn't know that, no, sir.

Q. Now, the gang rip-sawing machines—did you see any of them?

A. I didn't see any gang saws there.

Q. If there are three sets of gang rip-sawing machines you have not seen them or included them?

A. I have seen three rip-saws, but no gang saws.

Q. Then if there are five—I said three—five gang rip-sawing machines, you did not see them or include them?

A. I have not seen any gang saws.

Q. Then there are three what are called power spur-and-pulley-feed rip-sawing machines?

A. I seen three rip-sawing machines like the one you refer to. I don't know the names or expressions used to describe them. I have three large rip-saws here, $1,125.

1914 Q. That was three, but you didn't see the other three I gave you?

A. I have got one segment rip-saw here, $575.

Q. That is a resaw?

A. I don't know how they call them, rip-saw or resaw.

Q. Are you familiar with those saws?

A. No, we have none in our shop.

Q. You asked Jenks then?

A. Yes, sir.

Q. And he took a flier at them?

No answer.

Adjourned till October 10, '93, 10 a. m.

OCTOBER 10, '93—10 a. m.

The COURT: I will state to counsel this morning that I do not think there will be anything but detail this morning, and it will not be necessary for me to remain here. If any question should arise you may send for me over in the probate court. Judge Durfee is away this morning, and I have agreed to dispose of his business.

HENRY SPITZLEY, recalled for further cross-examination.

By Mr. DICKINSON:

Q. Did you see or have you on your list an improved swing cut-off sawing machine?

A. I got several cut-off sawing machines, but I don't know which should be the improved one.

Q. A swing cut-off?

A. Yes, sir.

Q. How many did you get?

A. Four.

Q. You are sure you didn't miss one?

A. I didn't miss any willingly.

1915 Q. No, I know that. I do not mean to reflect upon you at all.

A. I do not wish to have that done, because I would not do anything that I thought was wrong against either party, not for any money.

Q. I am only trying to see the fact of your testimony on cross-examination, and see if you omitted anything by overlooking it. No one supposes here that you are going to swear to a lie. I do not, and I do not want to carry on the testimony with any such assumption. Well, if there were five in the shop, then you have omitted one?

A. I would have missed one; yes, sir.

Q. Now, you are familiar with these cutting machines?

A. Yes, sir.

Q. Do you have them in your own shop?

A. We have one in our shop, yes, sir; and we have another one, but not similar to this one.

Q. Did you notice that these were mounted on extended frames?

A. They were fastened overhead so as to swing.

Q. You do not have that sort of an attachment in your shop, do you, with extended frames?

A. We have one, but there might be some one that might be arranged a little different from what ours is.

Q. Did you notice whether they were?

A. Not what I have seen, no, sir.

Q. Did you notice the gauges on these swing cut-off machines?

A. There are gauges—no, there is no gauge on what I have seen on the swing machine. There are gauges on all the other saw-tables, but not on the swing cut-off.

Q. Then on the four you did see you did not see any gauges at all?

A. No, sir.

Q. How carefully did you examine these machines?

1916 A. Well, I went over them several times, and took down the items and went there again repeatedly, when I thought I was not sure. I went there three times to look after the machines.

Q. But with the exception on your appraisal of a sum amount-

ing to about $1,400, which you named as being familiar with, you saw many machines there you had not seen before, didn't you?

A. That is, I have not seen those machines down there. I have seen similar machines.

Q. Did you examine the mounting of them?

A. Well, I didn't examine them so closely, no, sir.

Q. Did you see them in operation, all of them?

A. Some of them, not all.

Q. I suppose they do use machines that you buy from the shop or works or from the patentee, or whoever it might be, for different purposes in that shop than you use them in yours, don't they?

A. Yes, sir.

Q. Don't you think that it would require some different equipment in order to use them for other purposes?

A. Well, for the same machine they may require something different from what we are using.

Q. And those would cost, would they not?

A. Yes, sir.

Q. When you have estimated the value of a machine, have you taken into consideration the difference in equipment or improvements?

A. No, sir.

Q. Can you tell us whose make these four machines were, that you saw, the cut-off machines, in Backus' shop?

A. No, sir.

Q. Did you look at the machine to see what was stamped on it?

1917 A. I looked at several, but I didn't look at them to see who made them.

Q. Did you find the machines you saw there were better or cheaper machines than yours were?

A. Well, I think they were about the same thing as ours. If I had thought it was any different I would have examined it closely.

Q. Can you tell us who made yours?

A. No, sir. We have several different makes of machines in our shop, and I would not know without going and looking at them now where they are all made. We have some made by Fay and some by Hammond & Son and one Eagan.

Q. Do you have counterweights on your machines?

A. We have a counterweight on one machine.

Q. On this swing cut-off machine?

A. No, sir.

Q. Did you see any on the Backus machine?

A. No, sir.

Q. You would not say they were not there?

A. No, sir, I would not say that.

Q. You said you saw no gauges, or didn't you notice them?

A. Not on these machines. I have seen gauges on other machines, but not on them.

Q. You did not see the gauges on these machines?

A. No, sir.

Q. Could you say they were not there?

A. I could not say. I may have seen them if I looked closer, if they were there.

Q. Did you see where the provision was made for stops in the machine and for rests?

A. I don't know. If a man cuts off, swings the saw, he has got his timber or board laying there.

Q. Did you see the machine in operation?

1918 A. Yes, I seen one in operation; that was on the lower end of it.

Q. Did you see to what use Backus put these four swing cut-off machines?

A. I seen only one used there.

Q. Did you see the Greenly patent improved spur-feed gang rip-sawing machine?

A. I seen a heavy sawing machine. I suppose that is very likely this one; what we call a segment sawing machine.

Q. Did you notice the name of it?

A. I looked for that purpose, but I could not find the name.

Q. How many of them did you see?

A. One of them.

Q. That was a gang sawing machine?

A. There was only one saw in it when I seen it.

Q. Are you not talking about a resawing machine?

A. I suppose they use them mostly all for resawing.

Q. A large Greenly resawing machine you are talking about, are you not?

A. Just what you name, yes, sir.

Q. I am talking about a rip-saw, gang rip-sawing machine, not a resawing machine.

A. There are four saws right near one another. One is what we call a segment, where the plate is put together in pieces and the other one is not cut in pieces. If they call them gang saws, I have seen them.

Q. Isn't that a resawing machine?

A. They do resawing with them, yes, sir.

Q. Then it is not a gang rip-sawing machine?

A. I think not; I did not say there was a gang saw.

Q. Or a rip-saw. A rip-saw is not a resaw?

A. Oh, yes, a rip-saw is a resaw. Resawing is ripping up a

1919 board, setting it up edgeways and running it through the saw; that is ripping or resawing. Call it just as you are a mind to.

Q. Could you saw a board two feet wide through a machine——

A. There is a machine in it, yes, I think will saw a two-foot board, that is the one—the large one, what I call the segment saw.

Q. Where did you see the sawing machine that you think I am talking about as the Greenly heavy patented improved spur-feed gang rip-sawing machine?

A. Down below on the first floor.

Q. Inside the building?

A. Yes, sir.

Q. Now I am sure you are talking about a different thing. Did you take into consideration or examine any machines outside the building, next to the fence?

A. There are several of them, yes, sir. There is some down near the fence on the lower end.

Q. What did you call the one next to the fence, this way?

A. One cut-off saw, swing cut-off saw, and there is a cross-cut saw and a rip-saw, too. I think there are two rip-saws down there. It may be that one of the saws, what I call the rip-saw, is what you call the resaw.

Q. Did you see any machine there that was a rip-sawing machine that also had a resawing attachment, so that you could saw from the rip-saw right on to the resawing attachment?

A. Well, very likely——

Q. Not very likely. I want to know just what you saw?

A. What I was going to say, there was four saws right alongside of one another, and it is very likely they have an attachment that I have not seen that is different; that was not on the saw when I seen it.

Q. It was not there when you saw it?

1920 A. I say it may have been there. I never seen it. It was not attached to the machine when I seen it.

Q. Did you see the scroll or gig sawing machine?

A. Yes, sir.

Q. What did you put that down at?

A. $72. We have one similar to that in our shop.

Q. Whose make—the heavy scroll gig-sawing machine?

A. I don't know.

Q. Whose make is yours?

A. I don't know whose make ours is, neither, unless I go and look at it.

Q. Is it an Eagan?

A. It may be, but I am not sure. There is an Eagan machine down there, a boring machine, that I seen the name on, down at Backus'.

Q. Well, we have been over that, haven't we?

A. That is the only Eagan machine that I seen there; that I seen the name of.

Q. You do not mean to say this was not one, this gig-sawing machine?

A. Oh, no, sir, I do not say so.

Q. Did you see what is called a Chicago improved beveled siding machine, with cutter attachment?

A. I cannot remember that I seen it under that name.

Q. You know what a beveled siding machine is, don't you?

A. Well, we have not got one in our shop. It might be there. Some of those other machines they cut siding with down there.

Q. Then you don't know whether you saw that or not, do you?

A. I don't know.

Q. Well, that would be a pretty big machine?

1921 A. Well, I don't believe any big machine slipped my observation.

Q. Did you see the shuking machine, improved combined shuking machine?

A. I don't know.

Q. Did you see what is called a shuk machine?

A. I would not know it if I saw it unless they told me, because I don't know what the name means. There are so many names I don't know.

Q. Can you tell what the machine is?

A. No, sir.

Q. Don't you know what a box shook is?

A. No, sir, I don't know what that name means.

Q. Well, it is for holding them up and driving them together.

A. Holding up what and driving together what?

Q. Holding up the timber that goes into the box.

Mr. BAKER: The parts themselves are called shooks, aren't they, before a box is nailed together?

Mr. DICKINSON: They are held together. At all events you don't know it by shook?

A. I don't know what it is, I could not tell you; that is something outside of our business where I don't know anything about it, this special boxing.

Q. Have you ever been in Mt. Clemens?

A. Yes, sir.

Q. Do you know that large mill of—his name is Shook, I think—on the river?

A. I have only been there once and I did not have time to look around much.

Q. Where they manufacture nothing but shooks?

A. I have never seen that.

Q. Did you see there any wheel or swivel wood or kindling trucks?

1922 A. I seen a number of trucks there.

Q. Are they embraced in your estimate?

A. No, sir, I didn't know I was to put them in the appraisement, that is the wagons and trucks and all such.

Q. Did you know there were 65 of those heavy kindling-box trucks, with heavy wheels and swivels?

A. I didn't count them.

Q. You did not embrace them in your estimate, did not put them down or appraise them?

A. No, sir.

Q. Any more than you did the heavy truck wagons?

A. No, sir.

Q. Did you take notice of the heavy elevators?

A. Yes, sir, but I have not got them in my estimate. Mr. Kramer has got them.

Q. Outside of the 65 improved heavy kindling and box trucks, did you embrace in addition to the wagons I have told you of, the mill or factory trucks with axle wheels and swivels?

A. Not any trucks.
Q. There are 122, did you notice?
A. I don't know. There are quite a number of trucks around there and I didn't put them down. I did not know I was wanted to do that.
Q. You did not, either you or Mr. Cramer?
A. I don't think so.
Q. Did not put down the wagons or trucks in use?
A. I don't think Mr. Cramer has for them neither.
Q. Did you know the Backus & Joslyn improved 54-inch segment inserted-tooth resawing machine?
A. You mean a circular saw? That must have been one of the large saws that I had down.
Q. Resawing machine—that is the one you had down?
A. Yes, sir.
Q. How many of those?
1923 A. There are four large ones there.
Q. That is what you told us about a moment ago?
A. Yes, sir.
Q. What did you put them down at apiece?
A. I got those four—$2,225.
Q. Did you appraise them se-arately?
A. Yes, I got one—the one I suppose you were talking about just now, $1,100, and the other three are just about alike, $1,125.00—as much as I could see. I could not see much difference between them.
Q. There is one Backus & Joslyn, one Greenley & Dingler, one Backus & Graham, and one Backus & Huntington machine. Did you get the names of them?
A. No, sir.
Q. You simply bunched them together as so many resawing machines?
A. The large one I got separate, and the other ones I got together.
Q. And appraised them each the same?
A. One is $550. That is what I have got it; I have made a mistake. The large one I got at $550 and the other three at $1,125.
Q. That is the aggregate for the three?
A. Yes, sir.
Q. Now, did you appraise the Greenley & Dingler at more or less than the Backus & Joslyn?
A. Well, I cannot tell.
Q. You can't tell the difference?
A. No, sir.
Q. Did you observe any difference in the names of the machines?
A. I didn't look for the names.
Q. What distinction did you make among the three? Give us the highest and the lowest of the three you appraised.
1924 A. I could not tell you just now.
Q. I thought you put them down——

A. Oh, no, I got the one separate, $550. That is the large one, and the other three I got down at $1,125.

Q. Didn't you appraise them each separately?

A. I stood there and looked at them and I thought they were all three alike, about the same thing.

Q. So that you made no distinction, but appraised them all about an equal amount?

A. Yes, sir.

Q. What is an inserted-tooth saw?

A. Well, that is pieces—it is a saw where a tooth can be put in separate.

Q. Are those pretty expensive saws?

A. Yes, sir.

Q. Are those kind of saws patented?

A. Yes; they are all patented.

Q. Of those three would it surprise you to know that one of them cost double what either of the other two would?

A. It may be that is so, I have not noticed it. I did not look for the names of them and for the patent of them.

Q. You think it may be, but did you ever have those saws in your own shop?

A. No, sir.

Q. How did you get the figures that you put down?

A. As I told you yesterday, I went to Jenks and took his advice about it.

Q. Did Jenks have any other description of them save what you gave?

A. No, sir.

Q. You did not take the names of the machines when you went to Jenks?

A. No, sir.

1925 Q. What did you tell Jenks you wanted him to appraise for you?

A. I told him there were three large saws, rip or resaws, and they were all very good, substantial make, and I told him the size of them, about three feet in diameter, and I told him to look over his catalogue for any such saws he had in his catalogue, and what they cost; and I explained the other one as the inserted-tooth, as you said, and he said that is what they call the segment saw; and I explained that to him and told him how it was, and explained the extra heavy frame and the holdings of it to him, and he told me that was——

Q. You told him they were three-feet resaws, did you?

A. Three of them; one is four feet, the big one, or a little over four.

Q. Will you testify positively that there is a single three-foot resaw in the mill?

A. I had my rule on one of them, and as near as I could measure it was three feet—18 inches on the side from the center.

Q. I suppose the fans and blowers and all are taken by Mr. Cramer?

A. Yes, sir.
Q. Did you see any tying racks for tying up shooks?
A. I seen some where they had these frames as you showed me on the picture yesterday; very likely that was some of them.
Q. Did you appraise them?
A. No, sir.
Q. How many did you think there was in the shop?
A. As much as I remember now there might have been 14 to 16.
Q. And the tying rings?
A. I didn't see any rings.
1926 Q. If there were 115 tying rings you didn't see them and didn't appraise them?
A. No, sir.
Q. Did you see the iron drilling machine?
A. Yes, sir.
Q. What did you appraise it at?
A. $45.
Q. Did you see the iron and wood vices?
A. Yes, but I think Mr. Cramer has got them.
Q. Have you got them on your appraisal?
A. Only got one iron drill; that is all.
Q. But the whole appraisal, you took down with Mr. Cramer, didn't you?
A. Yes, the whole amount, the gross amount. He has the different items.

Mr. CRAMER: I have got the iron vices.

Q. You have no vices at all?
A. No, sir.
Q. Did you see a large machine downstairs that is called a traveling-bed ripsaw?
A. A traveling-bed?
Q. A traveling-bed ripsaw.
A. It might have been one of those saws that I seen down there that had a traveling bed; I didn't notice any traveling bed on there.
Q. Did you appraise it?
A. I appraised all the saws that I seen there, but I didn't appraise the bed.
Q. A joiner and rip-sawing machine, there is a pretty good view of it here—if you took that in? (Showing witness a photograph.)
A. I have got that here, but I didn't take the traveling bed. I have got the machine and saw but not the bed.
Q. Is the bed of any value, do you think?
A. Yes, sir.
1927 Q. Did you appraise it?
A. No, sir.
Q. Isn't the traveling bed all there is to that except the saws?
A. Well, it is about the same as a table on another saw. The saw is fastened to a frame, and they have a bed in place of where

the others are; you shove it by hand, on a table, and this here moves along by machinery, and moves the lumber up to the machine.

Q. (Showing witness photograph.) You see here are cast iron—in a traveling bed—cast-iron turned rollers?

A. Yes, sir.

Q. A great many of them?

A. Yes, and this is the timber it slides on.

Q. These rollers are cast iron, along the traveling bed?

A. I could not tell you, they may be.

Q. You did not appraise the machine as far as that is concerned?

A. Not the bed; no, sir.

Q. What did you call the machine worth?

A. Well, I suppose I have got that saw in with some of the other saws, $44, or $46.

Q. Now, there is a Prebble improved combined siding resawing machine, with a planer attachment?

A. I put down all the saws that I seen, but I cannot remember one with a planer attachment?

Q. You have not put that down? Well, it would be worth more with the planer attachment?

A. I suppose it would be worth more, but I have not seen any there.

Q. You have not got that machine down with planer attachment; you have not appraised it?

A. No, sir.

Mr. BAKER: He does not mean he has not got the machine down, he has not got the planer attachment.

1928 A. I might have the saw down, but I have not seen the planer attachment.

Q. You have not the combination down then?

A. No, sir.

Q. You have not appraised anything with a planer attachment?

A. No, sir, I have not seen any.

Q. You found this mill well equipped with fine machinery?

A. Yes, sir, good machinery in that mill.

Q. Everything in good order?

A. Yes, sir.

Q. A first-class mill?

A. I think it is a very good plant.

Q. And very fine machinery for the work to be done, inside work?

A. Yes, sir. I found very good machinery there; yes, sir.

Q. How many thicknesses of floor in the frame of the mill have you included?

A. Double inch and a quarter flooring.

Q. Of what material?

A. The lower floor is pine and the top floor is maple.

Q. And double flooring on each floor?

A. Yes, inch and a quarter.

Q. What thickness of floors on the elevators?

A. I suppose it is the same as on the other. I did not examine exactly as to that, but I suppose it is double flooring, very likely, two and a half inch flooring.

Q. Did you estimate the railroad tracks?

A. Yes, sir.

Q. What did you appraise them at?

A. 775 feet of private railway, $999.

Q. And the bumpers?

A. Yes, sir.

1929 Q. You included those?

A. Yes, sir.

Q. What did you appraise the bumpers at?

A. I did not make a special appraisement.

Q. You just lumped them all together with the tracks?

A. Yes, sir.

Q. How did you get your information as to the value of the railroad tracks?

A. I got the price of the rails, the number of pounds to the foot, and I counted the ties, and saw how far they were laid apart.

Q. Did you charge anything for the excavation for the track, making the road-bed?

A. I figured that in the laying of the ties level—I took it kind of that the ground was level.

Q. You did not put anything in for the laying or preparing of the road-bed?

A. No, sir, I did not take that, because I didn't know how the ground was when it was laid.

Q. And you did not, therefore, take it into consideration in appraising?

A. Did not make any extra charge for it.

Q. Only for the ties and the tracks?

A. Yes, sir.

Q. Nothing for the laying of the ties?

A. That was included.

Q. For the laying of the ties, not for the road-bed?

A. No, sir; not for the road-bed; I could not tell whether it was a good bed or not before.

Q. Did you take the traveling-belt elevators?

A. Yes, Mr. Cramer has got them.

Q. Did you include the stairs?

A. Yes, sir.

Q. And the ladders?

1930 A. I included everything in the building that was made out of wood, that belonged to my part of it.

Redirect examination:

Q. (Referring to Spitzley Exhibit "1.") Is this the list that you made out showing your estimate in detail?

A. Yes, sir.

Q. That is, it shows your own estimate in detail as you made it?

A. Yes, sir. I have got the gross amount from Mr. Cramer in there, which I did not make myself.

Q. Now, in making this list, to what extent, if any, did you overlook or omit things down there?

A. I don't believe that I omitted anything except several things here in the machines that I overlooked or omitted; otherwise I do not think I did omit anything.

Q. Did you endeavor to take an inventory of everything that was in the building there?

A. Yes, sir.

Q. Did they furnish you with any list?

A. No, sir.

Q. Did they help you at all in making it up?

A. No, sir.

Q. Do you wish to be understood as having omitted any of those large or small wood-working machines that were in that building?

A. I don't think that I omitted any large machines in there, what amounted to much.

Q. Of course you didn't go into these small rooms and examine what repairs they had on hand?

A. No, sir, there was quite a number of small things around there I didn't take into account, I didn't mark them down; and also about these trucks and wagons and all such; I didn't think it was required of me.

Q. That is the outside property?

A. That was moved all around, I suppose, through the
1931 mill and on the outside just as they are using them around there.

Q. And of course many of the machines that Mr. Dickinson has referred to by name are not on your list by name, but are here as a matter of fact?

A. Yes, there is a good many of them I didn't know the name of as they have got them.

Q. And the items of your appraisal are set forth and they are added up in this Exhibit Spitzley "1"?

A. Yes, sir.

Q. So that if there is anything omitted it is only necessary to add it to it?

A. Yes, sir.

Q. Will you state whether a considerable portion of this machinery appears to have been in use a good many years?

A. As much as I could understand from Mr. Backus they bought most of the machines about ten years ago.

Q. And in regard to these Boston people, you called their attention to machines that they had sold, as I understood you?

A. Yes, sir, I seen the names of the machines on there and I could not find out here in the city what they would cost, and so I wrote to Boston about it.

Q. Will you state whether old machinery that has been in use ten years is as valuable as new machinery with the later attachments or improvements?

A. Well, I don't think so. They are always making improvements from year to year, improving all the machines they are making.

Q. And I suppose there is some wear on these machines?

A. Yes, sir.

Q. And they wear out like other things in the course of time?

1932 A. Yes, sir, and maybe a little more so, if they are run strong.

Q. From your knowledge of the machinery down there, and you have looked it all over, what, if any, percentage of depreciation would you place upon it by reason of its age and the use to which it had been put?

A. Well, I should judge that the machines that were bought about that time, if you take the life of a machine, say 25 years, they have used about two-fifths of them.

Q. You would consider the machinery down there that has been in use ten years has worn away about two-fifths of its value?

A. Yes, sir.

Q. That is, as compared with a brand-new machine, such as you might buy now?

A. Yes, sir.

Q. And as I understood this letter from Boston, they gave you the prices for the new machine they had put in the place of those old machines?

A. They state in that letter what the price was at that time and what they are charging now for improved machines, and I put down the price of the improved machine.

Recross-examination:

Q. I think, in giving the price of the Boston machines, you stated on cross-examination that you did not put down the freight or transportation because you thought the wear of the machine would offset the freight?

A. I doubt that, whether the wear of the machine would offset it.

Q. Well, you did say so, didn't you?

A. That the wearing of the machine would offset the freight?

Q. Yes.

1933 A. They would offset it a great deal more.

Q. Didn't you say that on cross-examination?

A. I cannot remember if I said so. If I did say so, I did not wish to express myself in that way.

Q. What reason did you give for not adding the freight to the machines on the price-list you got from Boston?

A. I might have said that they would go in as an offset, but not for the full offset; that is what I meant.

Q. Don't you know that in the fine planing-mill shops where the machines are running and kept in first-class condition—you found these all in first-class condition?

A. Yes, sir.

Q. That after a machine has been run for a while in a regular business, where the competition is sharp, that it is worn, that the machine does more uniform work?

A. It may if it has been used a year or whatever time is allowed to wear off the sharp edges and such, but when you keep on using it, it will wear out.

Q. It will wear out in about twenty-five years?

A. That is my opinion, yes, sir.

Q. In a well-kept shop with knives and saws, is it not your experience and is it not common knowledge that the machines which have been in use in the mill are better when they have been worn say for five or ten years?

A. No, sir, I do not think for that length of time. I think they are better after being worn maybe a year or two.

Q. Well, they do keep their machinery in first-class condition down there, don't they?

A. It looked so to me, yes, sir.

Q. Do you know the product of their mill?

A. No, sir.

Q. You don't know its repute as to being uniform and doing first-class work?

A. I know they are doing good work down there.

1934 Q. First-class work?

A. Yes, sir.

Q. You say the life of machinery is about twenty-five years?

A. That is as near as I can judge by my experience in our shop. We have had machinery before we burned out—we burned out about eight years ago—and some of those machines after we had had them running a number of years were worn out, and we were talking about renewing some of them if they had not burned up.

Q. Did you see any machines in the Backus shop that were worn out?

A. I did not see them all running. There was some wear on them, certainly.

Q. Did you see a single machine in Backus' shop, old or new, that was not in first-class condition to do its work?

A. As much as I seen they were in good, first-class condition.

Q. Well, a machine that is in good, first-class condition and does its work well, does uniform work, first-class in every way, is as valuable as a new machine, isn't it?

A. It is, if it is not much worn, yes, sir. Now, there is one thing, you know, you take for instance the cog wheels, and all that——

Q. You do not mean that the wearing of a machine prevents its doing first-class work?

A. If it is not worn out so much, they are doing first-class work.

Q. Now, I understand you to say that Backus did not assist you any. You do not mean to say that Backus did not offer to, but that you refused?

A. Oh, no, I didn't refuse; Backus said that he would assist me.

Q. You didn't accept, did you?

1935 A. I did not say that I did not want his assistance.

Q. You did not tell him——

A. I did not tell him to come along and show me or give me his assistance. I did not ask him that.

Q. Didn't he ask you three or four times if he could not be of assistance to you, and ask you if you wanted him?

A. The old gentleman asked me——

Q. You did not ask them for any list or assistance?

A. No, sir.

Q. They offered their assistance to you?

A. They told me if they could assist me in any way they would do so.

Q. You did not tell them anything about which you wanted assistance?

A. No, sir.

Redirect examination:

Q. One question about this wood-work. I see it comes to $22,612 09. That is the building or buildings proper?

A. Yes, sir.

Q. Will you state whether that estimate is upon the basis of its being new?

A. Yes, sir.

Q. That is, you would duplicate it for that?

A. Yes, sir.

Q. If you were appraising the present cash value of those buildings, what percentage of depreciation would you put upon it because of its age and the use to which it had been put?

A. Well, there would not be much depreciation there, because the roof is the main thing that would depreciate, and the roof, as I understood them, they put on new about a year or two ago, and I was on the roof and it seemed to be all in first-class condition.

1936 Q. Are the buildings there just as good as they would be if they were built brand-new again?

A. Not exactly, because there is some wear on it; it would not be exactly as good.

Q. But this estimate is based on the theory that everything is new?

A. Yes, sir.

Recross-examination:

Q. Did you take into consideration in your appraisal the cost of setting up these many machines?

A. No, sir.

Q. What is to be added, for the expense and cost of setting up, to the value of a machine as set up? It is worth more set up, of course, than it is in the shop?

A. Oh, yes, it is worth more set up than what it is coming from the shop.

Q. How much more is it worth to set up?

A. Some machines cost more and some less. I understood Mr. Backus to say that some of the machines were set over and they put in stone foundations. Well, now, the stone foundations and all that—I thought those foundations would all be taken in by the mason-work.

Q. You don't know, then, how they were set up?

A. I don't know only what Mr. Backus told me.

Q. He did not tell you there were any stone foundations?

A. He told me that some of them were stone foundations.

Q. Which Backus told you that?

A. That was the old gentleman, I think.

Q. Can stone foundations be used in a planing mill? Isn't it necessary to have timber foundations, the heaviest oak?

1937 A. I am mistaken about the stone foundations—that was put under the columns.

Q. Now, a machine like these fine planing-mill machines, where the finest work is done, a stone foundation would be too rigid, would it not, and isn't it true that they have to be set up on the strongest and firmest oak foundation?

A. Well, it may be in some cases.

Q. You do not mean to be understood now by the jury that under the machinery they have any stone foundations?

A. No, sir.

Q. And yet they are strong and firm?

A. Yes, sir.

Q. Did you know the kind of foundations they were?

A. I didn't examine the foundations.

Q. And didn't take into consideration in your estimate the foundations?

A. No, sir.

Q. In your appraisal of the buildings or machines?

A. The flooring under the machines—I figured all that.

Q. Just the flooring?

A. The flooring, yes, sir, and the sleepers.

Q. You didn't figure the foundations under the machines?

A. No extra foundations.

Q. Isn't it true that in some of those machines the foundation costs half as much as the machine itself, to lay it properly for fine work?

A. I don't think so.

Q. What would you add for the setting up of a machine, one of these large, strong machines for fine work?

A. In those machines where they are setting down in the basement, if they have any extra foundation it might cost from $5 to $10 to a machine.

1938 Q. For heavy oak foundation?

A. Yes, sir.

Q. And including the setting up?

A. Well, the screwing down of the machine, if the foundation is made, of course that is not much of a job.

Q. How about the second floor?

A. I have not seen any extra foundation on the second floor. I don't believe there is any.

Mr. BAKER: We offer in evidence Exhibit Spitzley "1."

Mr. DICKINSON: We will object to it and to all the testimony of Mr. Spitzley, except as to such as he has given on his own information, and we move to strike out his testimony except as to that that he claims is of his own knowledge. And we object especially to any evidence which he has introduced as information from Boston or Jenks, as hearsay testimony, and move to strike it out. And we object to this list, Exhibit Spitzley "1," on the same ground.

EXHIBIT SPITZLEY "1."

Estimate of A. Backus, Jr., & Son, Planing Mill and Office and Additions.

Mill:	
243,676 feet lumber and labor	$5,656 21
69,400 feet hard-wood flooring	1,926 00
124 squares gravel roofing	434 00
Doors and windows	844 50
Stairs and partitions	84 20
Cupboards, closets and chute	54 00
Iron door fenders	64 00
Elevator-house:	
10,380 feet lumber and labor	260 50
6,075 feet flooring	181 50
10½ squares gravel roof	36 75
Doors and windows	182 50
1939 Store-room alongside of railroad:	
42,425 feet lumber and labor	1,018 20
27,600 feet flooring	828 00
47 squares gravel roof	164 50
Doors and windows	137 00
Stairs	27 00
Sheds on River road and along R. R. track:	
2,676 feet lumber and labor	66 90
1,920 feet flooring	38 40
15½ squares gravel roof	53 80
Windows	12 00
21,870 feet lumber and labor	483 32
5,000 feet roof flooring	100 00
70 cedar posts	35 00
36 squares gravel roof	126 00
Skylights	90 00
46 cedar posts	23 00
10,668 feet lumber and labor	266 17
6,000 feet roof flooring	120 00

46 squares gravel roof	$161 00		
15,863 feet lumber and labor	317 00		
260 feet fence, 10 feet high, with gate	260 00		
10,738 feet lumber and labor	215 70		
35 squares gravel roof	122 50		
Large sign on top of sheds	160 00		
Tank 8 x 10 in mill	45 00		
Iron columns, sheet and *currogated* iron, and bolts	398 00		
Paint and glass	395 00		
775 feet private railway	999 90		
Main office:			
Carpenter-work	2,700 89		
Paint and glass	384 65		
1940 Decorating and papering	300 00		
Gravel roof	44 00		
Plumbing and gas and fixtures	207 00		
Tin-work	13 00		
Marble mantel	75 00		
		$3,724 54	
Four dry kilns:			
16,792 feet lumber and labor	$371 82		
14,500 feet flooring	370 00		
52 squares gravel roof	182 00		
Eight large sliding gates	120 00		
Chains, weights and pulleys	117 60		
Air gates and small doors	24 00		
1,500 feet canvas	20 00		
Engine and sawdust-house:			
11,130 feet lumber and labor	267 64		
4,970 feet flooring	105 90		
29 squares gravel roof	101 50		
Flues—1,800 feet lumber	54 00		
2,222 yards burlaps	155 54		
Doors, windows and scuttles	75 00		
Steps	4 00		
Bridge, platforms and runway for transfer	72 00		
38 large blinds	114 00		
23 iron beams, 24 feet	345 00		
		$27,586 01	
		22,612 09	
		$4,973 92	
Engines and boilers, pumps, injectors, water supply, exhaust, steam and return pipes, connecting pipes, heating and drying apparatus, fire apparatus, 1941 blowers, fans, shavings conductors, shavings-room fixtures, fixtures and tools in engine-room and boiler-room, foundations and setting		$19,660 00	

Shafting, couplings, hangings, pulleys, tighteners, belts, belt elevators and conveyors, pneumatic delivery, iron doors, spouts and millwright-work		$8,585 00
		$50,857 09

Wood-working machinery:

3 large planters, 30", at $1,600	$4,800 00	
1 planer and matcher, 24"	1,900 00	
2 matchers, 14"	2,000 00	
1 large moulder and matcher	470 00	
1 small moulder and matcher	130 00	
1 segment rip-saw	550 00	
3 large rip-saws	1,125 00	
1 large band saw	1,100 00	
1 band-saw filer	75 00	
1 borer and drill	45 00	
4 rip-saws in yard	176 00	
3 swing cut-off saws	150 00	
1 circle saw	44 00	

Upper floor:

1 large planer, 30"	1,600 00	
1 large planer, 24"	1,300 00	
1 Eagan bore machine	100 00	
1 gig-saw	72 00	
1 Battle Creek saw	90 00	
1 cut-off saw	56 00	
6 cut-off saws, at $45	270 00	
4 rip-saws, at $44	176 00	
2 matchers, at $65	130 00	
1942 1 swing cut-off saw	50 00	
1 pony planer	135 00	
1 pony planer	80 00	
3 rip-saws	132 00	
3 cut-off saws	135 00	
		16,891 00
		$67,748 09

ANTHONY F. CRAMER, sworn on behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. Detroit. I have lived here 22 years.
Q. What is your business?
A. I am a machinist; have been for 33 years.
Q. Do you know all about steam-engines and shafting?
A. Yes, sir.
Q. And such machinery as Mr. Backus has down there in his mill?
A. Yes, sir.

Q. You have manufactured them and dealt in them for a good many years?

A. Yes, sir.

Q. Have you made an estimate of what his engine and boilers and the apparatus or machinery connected with them is worth?

A. Yes, sir.

Q. And also the shafting that runs through the mill?

A. Shafting, hangers, belting, coupling and so forth, all the transmission.

Q. Have you made that in detail; have you got a list of it?

A. No, sir, I have not got everything in detail. I got
1943 all the shafting and pulleys and hangers, but I did not think it necessary. The engine and boilers and these things I figured up, but it takes quite a good deal of paper to figure it on, and I threw that in the waste-paper basket.

Q. As you went along with your figures you merely kept the amount?

A. Yes, sir.

Q. What is the total amount of all your estimate?

A. Engine, boilers, pumps, injector, water-supply pipes, steam pipe, heating and drying apparatus, fire apparatus, shaving and blower pipes, $19,660. Shafting, coupling, hangers, pulleys, belts, belt-tighteners, elevators, conveyors, iron doors, pneumatic delivery, sprouts, millwright-work and general power transmission, $8,585.

Q. Those two amounts, then, cover your estimate?

A. That covers my estimate, yes, sir.

Q. Now, you have some figures in detail?

A. I have figures in detail and have the memorandum, what I put down for estimation; there is the shaftings, pulleys and hangers.

Q. Will you state whether or not these estimates of yours are based on what it would cost to duplicate them?

A. I figured them to duplicate them, everything.

Q. So that they would be all new upon your estimate?

A. All new.

Q. I suppose a boiler depreciates some by use. Does a boiler wear out?

A. Oh, yes.

Q. So that an old one is not as good as a new one?

A. No, sir.

Cross-examination.

By Mr. DICKINSON:

Q. Did you find the boiler set in pretty good foundations?
1944 A. Yes, sir.

Q. Well set?

A. Yes, sir.

Q. All the work in first-class condition?

A. Yes, everything in first-class condition.

Q. Does it cost more to set a boiler sometimes than the cost of the boiler?

A. Of course, sometimes it may cost more; it depends upon the foundation.

Q. It is well set, is it?

A. Well set.

Q. You didn't see anything in the machinery there in that mill that was not first-class in every respect, did you?

A. No, sir, everything was in very good shape.

Q. What is your firm at present?

A. F. Huetteman & Co.

Q. Are you a member of the firm?

A. Yes, sir.

Q. Where is your place of business?

A. On Sherman, near Hastings, now.

Q. You manufacture boilers?

A. No, we do not manufacture boilers, we only handle them; we manufacture engines.

Q. Did you ever manufacture boilers?

A. No, sir.

Q. How did you appraise the boilers in there?

A. Appraised them by the list and by the weight. We handle boilers most every day. The cost of a boiler depends upon the weight; we do not need to figure it out, as we have the list of every boiler and the price.

Q. By the make?

A. Yes, sir.

Q. Did you appraise the platform loading scales—Howe's?

1945 A. I did not.

Q. Or any one, to your knowledge?

A. I don't think so; I didn't see them at all. My attention was not called to them.

Q. Did you appraise the grinding apparatus, stones and frames, for knives?

A. I appraised that one in the engine-room, yes, sir.

Q. Did you appraise any more?

A. No, sir.

Q. You didn't appraise the one in the shop?

A. I didn't appraise any machinery except the belt elevator and so forth, connected with belting and shafting and pulleys.

Q. Did you appraise the other knife balancing and weighing scales?

A. No, sir.

Q. I understood Mr. Spitzley to say that you did, or that he left them to you. What are these boilers? Give some description of them.

A. Well, they are 54 by 16 feet boilers, common tubular boilers, with general-sized dome.

Q. Whose make?

A. That I don't know.

Q. Was the name on the boiler?

A. I didn't see any name on the boiler. I measured the breeching but I did not know the name.

Q. Whose make was the engine?
A. Made by the Riverside iron works, I think.
Q. It is a sliding-valve automatic cut-off engine.
A. Sliding-valve engine.
Q. Was it extra heavy, in the language of the trade?
A. Well, the engine itself is not extra heavy. They have a very heavy band wheel. It is heavy, although the engine is in proportion.

Q. What is the size of the shaft?
1946 A. I think it is nine and a half inches.
Q. And the governor?
A. Nine inches.
Q. What is the belt wheel?
A. Fourteen feet six by thirty-two inches.
Q. How many exhaust connections?
A. Well, there is a main exhaust running to a heater first, and from there to a kind of receiver and purifier.
Q. What is the size of the exhaust connection?
A. Ten inches diameter, riveted pipe.
Q. What is the make of the feed-pump?
A. There was one Hughes and one Worthington, steam pumps.
Q. Did you appraise the sewer to the river?
A. No, sir.
Q. Their water connection?
A. I got a three-inch pipe from the river up to the engine-house.
Q. How much did you put in for that three-inch pipe?
A. I don't know; I remember, though——
Q. What did you put it in at?
A. I appraised the connection to the river and the other lead pipe together, the whole water connection, something like $1,400.
Q. Water connection to the river and the other water mains from the city? Do you know how deep down the pipe is—water pipe?
A. I estimate that about eight feet, the average.
Q. How did you get the information?
A. I went down to the dock and looked how deep the water stood there, and stepped it off and got my length. I don't think they had to go deeper than four feet or five on the river.

Q. How many thousand feet to the kilns?
1947 A. I will have to figure that out first—5,300 feet of small pipe for each kiln, and there are four kilns.
Q. How did you get at that?
A. I counted the coils and measured the length of the coils.
Q. If there is actually a mile and a half of pipe in each kiln, 8,000 feet, you would be astonished, wouldn't you?
A. I don't see where they were. The engineer was with me when we measured it. And we measured it as close as we could.
Q. You only estimate, then, 5,300 to each kiln?
A. I got them 6,300. I don't know whether I got the right length.
Q. Did you estimate it at 5,300 or 6,000?
A. I figured it at 6,300; I got four kilns.

Q. Do you leave it there, 6,300 feet?
A. That is all the pipe I got there.
Q. Have you got the large pipe in?
A. Yes, I got all that.
Q. How much have you got, and what is the size of the manifold pipe for each kiln?
A. Eight inches. I got 351 feet of eight-inch pipe, and 351 feet of four-inch.
Q. What other pipe have you got?
A. I got a pipe for the heating in the shop on three floors. I have got the heating of the office, pipe underground.
Q. Is that all included in your estimate?
A. Yes, sir.
Q. You have included in your estimate all the pipe in the shop and in the kilns?
A. As I measured them; yes, sir.
Q. And pipes to the river and to the offices?
A. Yes, sir.
1948 Q. You found, did you not, that Backuses did not use the water works, they do all their pumping from the river?
A. Yes, sir.
Q. Did you find the exhaust-steam injector, feeding boilers?
A. Yes, sir.
Q. What make?
A. Shaffer & Buttenburg.
Q. What did you estimate that?
A. List price; I could not say exactly what it is, about $120 or something like that. I think it is No. 8.
Q. Did you include in that the pipes, valves and water connections?
A. No, sir, I figured them separate.
Q. Have you included it in your separate list?
A. Yes, I got all the connections between the pumps and the boilers.
Q. In connection with the exhaust-steam injector?
A. Yes, sir.
Q. Do you know what the price of the Shaffer & Buttenburg exhaust-steam injector is?
A. I think it is $120, on that size; I don't know.
Q. What size?
A. I think it is No. 8.
Q. Well, you know, don't you, from your examination?
A. No, sir, I don't know exactly. It may be $200 for all I know now. I know I put it in at the list price because there is only 30 % off on those injectors and it costs about that much to put on the necessary valves.
Q. You found a patent belt-tightener and frame there, didn't you?
A. Yes, sir.
Q. What did you put that in at?

1949 A. $111. That is the list price, though there is forty off that.

Q. You say there is a list price for that sort of thing?

A. Yes, sir.

Q. Who makes it?

A. It is made by all the firms who manufacture pulleys, shafting and transmission.

Q. You mean a machine like this one you saw at Backus'?

A. Yes, a belt-tightener.

Q. Have you put in the power ventilators, blowers, belts, pulleys and connections?

A. Yes, I got three ventilators, blowers for shavings, suction fans, and one blower for heating, and I got the piping.

Q. What did you put them in at?

A. I put the fans in at $180 apiece without the pipe.

Q. Did you put in all the connections?

A. I put in all the piping; yes, sir.

Q. Belts?

A. Yes, I got every inch of belt.

Q. What did you put in that whole ventilator apparatus at?

A. That I could not say now. I didn't keep that separate. I didn't put my figures separate because I didn't think it was necessary.

Q. You cannot tell now what your estimate was?

A. Not exactly. I had to inquire for the price of the Sturdeman blowers. I know what they are, and the exhaust pipe, 24-inch—all piping I figured at about $4 a foot, between four and five dollars per foot—at $4, I think, I took it all. There is some laying in the ground covered with wood and the others running on the outside to the shavings-room.

Q. Can you tell us how much it came to at your figures?

1950 A. Not unless I figured it up again, exactly.

Q. How many blowers did you figure?

A. I figured three in the shop and one in the back of the boiler-room; that is, three suction fans, shaving blowers, and one for heating purposes in the kiln.

Q. Did you get more than one ventilating blower?

A. Then I figured two more. I don't know for what purposes they are used; wooden blowers, five in all I got.

Q. Whose make were the boilers?

A. I could not find out; I didn't ask either.

Q. Don't you know McGregor's boilers?

A. Yes, they are made in town here. I think they were made by McGregor; it does not matter who makes them here.

Q. What price did you put on that engine?

A. I put on the engine and foundation in the neighborhood of $3,000. There may be $50 over $3,000; the engine and foundation, and small fixtures around it, governor, tightener and so forth. I think the engine I put down at $2,250 or $2,100, $800 for the foundation. There is a very large foundation.

Q. What did you put the fixtures down at?

A. That includes extra fixtures.

Q. Just tell us, if you can, what you have included with the engine.

A. I got included with the engine all fixtures that go with it now. Governor, lubricator, all the oil cups, and on an engine like this what they have there; belt-tighteners go with every governor now for the governor pulley.

Q. You included the belt-tightener?

A. Belt-tightener for governor pulley; yes, sir.

Q. Did you include the exhaust connections?

A. Yes, sir; and I figured separate.

Q. And the steam connections?

A. Yes, sir.

1951 Q. And the sewer connections and water connections?

A. Yes, sir.

Q. Did you include the heater and pumps?

A. The heater and pumps are separate.

Q. You appraised them separately, did you?

A. Yes, sir.

Q. What did you estimate that big fly-wheel?

A. The weight of it?

Q. What did you appraise it at?

A. I appraised the weight of it at 6,000 pounds, at 4 cents a pound.

Q. Did you include the fly-wheel in your estimate of the value of the engine?

A. Yes, sir, at the cost of it. I estimated the whole engine at 8 cents a pound; weight of the engine between 24,000 and 25,000 pounds, at what a good engine costs to build, 8 cents a pound.

Q. What is the governor worth?

A. I don't know; I guess an eight-inch governor is worth about $250 now.

Q. Did you estimate the furnaces in connection with the boilers?

A. I did not estimate the furnaces, but I figured the boilers with a full flush front. There is very little front to the boilers now, the way they are arranged, and I think the breeching and the whole front they have now would come up to the cost of four full fronts. That is the way I estimated it. I estimated full fronts for each boiler.

Q. You did not take the furnace as they have it then and estimate it?

A. No, I estimated the full front, crates and everything—fixtures.

Q. You theorized upon it and put on what it would be at full front.

A. Yes, sir.

1952 Q. You did not estimate the furnaces as they were in the Backus mill?

A. No, sir, I did not estimate only the iron floor and iron-work in the fire-room. That I estimated.

Q. What was the breeching estimated at?

A. About $330.

Q. And water tank behind?
A. I got that in, the receiver, at $375.
Q. Did you estimate the chimney?
A. The ventilating pipe?
Q. I mean the brick chimney.
A. No, sir, only the foundation under the boiler and engine.
Q. Did you estimate the galvanized pipe that leads through the dry kilns?
A. Yes, sir.
Q. At what did you put that in?
A. I figured at the weight of it and put it in at a shilling a pound.
Q. How many pounds?
A. I could not say now. If I had known you would have asked me that question I would have kept it separate, but I didn't.
Q. What did you put in the automatic grinding machine at, for the grinding of planers, sylinder knives, and so on?
A. I think it is $125.
Q. Did you include in that the counters, belts, pulleys, and appliances for working it?
A. Yes, sir.
Q. Did you measure all the belts in the mill?
A. I measured all the belts.
Q. How wide is the engine belt?
A. 30 inches.
Q. How long?
1953 A. 74 feet.
Q. How thick?
A. Double thickness.
Q. Did you appraise the oil tanks and pumps?
A. Yes, sir; I got the oil tanks.
Q. With the pumps?
A. I got the oil tanks and pumps as they are in the engine-room.
Q. What did you put them in at?
A. I put them in at new price, but I couldn't say now.
Q. You can't remember?
A. No, sir; I think about $7 or $7.50 a tank; I got four oil tanks.
Q. What did you put the big engine belt in at?
A. $686, 50 off.
Q. Did you include the gongs, bells and whistles in the engine?
A. I have got them; yes, sir. I got an electric bell and gong.
Q. In addition to the price you have fixed for the engine?
A. That is included in pulleys and fixtures in the engine-house, oil tanks and all. I put that all together because they did not tell me to keep it separate.
Q. Did you estimate the steam drum that goes across the boilers?
A. Yes, the horizontal connecting drum.
Q. Did you put that in in the price on the boiler?
A. I figured that all in the boilers, boiler settings.
Q. You don't know what you estimated it at?
A. I think at $260 or $270. I figured at the weight of it, about.

Q. Did you see the large horizontal condensing boiler for the return water and steam?

A. What I call the receiver; yes, sir, I have got that.

1954 Q. What did you estimate that at?

A. I think it is $220 or something like that.

Q. Don't you know what is called the water trap for the valves and fittings?

A. Yes, sir.

Q. Did you estimate that separately?

A. The engineer gave me the size of the water trap. I put that all in with the heating and water connection.

A. What did you estimate the blower apparatus there at with the exhaust fans?

A. I think it is $1,100.

Q. Did that include all the piping?

A. That includes the piping and the housing of the pipe.

Q. Where did you get your information to appraise that?

A. I had to inquire from the works where it was made.

Q. From whom did you inquire?

A. Huyett & Smith.

Q. What did they tell you about it?

A. They could not give me the prices, they said they did not sell it, so I knew of an apparatus that was sold to a brewery a little smaller, but I got the size of fan and the amount up there and figured it out myself, I think it is second hand.

Q. What did he put it in at?

A. $1,100.

Q. What did Huyett & Smith tell you?

A. They did not give me any price. They wanted to know the size of the kilns, what it was used for.

Q. Did they give you any price?

A. No, sir; I didn't give them the size of the kilns; I didn't figure on it, and I didn't want to let them go to the trouble. I don't know whether that was made for the size of the kilns there or not; it is a six-foot fan.

1955 Q. Did you estimate the dust-arrester?

A. No, sir.

Mr. BAKER: That is in the wood-work, I suppose.

Q. Did you estimate the wood-carrying belts?

A. Yes, I got the wood-conveyor.

Q. What did you get that in at?

A. I don't know. I got them about six or eight or nine dollars a foot; I don't know which. I got one 14 feet center, two 24-inch pulleys and 1 94-foot center.

Q. What did you appraise it at?

A. I could not say; I think about five or six dollars a foot.

Q. What did you include in it, what other items?

A. That is included, I think, in the belting, the last item.

Q. You included in the belting, then, the carrying apparatus?

A. I got it named conveyor—shafting, cou[illegible]ngs, hangers, belt-tightener and conveyors. That is in the $8,000.
Q. Can you tell us what your estimate of all the belting was?
A. There is 2,131 feet.
Q. What can you buy that for a foot?
A. I got $4,262, list price—50 off.
Q. Whose belt did you figure on?
A. I figured on oak-tanned leather belting.
Q. Did you figure on single or double belts?
A. I figured the belts as they are, some single and some double.
Q. Did you figure them all at so much a foot?
A. No, sir; I figured the double belts double price.
Q. What did you figure the double belts at?
A. I figured them list price.
Q. What was that?
1956 A. It is according to what size the belt is.
Q. Those belts in Backus' mill, that is what we are belting, is list.
A. The price of belting is 50 off the list, and double is list.
Q. Very well, what did you figure your double belting at?
A. At what I can buy new belts for.
Q. Well, what was that; that is what I want to get at.
A. I gave you the price awhile ago.
Q. Well, double belts saparately?
A. It will take me some time to figure that out?
Q. What price did you put it in at; can you tell?
A. I got all the belts together, figured at list price.
Q. Whose make at list price?
A. The list on belting is all the same all over the country.
Q. No difference in prices?
A. No, sir; there is only a difference in discounting, and that is very little.
Q. I wish you could give me, if you can, the price per foot.
A. The price per foot of belting?
Q. On double belting such as in the Backus mill. What did you appraise it at? You have got it figured in here in your appraisal?
A. All the belting; yes, sir.
Q. What did you put it in at?
A. I got 385 feet of six-inch single belting.
Q. At how much?
A. At list price. I have not got the list with me.
Q. You cannot tell what price you put it in at?
A. No, sir.
Q. Can you tell us the double-belting price?
1957 A. No, sir, not unless I get a list. The list is the same in all belt manufactured, only different on the discount. The discount now is 50 and 10, and I figured 50 off. I allowed the 10 for putting up the belts. I can bring a list here if you want it.
Q. The list is not evidence. I want to get at what you put them in at, accurately.
A. All the lists are alike.

Q. What is your total feet single and double belting?
A. Well, I got $1,111.32.
Q. I am asking for the feet, my dear sir, of single belting and double belting.
Mr. BAKER: Length or square feet?
Q. It is always length in belting, I think.
A. 1,244 feet of double belting.
Q. How much of the single?
A. I got 3,572 of single.
Q. What did you estimate the double belting at so much a foot?
A. At list price.
Q. Then you had only one price for all the double belting per foot?
A. I figured all the double belting out per foot.
Q. And all the single belting at so much per foot?
A. Yes, sir.
Q. You made no difference; there was no difference in the price of the belting, was there?
A. There was only the difference between the double and single.
Q. That is the only difference you made between the double and single belting per foot? Is that right?
A. Yes, sir.
Mr. BAKER: You don't mean that if it is 30 inches wide or 4 inches wide it is the same price?
A. No, sir.
Mr. BAKER: That is what he means.
1958 Q. I want to get at whether you figured the double belting at so much a foot, the same price per foot?
A. The same price as per list; I figured six-inch six-inch belting, and thirty-inch thirty-inch belting.
Q. Then on the double belting you figured so much at one price and so much at another?
A. Yes, I got different widths.
Q. And so with the single?
A. Yes, sir.
Q. Did you estimate the pulleys and hangers?
A. Yes, sir.
Q. How many pulleys?
A. Well, I don't know. There is quite a few.
Q. I want to get your estimate of the pulleys and hangers, and what is the other scientific name?
Mr. BAKER: Just get a dictionary of machinery and read it off.
Q. No, just take the pulleys and see what they are. We want to know what they are, the pulleys and hangers.
A. I got the hangers here. I don't know the number, I got the price.
Q. What is the price you got the hangers at?
A. $1,044.
Q. That is all the hangers?
A. Yes, sir.
Q. Now, can you tell us the price you got all the pulleys down

at and give us the number. Did you appraise them separately or with something else?

A. I figured every pulley separate.

Q. They appraise at different prices, do they?

A. Yes, I figured them according to the price-list. I got them $1,810.

Q. Now, have you figured on the idlers?

A. Yes, the idlers are included in here.

Q. You included them at the same price?

1959 A. I got the idlers here at $540, put up.

Q. For all of them? How many belt-tighteners?

A. I see you say idlers. You ask me for belt-tighteners.

Q. Yes; separate from the pulleys.

A. I got 24.

Q. $540 is a pretty good price for idlers, I think. Did you take in the fire-hose throughout the building?

A. I got 600 feet of fire-hose.

Q. Did you appraise that separately?

A. Yes, sir, at list price, but I don't know what that is.

Q. It is all in your $19,000?

A. Yes.

Redirect examination:

Q. What is a pulley?

A. It is an iron rim with arms fastened to the shafting, where the belts run through.

Q. What is an idler?

A. It is a pulley too; it is put somewheres to either steady a long belt or else for a shifter, to run a belt on or off, and for a tightener. An idler should not be called a tightener.

—. ——?

A. Yes, put up a frame with a pulley in it and so much weight on it and drop it down onto the belt to tighten it onto a pulley.

Q. I suppose you have two wheels side by side and part of the time the belt runs on one and part of the time on another, and is one of them an idler?

A. Some call them an idler; they ought to be called loose and tight pulleys.

Petitioner rests.

Adjourned till October 11, '93, 9.30 a. m.

1960 OCTOBER 19, 1893—9.30 a. m.

Mr. DICKINSON: May it please the court and gentlemen of the jury, we desire to renew the motion to which reference has been made heretofore during the trial, and we desire to raise all the questions again. Does your honor desire me to restate them—those I have made at every stage of the proceeding, and which are set out in the pleadings on file?

The COURT: I have ruled upon them.

Mr. DICKINSON: I desire to simply renew them. You do not care to let me restate them?

The COURT: It is not necessary.

Mr. DICKINSON: And we protest against the proceedings on these grounds, as stated before, simply to renew the protest upon the grounds which I think have been made emphatic before, and especially this, that the claimant has acquired everything that it sought by this proceeding, has built its structure and has paid the consideration therefor, having everything it seeks in the proceeding, and that there can be no constitutional way by which this proceeding can be regular.

The COURT: I would have to overrule that, Mr. Dickinson, for the reason that the supreme court has passed upon it and I should have to follow the opinion of the supreme court.

ABSALOM BACKUS, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. You are the Absalom Backus, Jr., named as respondent here, are you not?

A. Yes, sir.

Q. Yourself and A. Backus, Jr., & Sons are the defendants?

A. Yes, sir.

1961 Q. Principal defendants. James N. Dean has no interest, I suppose?

A. No, sir.

Q. And William H. Davison?

A. No, sir.

Q. You have been defending the proceeding to condemn the property sought by the petitioner, filed January, '91, have you, in this case?

A. Yes, sir.

Q. Will you state whether, since the filing of that petition, the petitioner, The Fort Street Union Depot Company, has built the structure and taken possession of the property?

A. It has.

Q. Precisely in every respect as it sought to do by its petition which it first filed against you?

A. I so understand.

Q. Will you state whether, and, if so, when you were paid by the union depot company for the property so taken possession of, for the building of the structure?

Mr. BAKER: I will make a formal objection to that as immaterial.

A. About the 26th of January, '92.

Mr. BAKER: Note an exception.

Q. Will you give me the amount paid for the realty and the amount paid for the damage due the corporation of A. Backus, Jr., & Sons?

Objected to as immaterial and incompetent. Objection overruled. Exception for petitioner.

Q. And the date?

A. About January 26th, 1892. The amount paid to me as the owner of the realty was $17,850, and the amount paid A. Backus, Jr., & Sons was $78,100 and something over.

Q. $78,293, to be exact?

1962 A. That is correct, I suppose. The total amount paid was $96,143.

Q. Since then has the Fort Street Union Depot Company been in the full possession and use of the property, running their trains over it and so on?

A. Yes, sir.

Mr. BAKER: I have no cross-examination—well, I will ask one question. I suppose you have got the money yet, Mr. Backus?

Objected to.

No answer.

Mr. DICKINSON: Well, you have not paid it back to them?

A. No, sir, and I never expect to.

Q. You have not paid it back to the union depot company, anyway?

A. No, sir.

Q. Have they asked you for it?

A. No, sir.

Mr. DICKINSON: Now, if the court please and gentlemen of the jury, I move the jury and the court that this proceeding, this petition, be now dismissed on the ground that the petitioner in the proceeding has acquired everything it sought, has paid the compensation and has taken possession of and is occupying the property with its railroads. I would like a ruling of the jury upon that, your honor.

The COURT: That motion has to be addressed to the court, Mr. Dickinson, but I shall overrule the motion.

Mr. DICKINSON: Your honor does not assume for one moment, knowing your honor's views—though I do not agree to your honor's full view having been sustained by the supreme court—your honor ought to understand that when I make this motion and state

1963 the terms of it, I am offering no personal disrespect to the court, but am asserting the theory which I propose to hold until the end of this litigation, which I think to be the right one, that the jury in this proceeding is a constitutional tribunal *sui generis*, with power to determine, under the constitution.

The COURT: That may be very true, but the jury will only determine those questions that I shall submit to them.

Mr. DICKINSON: I desire at this stage of the proceeding to ask the disposition of the jury, and your honor can discipline me in such way as your honor sees fit, within the lines of the practice and the rule as your honor understands it. Your honor does not permit me, then, to make the application to the jury?

The COURT: Certainly not, and the jury will only determine those questions that I will submit to them. And I will see that my ruling is carried out by the jury, also, Mr. Dickinson.

Mr. DICKINSON: To that we take an exception. We insist that we have the right to go to the jury upon that question, and your honor declines to permit me to address the jury upon that motion?

The COURT: Yes.

Mr. DICKINSON: To that we take an exception. Does your honor pass upon the motion, then?

The COURT: I will overrule the motion.

Mr. DICKINSON: To that we take an exception. That being the case, may it please your honor, we shall, under protest, go into the testimony.

HENRY BACKUS, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. What is your age?

A. Thirty-eight.

1964 Q. Where do you live?

A. Trumbull avenue, Detroit.

Q. How long have you lived in the city of Detroit?

A. About twenty-six years.

Q. How long have you been engaged in the business which is now carried on or has been heretofore carried on by the corporation known as A. Backus, Jr., & Sons?

A. I have been in the corporation since 1885, and I was with the firm before that, and I have been in their employ, so that altogether I have been in that business about 21 or 22 years.

Q. Nearly all your manhood?

A. All my life, practically.

Q. Been devoted to that business, has it?

A. Yes, sir.

Q. Have you ever been in any other?

A. No, sir.

Q. Will you please state whether you are familiar with the mill property there known as the Backus mill, which has been referred to in the testimony of Mr. Spitzley and Mr. Cramer?

A. I ought to be; I built it twice.

Q. It burned down once, I think?

A. Yes, sir.

Q. You were in active charge of it?

A. Yes, sir.

Q. Have you been the active man in the management of the business?

A. Yes, for a good many years.

Q. You have heard the testimony of Mr. Spitzley with reference to the valuation of the timber and frame part of the structures composing the mill?

A. Yes, sir.

Q. Will you please state to the jury when the mill was last built?

1965 A. It was destroyed by fire about the 22nd day of October 1882, and was built from that time on until it was in running order, June or July of the next year, 1883.

Q. What was the value of the structure in 1892?

A. You mean the entire plant?

Q. No, the timber part; referring to that part now that Mr. Spitzley had to do with and testified in regard to.

A. Somewhere between thirty and forty thousand dollars.

Q. You may tell the jury, if you please, by referring to different parts of the structure, itemizing so as to show them, the grounds of your valuation.

A. I understood just the wood-work was referred to when I answered your question.

Q. I am referring now to the wood-work, and do you not in that include the timber?

A. I include the timber, and gravel roofs, and perhaps some slight iron-work in the building.

Q. Well, you can specify what.

A. All that pertains to the making up of the building itself.

Q. To the making up of the frame part?

A. Yes, sir. I do not include in my statement any plumbing or gas fixtures, or fixtures of any kind. In the first place, our foundations are very heavy and our mills has to carry terribly heavy loads and the framework is very strong. The timbers are 12 by 14 and very long, some 41 feet in length, and the building is well tied together with anchor rods; the joists are 3 by 12 and 20 feet long, very close together, making a very strong and substantial building. The roof is the best gravel roof that we could procure.

1966 Q. I will ask you here whether the building wasn't specially built for you, from your experience, or did you call in outsiders to build it for your occupancy?

A. Oh, no, sir; we had to build it ourselves.

Q. Build it yourselves according to the machinery and the building there?

A. According to the experience we had had in the business.

Q. Is it a sort of building that you could let out to carpenters or builders to construct for you?

A. Oh, my, no; we worked without any special plans; we were our own architects, our own engineers, and, to a large extent, our own master mechanics.

Q. You could not, then, advertise, say, for bids for this kind of work for your business and get it put up by contract?

A. In that kind of business a man seldom knows just what he wants until he gets into it. He has to build a building as his experience teaches him in reference to his machinery and the load it has to carry, and there are many things that are hard to understand.

Q. Especially with reference to that particular business?

A. At the commencement.

Q. Well, proceed and give the jury the different parts of the building.

A. We have an elevator-house which is encased in brick, very heavy brick walls, which opens into the main mill building with large swinging doors. In this building are two large freight elevators which are constructed for carrying very heavy loads. The floors are double, the top floor being of hardwood. The frames are four sash each, and there are also other doors in this building which are very large and heavy, some three inches thick, hung with the very best appliances, nothing that we bought but
1967 some of our own get-up. The hangings are not what we could buy—the boughten ones were not strong enough—and all through the factory it is the same way. The door hangings and such things are built very heavy from our own patterns. And then next to this elevator-room is a shed called the store-room, which is ironed up on one side with glass, the extreme length of it, to the top with a gravel roof and iron posts. The lower story of this building—shed I call it—is what we call our store-room, where we hold or carry a large amount, at times, of manufactured stock, and in this building, also, or adjacent in the elevator building, is a large Howe loading scale where we weigh everything that goes into the cars. Then our main building or mill proper——

Q. Hadn't you better take up the other and give your valuations, if you are prepared to do so?

A. I can only do so through those sheets.

Q. (Handing papers to witness.) Yes, take any memoranda that you choose to refer to that you made yourself.

A. I will first take the mil-.

Q. Now, you please tell us, if you are prepared to do so, the omissions, if any, of Mr. Spitzley, when you refer to any part of it, and the mistakes of Mr. Spitzley, and a statement of the values.

A. Of the mill proper, Mr. Spitzley puts in the lumber and the labor, that is the rough timber, at $23.20; that is the average of his price, where much of that timber today could not be bought short of $28 or $29.

Q. Well, in 1892?

A. The same in 1892.

Q. What is the difference there?

A. I have figured it on a basis of $25, which is much below what my own convictions tell me it is worth.

Q. You know the timber that is in there, and therefore you know what it is worth?

A. Yes, sir.

1968 Mr. BAKER: Is that a thousand?

A. Per thousand feet; yes, sir.

Q. Just give the unit that you use, if it is a thousand feet or whatever it is, so that we will understand what price you are figuring.

A. Mr. Spitzley figured it at $23.20 per thousand, and I figure it at $25 per thousand. He makes it $5,656.21 and I make it $6,709.87. On the maple flooring he figures it at $27.60. That maple cannot

be laid, from any experience I have had, surely at less than $35 per thousand.

Q. The maple that you have put in there and that you know is in there?

A. Yes, sir. On the basis of $35 per thousand I make it $2,429 and Mr. Spitzley makes it $1,926. This, you understand, includes the lumber and labor of laying the same. Now comes the gravel roof, which Mr. Spitzley puts in at 124 squares, at $3.50 per square. It actually measures 131 squares, and I have failed to find any one who will put on a good roof at less than $4.00. I got bids here recently for a new roof on our works, from every reputable builder in Detroit, and not a man would talk less than $4.00 per square. I make the roof $524 and Mr. Spitzley made it $434.

Q. Can you tell the jury what the actual cost of the roof was when it was put on—the last roof, put on quite recently?

A. That roof was put on when I was away from home; I was in Florida at the time.

Q. You have the cost of it here figured?

A. No, sir.

Q. I suppose the books show it?

A. I could not say as to that.

Q. That roof was put on by days' work—was that the way it was done?

1969 Q. Yes, largely, and the party that put it on—I forget who it was—is not in the business here now, if I mistake not. Then there are 38 doors, 54 windows, one skylight, 260 sash, and one scuttle. Mr. Spitzley puts in the doors and windows at $844.50, omitting the skylight and scuttle. I make that item $10.74. Mr. Spitzley puts in the stairs and partitions at $84.20. There are five stairs and partitions that requires 6,239 feet of lumber to build. Figuring the stairs at 75 cents per tread, they would come to $63.75, and the partitions at $25 per thousand would come to $155.97, for a total of $219.17 as against $84.27. Mr. Spitzley puts in cupboards, closets and chutes at $54. There are 32 cupboards. One of these Mr. Spitzley furnished himself and charged us about $40 for it. The cupboards represent 2,531 feet of lumber, on a basis of $50 a thousand, which I think very low, and which would come to $126.55. Three closets, requiring 360 feet of lumber, at $30 per thousand, $10.80.

Q. What do you call these cupboards?

A. They are cupboards for the men for their tools.

Q. And the closets?

A. Closets where the doors open, the same as any closet would be, and the chutes are where we load our wood and shavings. There are six of those, which require 2,160 feet of lumber at $30 per thousand, which would be extremely low at $64.80, or a total of $202.15, or $14 left to pay for the remainder after paying Mr. Spitzley for his cupboard. There are 16 iron door fenders which Mr. Spitzley put in at $4 each, $64. I left it the same, although there is a great deal of labor connected with putting them up. We had to drill in two feet of brick-work for each fender, with good long bolts,

and fasten them up, and he has omitted the following: Whitewashing the mill, which cost us $250. We contracted that
1970 out and paid one man $100, and he got sick of his job, and we paid another $150 for the two upper floors, making a total of $250. Painting, 1,084 yards, $216.80.

Q. You are speaking now of the omissions of Mr. Spitzley?

A. Yes. I recollect when we were building the mill we had to take out a builder's risk and insurance risk, which cost us $192.

Mr. BAKER: What about that painting; was that omitted?

A. Yes.

Mr. BAKER: Let me get that builder's permit; how much was that?

A. No, insurance risk, $192. I have forgotten to put the builder's permit in myself. Conductor pipes, $125, omitted by Mr. Spitzley. Seventeen benches, $315.

Q. What are the benches used for?

A. Those are the benches in the mill.

Q. Connected with the working?

A. Yes, sir; nailing benches, and such like. I put those in with the mill, because they are there and they are wood. Of course, they are not machines. A total of Mr. Spitzley in the mill of $9,062.91, and of my figures $12,321.54. Now I take up the engine and boiler house or the engine and sawdust house, as Mr. Spitzley called it.

Q. This is still lumber and timber?

A. Yes. Mr. Spitzley made 11,132 feet of rough lumber in this building, and I make 19,435. Now, I say I make that. I have had a memorandum taken of everything in the mill, as near as I could, and summed it up, and this is the report. You understand perfectly well there is some of this work I could not do myself.

Q. That is the report of what is there?

A. Yes; the timber was figured up by other parties. Mr. Spitzley puts this in at $24, and I put it the same as the mill, at
1971 $25. Mr. Spitzley makes $267.64, and I make $485.87. Mr. Spitzley makes 4,970 feet of flooring, and I make 6,412. I put that in at the same price that Mr. Spitzley did, $20; he makes a total of $105.90 for the flooring, and I make $128.24. He makes 28 squares of gravel floor where it takes 39 squares to put it on.

Q. That is on the boiler-house?

A. On the engine and boiler house. I make that $156 and Mr. Spitzley makes it $151.50. The bond timbers, seemingly, have been omitted in all the figuring. There are a great many bond timbers put in the brick-work and wall, to nail our casings to and all of our other fixtures, which would represent a good many thousand feet of lumber in the plant. They seemingly have been omitted, and I have omitted them as well myself. Mr. Spitzley makes $1,800 feet of lumber in another item in the uprights of the dust-arrester house; he figures 3,000 feet. His total is $54 and mine is $90. He makes 2,222 yards of burlaps, at 7 cents per yard, $155.54. I call that the same. He has omitted the royalty for which we had to pay the Backus Company. I called that $700, but I think we paid more than that.

Q. You mean the Backus——

A. Dust-arrester Company. That is the royalty for permission to build and use. He has put in doors and windows at $75, and I make them $128. He calls the steps $4.00, and I find four steps, which would be seventeen treads, at 75 cents per tread, $12.75. Mr. Spitzley puts in the bridging, platforms and runway at $72. There are 2,732 feet of lumber in these and I have called it the same, $72. Mr. Spitzley calls for 38 large blinds, at $3 each, $114, and I call that item the same. A few of the blinds have been taken down, but when they are all in place there would be 48 of them. We have them there, but I have made no notation of that. Mr. Spitzley calls for 23 iron beams, 24 feet long, $345.

1972 Q. What are they?

A. They are large girder beams, T-rail girders, 23 of them, and ten of them are trussed. He has no account of the truss. I put those in at $600 put in place. They are very heavy and represent a good deal of labor. He omits the following: Large ventilator pipe, from boilers to roof of dust-arrester, $75; double ratchet shut-off for shutting off where the shavings come down. There are two wheels—the shaft with pinions and trun-ions, and he omits the lightning rod, which I suppose $35 is about right for. I recollect that is just what we paid for it.

Q. What is that double ratchet shut-off?

A. That is a rack and pinion, two rows of those, with a shaft running through a large wheel on each end and an iron floor, which shuts back to close the space between the shavings-room and boiler-room, so the fire cannot run back on us.

Q. What did you estimate that?

A. One hundred dollars; I think it cost all of that. One transom light, $3.00; three skylights and frames, at $3.00 each, $90.00 These are small ones. Fourteen iron doors, at $5.00, $70.00. I think they cost a good deal more than that, but I have put them in at that estimate. At least, I do not think they could be replaced at that. Painting, $82.00. I have put in the star plates and anchor rods at $50. There are some 15 or 20 of them, and I should say they ran, some of them, clear across the building, and some 30 feet long with a plate on each end. Conductor pipes, $37.50. Iron floor in boiler-room and ten girders supporting the same, $75. Giving a total of Mr. Spitzley's figures of $1,294.58, and of my figures, $3,178.36. Next comes the elevator-house. Mr. Spitzley makes 10,380 feet of lumber and labor at $25, $260.50; and 6,075 feet of flooring at $25, $181.50. These two items are at the same price; I put them in at the same price, $501.05 for the two items. He
1973 figures 10½ squares of gravel roof, and my estimate is 12. He makes it $36.75, and I make it $48.00. Door- and windows he puts in at $182.50, and I figure them at $293.00.

Q. On what do you figure those—your knowledge of the cost of putting them in?

A. Yes. I should not be at all disappointed if Mr. Spitzley probably omitted them. It is a very difficult matter to go over that mill and not miss something.

Q. To a man that is not a builder?

A. And yes, even the man that built it.

Mr. BAKER: How many doors and windows are there there?

A. Ten doors, 17 windows and 88 sash.

Q. Is that included?

A. I do not charge anything for the sash. They go with the windows at so much. There are two small sash which I have put in at $1.50 each.

Q. That is all in your estimate?

A. Yes, sir. There are two large skylight frames, $5 each, $10; 12 large skylight sash at $3.50 each, $42.00.

Q. Were those omitted by him?

A. Yes, sir. There is also 415 feet of maple flooring which he omitted, at $35 per thousand, $14.52. Two partition sash at $1.75 each, $3.50. Painting, $39; conductor pipes, $50. I would say right here that our conductor pipes are very heavy, most of them being made of heavy galvanized iron, riveted and soldered. 480 square feet of sheet iron on ends of building above roof, 960 pounds at 3 cents per pound, $28.80. Mr. Spitzley's total of this building it $661.25, and mine is $1,029.87.

Four dry kilns comes next. Mr. Spitzley makes 16,792 feet of lumber and labor.

Q. Not so many feet of labor?

A. He puts it in as lumber and labor, and I have simply
1974 copied his statement from the testimony. I make 35,880 feet, more than double. He puts this in at $22 per thousand, and I have put it in at $30 per thousand, for the reason that it has a ceiling overhead which is very expensive, and a great deal of bridge-work, small stuff cut up into quite fine stuff for supporting our tracks and foundations. He makes 14,500 feet of flooring and I make 8,974. You see much less than his amount. But he omits the ceiling and there are 14,739 feet of ceiling evidently omitted. He puts this in at $25, and I put it in at $30. Mr. Spitzley's total of lumber is $741.82 and mine is $1,787.79. He has got the number of squares of roof in this building correct, 52. He makes this item $182, and I make it $208, the difference in the price of roofing. He puts in eight large sliding gates; those are very large doors at the front and rear of the dry kiln, at $15 each, $120. I have put them in at $25 each, $200. He puts in the chains, weights and pulleys on a basis of $7.33 each. (You understand the way I get my average of his prices; I have had to make it myself, dividing his number of articles or feet into the dollars and cents, which he called it.) He makes this item $117.60. There are 16 set- and I call them $10 each set, $160. His next item is air gates, and small doors, $24. This item I have put in at $46. There are four air gates and eight small doors; I added to it because of the amount of labor and material I thought it would take to build them.

Q. Did you build them or superintend the building of them?

A. Yes, sir. He has put in 1,500 feet of canvas. Those are the large tent-cloth canvas curtains which we have at the front of the kilns, to throw the draft down through the lumber. I call this item

$30; his estimate is $20. I had the yards of that all figured out, 100 yards at 30 cents a yard. Painting, $145.60. These two
1975 items I have just given you now are omissions, and conductor pipes, $25. The total of Mr. Spitzley's figures is $1,205.42, and mine is $2,602.39.

I wish here to correct my figures a little on the engine and sawdust house. I should add 54 cents to my own, an omission in carrying out.

The next is the store-room alongside of railroad.

Q. You mean by the Michigan Central?

A. Yes, next to the Michigan Central, near it on that side. Mr. Spitzley makes 42,425 feet of lumber and labor, at $24, $1,018.20. I could not see why he should put that in at less than he did the $25 on the other building. But I have accepted his figures. 27,600 feet of flooring, at $30, $828. That is about right. He has 47 squares of gravel roof, which is correct. He makes it $164.50, and I make it $188. He puts in the doors and windows at $137, and I make them $178. He puts in one pair of stairs, $27—whereas he put in five pair of stairs in the mill, including all the partitions, at $84.20.

Mr. BAKER: What do you put this at?

A. I call it the same. There is a little division wood wall there that takes about 600 feet of lumber to make, which I assume he has included in that item. If he has, he made it a very fair estimate. The following are omissions: 24 four-inch iron posts, with a cap at each end, brace rods and clamps. These posts are braced with a clamp around the post, and an iron rod running down to form the race, fastened to the roof of the building. I put those in at ten dollars each, $240. One transom, $3; painting, $90; conductor pipes, $15; 2,124 square feet of corrugated iron at 7½ cents per foot, put on, $159.30. The sewers and all that I have left out, of course, when he did; they have not been considered in any of the buildings.

Q. That is in Mr. Spitzley's estimate?

1976 A. Or mine either. Mr. Spitzley's total of this building is $2,174.70, and mine is $2,746.50.

Now, going to the sheds. The only difference between us on those is in the taking of them. He took them separately and I took them all together, collectively. The total of Mr. Spitzley's figures is $4,488.69, and mine $5,656.61. Now I will give you the corrections. He has put in the windows at $12, and I have put them in at $24. I am now giving you the sheds next to the fence on River street. The squares of gravel roof are correct. He makes $53.80, and I make $62, the difference in the price of 50 cents a square. In the shed next to the mill, the squares are correct. He makes $126 and I make $144, the difference being 50 cents per square. Then he calls the skylights $90. There are six very large skylights with very heavy large sash, which I call $25 each, making $150. I have put the sidewalk in here, which we had to build and had to keep up, at 25 cents a running foot, $63.75.

Q. Is that omitted from his?

A. Yes, sir.

Q. Which one is that?

A. On River street. He puts in 260 feet of fence, ten feet high, with gate—there are four gates, but I have left that the same—$260, $1 per foot running he puts that in at, but he omits 60 feet of side fence, which is a high fence about eight feet, dividing our property from the property that Mr. Joy claims he bought here a short time ago, about 60 feet deep. That makes that item $24, which he omitted. He makes 46 squares of gravel roof, $161, and I make it $184.

Now we come to the shed back of the office. The shed I just gave, which included the sidewalk and the fence, was the shed between the two tracks on River street, and I am now going to give you the shed back of the main office on Fort street, at the
1977 end of the mill. He makes that 35 squares of roofing and I make it 51; his total is $122.50, and mine is $204. He puts the large sign on top of shed at $160. It is low enough, but I have left it the same. He includes in this shed back of the office one tank which is on top of the mill, so I have had to do the same, one eight by ten water tank. He puts it $45. The tank is 10 by 12, with heavy hoops, connected, which cannot be done for less than $100. Total amount of lumber given by Mr. Spitzley, $58,067, on an average of $24 per thousand, $2,695.79; as against Mr. Spitzley's I make 90,382 feet, on the same average basis of $24 per thousand, $2,169.16.

Q. How is that?

A. I have made a mistake in Mr. Spitzley's statement. I will have to give you the total amount on this, that is, on all the four sheds. I withdraw that statement. Mr. Spitzley makes in the shed next to mill and the shed between the two tracks, 116 house blocks, and I make seven more, 123. Mr. Spitzley's total for those sheds is $4,488.69, and mine is $5,656.61. He has put in one item of painting and glass, $395, which I have corrected. There is no glass there, excepting the skylights, and I have called the painting $120.

Mr. ROBISON: Does not this item cover what you say he has omitted of painting? This is the only item he has got in the whole business?

A. He did not mean that. His painting and glass he puts in at $395, and there would be no reason in that.

Mr. BAKER: For these sheds?

A. He puts in 775 feet of private railway, $999.90. I make that item $1,532.20. I make 90,382 feet of lumber in the four sheds, and he makes 58,067 feet.

Q. You figure the price per thousand the same?

A. Yes, sir. It is a very hard thing to get at.

Q. Is there any painting in the sheds?

1978 A. There is no painting on the sheds between the tracks, excepting the cornice and the posts, iron-work, of course.

Q. Might not Mr. Spitzley have included all that in that part of his statement, the grand item for painting through the mill, of $395?

A. No, sir, I think not, because the painting would come to a good deal more money than that.

Q. At all events it is in there?

A. Includes painting and glass. The dollars and cents show that, be it one way or the other. I simply saw the mistake and corrected it, that is all.

Q. Does that finish the timber?

A. That finishes all of the wood-work that I am familiar with. I would say that when we built the mill we paid for that timber $17 delivered. An agent of the same parties from whom we bought it came into the office the night before last, to sell me some lumber, and I asked him what this timber of the same size would be worth; I asked him for the list and he handed it to me.

Q. Is that from what you have made up this statement?

A. No, sir, I have not. I have made my statement upon the values of that timber way back in 1882, when we built that mill, remembering that the lumber cost me $17, and yet today there is much of that lumber that cannot be bought at less than $29 or $30.

Q. Then you have used in your estimates the price of lumber per foot at cost price?

A. I estimate the cost price in 1882 and '3.

Q. How much less was the lumber worth than in 1892?

A. Well, I should say at least $2, and I do not know but $3 per thousand feet, excepting the long timbers, and that I will give you some idea of here. We bought this lumber from Salling, Hanson & Company, of Grayling, Michigan, just the square, heavy timbers, and we will take the item of 12 by 14 by 41. We will call it 40. We paid $17 delivered in Detroit, and their price today is $27 on the cars at Grayling, plus the freight, which would be about $3 per thousand, which would make it $30 delivered here, or $13 more than we paid for the stock then.

1979

Q. There is no change, material change, in the price of lumber from 1892 until now?

A. No, sir, we have not found it any different yet. I have gone further still. I have averaged Mr. Spitzley's figures, taking all of the lumber in the mill, putting it all together at the price he has called it, including the hardwood, the maple flooring, and some oak flooring which I presume he put into the maple, but which is more expensive, yet I have called it the same, and it averages $24.29 per thousand, including the labor put into the building, all of the buildings—mill, elevator-room, engine-room, sheds, etc., and if you take out the hardwood part the average is $23.32; this, I suppose, includes nails, etc. I can give you a recapitulation of the whole building, if you wish, of the lumber, as far as prices are concerned. I will take, for instance, a start with the kilns. Mr. Spitzley makes the rough lumber $22, flooring $25, and I make it $30. Engine and boiler house, Mr. Spitzley makes the rough lumber $24 and flooring $20. I make the rough lumber $25 and the flooring $30. Store-room, shed, Mr. Spitzley puts the rough lumber at $24, flooring, hardwood, etc., $30, and the elevator-room he puts it all in at $25. I call it the same. And the average of all of the sheds he

puts in at $24, and I call that the same. In the mill he puts the rough lumber in at $23.20 and the hardwood flooring at $27.60. I put in the rough lumber at $25, which is less than a large amount of it would cost, and the hardwood flooring at $30; or, as I figure it, Mr. Spitzley, in the grand total, recapitulation of the whole wood-work of the buildings, puts in at $18,887.55, and my figures
1980 are $27,586.01, and I consider that a very low price.

Q. That is the total wood estimated?

A. Yes, sir.

Q. In that wood estimate, as I understand you, you have estimated the lumber at the old prices of 1882, $17?

A. At $17 per thousand.

Q. Have you got any estimate of the timber that is in the mill at the prices of '92?

A. No, sir, I have not made an estimate in that way.

Q. About what difference would that make?

A. The present price of timber of those dimensions is very high. I think it would be fair to add two to three dollars all through.

Q. On all lumber?

A. On all lumber from two to five dollars. Hardwood flooring he has put in at $27.60, and I cannot buy the flooring myself for that today. We sell maple flooring here in Detroit for about $30. I called on Mr. Demann the other day and talked with him about maple flooring—one of the builders here—and I asked him what he figured maple flooring at, laid, regardless of his knowledge of what I wanted it for—that is, he did not understand my motive in asking it—and he told me he ought to have forty-five to fifty dollars for maple flooring laid, including the labor, nails and waste. There is a very large amount of waste, and it is all kiln-dried, the flooring is. We pay sixteen to eighteen dollars, and we have always calculated it cost ten to twelve dollars a thousand to kiln-dry, and perhaps allowing a trifle for the waste, that would make thirty dollars. We sell that flooring from thirty to thirty-five dollars, and sometimes we get forty dollars. Now, we cannot buy that same flooring and lay it, including labor and nails—and it is very hard to lay, often have to drill it for the nails—we cannot get it
1981 laid for three dollars less than it costs, and I think my estimate of thirty-five dollars is very low.

Mr. ROBISON: How much did you say Mr. Spitzley's wood estimate was of the whole business?

A. $18,887.55.

Q. He has got it $22,000?

Mr. DICKINSON: I think he included in his estimate the masonry. This is the item of the framework. You will find he included in there the estimate of the masonry.

A. I have found it to be an endless job. I have worked diligently for weeks, almost nights and days, to get this thing in form, and I have perhaps made a few small omissions, but not intentionally.

Q. In estimating your timber, which you say you have throughout the mill estimated at $17, the price of cost, whereas the price

now is $24 to $25—can you estimate the price of that lumber at present prices, or at the prices in 1892, and give us the addition to your own estimate?

A. Yes, I can give you the total amount of timber in that mill, as figured by Mr. Spitzley and ourselves.

Q. You figured it at $17?

A. Yes, sir.

Q. Have you any doubt whatever, from your own knowledge of the business—you are shipping timber at your own dock there all the time?

A. Yes, we are handling a great deal of that kind of stuff.

Q. At your own estimate, from your knowledge of the prices in '92, there has been no change from then until now? I think you have some list there?

A. Yes, sir.

Q. You figured at $17. Now, give us, if you please, the additional cost. What is the total of the timber in the mill?

1982 A. According to Mr. Spitzley's own figures, and not mine, 507,620 feet.

Q. What is the average price on that?

A. On the total, $24.29, including hardwood flooring and everything, and that includes the labor in getting the stuff off, raising it in place and laying it down.

Q. You have only put in the hardwood timber at $17?

A. No, sir, the building timber; but the hardwood at $35.

Q. What I am trying to get at is the building timber, that he had done, and according to his testimony, and as I understand it in all your estimates, you have given us it at $17, cost price?

A. Yes, sir.

Q. What amount of building timber is there in the mill?

A. There is probably 200,000 feet.

Q. And the price, you say, is $24 at least?

A. You could not buy that timber today, taking it as it runs, at less than $21. That would be about $4 advance. You understand that does not include all light lumber.

Q. I understand that it only includes 200,000 feet, about $800.

A. That would be about $800 advance. That is what I figured it last night.

Q. Have you taken up the masonry work?

A. Why, to no extent. I trusted to Mr. Finn and to Mr. Dee. I thought they were pretty reasonable men myself. They made a few omissions. Mr. Finn came to me the other day, after he left the court and wished to correct a few things, some omissions he had made. One was all the foundations under the twenty-five posts under the mill, and there were one or two small walls.

Q. There are some items that Mr. Spitzley included, having

1983 gotten them from an estimate by somebody else?

A. I have taken from the testimony there the figures of Mr. Spitzley, right off verbatim, or rather as they were on there.

Q. Have you had to do with the placing of the various machinery in that mill?

A. Why, I have not only had to do with the placing of it, but I have been the inventor and getter-up of very much of it.

Mr. ROBISON: Now, I do not understand the difference between Mr. Backus' estimate and Mr. Spitzley's. You say Mr. Spitzley makes it $18,000 and Mr. Spitzley has figured it here at $22,000?

A. Oh, I beg your pardon, I see where the difference is—the office. The office I have not had time to get at.

Q. He figured the office at how much—have you got that?

A. Mr. Spitzley figured the main office; he just says carpenter-work.

Q. Just read what the total is.

A. $3,724.54. Does that make your statement correct?

Q. That is what Mr. Robison and I are both after. Now, in setting up this various machinery in the mill—mostly originally patented articles, I suppose——

A. Yes, sir, much that we buy is often patented, generally patented.

Q. Does the cost of putting the article you buy in the mill compare with the value or cost of the machinery you have running in the mill?

A. You are speaking now of machines we have bought outright?

Q. Yes, sir.

A. No, sir, we have very much improved them.

Q. You have your own improvement?

A. Yes. There is scarcely a machine in that mill we have
1984 not had apart, taken down and made wrought-iron parts where they were cast iron, and added thousands of dollars of expense.

Q. Then, does the most of the patented article, as put in the mill, bear any relation except as an estimate in making up the total value of the machines, to the cost and value of the machines in the Backus mill?

A. I can answer the question in this way. There is a great difference in the machines. Some machines we have lots of that repairs to do——

Q. Repairs or improvements?

A. Improvements. I call them repairs, but I mean improvements. I went up the other day and looked through Mr. Spitzley's mill to compare his machines with ours.

Q. Never mind that. The competition in the planing-mill business is very close, is it not?

A. Very.

Q. And the margins very narrow?

A. Yes, sir.

Q. And you have made a success of the Backus mill, from your company and yourself working at it and constantly improving the machines, and supplying parts where you saw they were needed?

A. Yes, sir.

Q. Although you would buy the original patented article?

A. That is correct.

Q. Is there a single machine in that whole shop that does not

bear some improvement, from one to numerous in fact, and almost revolutionize the machinery or changed its general character of some nature, supplied by your experience in the planing-mill business?

A. No, sir, I do not know of any.

1985 Q. Could a mill be supplied with going into the market and buying machines and starting up anywhere?

A. No, sir.

Q. That would be a success?

A. No, sir, it takes years to get down to a working basis. I would give more for the machinery which I had in my mill than for new machinery. I could not use the new machinery until I had gone through my experience. There are weak parts in any machine.

Q. You have to adjust them to your own theories and experience?

A. Yes, and the man that carries more lumber in a day finds more weak parts than the man that does not.

Q. A machine that you buy in the market has to be Backusized to become a part of the Backus mill?

A. Yes, sir.

Q. And this is done at a cost?

A. Yes, sir.

Q. You heard Mr. Cramer's testimony?

A. Yes, sir.

Q. Will you now please state whether, listening to his testimony as to what there was in the shop, if you had not known that he was testifying to matters in your own shop, whether you would have known that you had any such material as he testified to here, from hearing it?

A. Well, I do not think that a man could get any idea of what we had there in the length of time he was at it, and yet he was at it considerable time.

Q. Well, from his own statement of what the machines were, did you recognize them?

A. Oh, no, sir.

Q. You could not tell what machine he was talking about at any time?

A. Hardly.

1986 Q. Now, have you gone through his testimony with the care you have gone through Mr. Spitzley's?

A. I have not gone through Mr. Cramer's testimony to the extent to which I have Mr. Spitzley's.

Q. You have examined the matter of the machines as to which he was testifying?

A. As to which Mr. Spitzley testified, and to some extent those to which Mr. Cramer testified.

Q. From Mr. Spitzley's statements of the machines, were his descriptions of them in your shop, descriptions of them representing their character as they actually are in the shop?

A. Oh, no, sir.

Q. You did not recognize, from his description?

A. I could not get any head or tail.

Q. What he was describing or what he was telling the jury about?

A. No, sir, it puzzled me a good deal.

Q. Now, take up, if you please, Mr. Spitzley's testimony as to the machinery in the shop, and tell us something of the machines there are in the Backus factory?

A. Well, there are five S. A. Wood's—that is, machines built by S. A. Wood, upon instructions from us with our improvements—five, thirty-inch, eight-roll, eight-inch roll, broken pressure bar—we call it broken, we mean divided—and broken-roll double-surfacing machines, which Mr. Spitzley, I believe, put in at $1,600 each. That would not be far out of the way for the machines delivered on the cars at Boston. Then the setting up would come extra and the freight extra. One S. A. Wood's 24-inch dado.

Q. Now, take the five machines that you speak of and put in as delivered on the cars at Boston, at $1,600, and subject to the wear and tear——

1987 A. Yes, I heard Mr. Spitzley say that the wear and tear would make up for the difference in the freight.

Q. Now, what are those machines, as set up in the shop, worth? What is the value of them as you have them in the mill?

A. Oh, I do not suppose they stand us a cent less than $2,000. Out of foundations—you see, we have to dig down into the ground and put in oak tires crosswise, and then put oak timbers on top and bolt them together, and place the machines on that and bolt it down to make it firm. If you did not, it would rack itself all to pieces.

Q. Then, have there been additions to those machines in the shop that you have just referred to?

A. Yes, we have had to throw away the cast-iron wrenches that come with the machines and have wrought-iron wrenches made; and we have, in some cases, put in heavier arbors, and in a general way we have had to improve the machines; and it would be so with any machine we had. It has been my experience.

Q. In your mill, will you state whether you have, for those machines to which you have just referred to, parts ready for renewal?

A. Oh, a great many parts. We have extra tools, extra knives, extra dead-rests and pressure bars.

Q. You have them ready to renew parts, in your mill?

A. Yes, sir.

Q. So that there would be no stoppage?

A. Yes, we have to.

Q. You have them on hand?

A. Yes, in great numbers.

Q. Now, Mr. Spitzley gives only four of those machines?

1988 A. I would say right here, that were we dependent upon sending to Boston for a little break in one of those machines to repair it, to get a new part and take its place, it might disturb us for a week or two.

Q. You have to keep equipped to supply the thing in the shop? Mr. Spitzley only gave four?

A. Mr. Spitzley missed one of those machines. I do not know how he missed it, but he did.

Q. Now, with all extra parts supplied, the entire equipment of each machine, what is the value of them in the mill?

A. I consider those machines stand us $2,000 apiece today.

Q. With the extra parts?

A. Yes. I should not consider that as far out of the way.

Q. Were they worth it in the mill in '92?

A. Yes, sir. You understand that when a part of a machine, one of these machines, gets in any way worn, we immediately replace it with a new part, and a better part, if possible, so that the machine is practically in better running order today for our business than a new machine would be if it were just set up. We keep the machines up in apple-pie order.

Q. With the machine that you have running in the shop, one of these five you have just spoken of specifically, is one of the machines in the shop you have equipped, ready for readjustment on any breakage or anything of that sort, running in accordance with the theories in existence in your shop—is it worth more or less than a new machine to put in?

A. To me it would be worth a good deal more.

Q. Well, worth to the mill?

A. To the mill, certainly; that is me.

Q. Worth in its place more or less?

A. It is worth more. That has been by experience all my life.

1989 Q. How often are those machines rebab-itted?

A. Oh, they sometimes will run a year, possibly six months, if the men do not get careless at all and let them get dry; then they will run longer. It is a very expensive job to babbit- one of those machines.

Q. Your estimate then on those five machines would be $10,000?

A. Yes, they are worth that to us today.

Q. Take up the other items.

A. There is one 24-inch machine in the same class. That makes six altogether. And I should say that the difference between the price of that and a 30-inch machine ought not to be over $200; possibly not over $100. Yes, I guess $100 is enough for the difference in the width.

Q. What is that worth, equipped in accordance with the testimony you have given?

A. Well, that would be worth, say $100 less than the others—$1,900.

Q. Did Mr. Spitzley miss that machine, too?

A. No, he had that.

Q. He had that, so that we got it by showing him the photograph and having it identified?

A. Yes, sir.

Q. Now, have you a statement of the omissions of Mr. Spitzley of machines that you could not find he had seen at all?

A. Yes, I have a partial list.

Q. In his estimate of rip and cross-cut saws, he gave seventeen as the number, and put in the price of those seventeen saws as $748. That would be at $44 apiece, and a few of them he put in at $45. Are there but seventeen rip and cross-cut saws?

A. There are thirty; he omitted thirteen.

Q. What is the value of those thirty rip and cross-cut saws, as they are in the mill?

1990 A. Well, they have cost us, I should say, at least $100 apiece; that would be $3,000. They are worth more than that. Those have my own improved appliances, built by myself. I cannot buy a machine in the country anything like them. They are not in the market; not a stock machine.

Q. Give us some idea of the improvements upon the rip and cross-cut saws that you have, in addition to the original cost of them.

A. In our cross-cut saws we have a carrying table which is very important in cutting off, in order to enable one to cut off square. It is very seldom that you will run across a table that will do that. In fact I have never seen any myself that would absolutely cut stock square, and you could depend upon it, except ours. Then there are what we call yokes over the saw, to protect the boy from getting hurt that is standing over the frame. We will say the saw is here and his lumber is traveling along here. Here is a yoke up over the saw. Now, as his board is all cut excepting the last piece, he can pass that along just the same, clear passed his table, off his table entirely and beyond this yoke, carries it over the saw and then he cuts the last piece, instead of having to turn it over and look at his measure and make a mistake of a sixteenth or eighteenth of an inch. Then we have what we call a back gauge.

Q. To these same thirty rip and cross-cut saws?

A. To the cross-cut; about twelve of them. We have what we call a back gauge, which is a very intricate and expensive affair, for cutting short stuff. In case we have an order today and we have a lot of stuff——

Q. On every cross-cut?

A. Yes—for squaring off the ends; that is used on short instead of long lumber. Then we have a large number of what we

1991 call finger gauges, trip-gauges, that were my own get-up. I worked years and years to learn how to handle that part of the business, and those will trip down. You can get eight or ten lengths of stuff; that is, you can set the gauges to cut eight or ten lengths, and you can cut any one of those and skip right over and the gauges will trip down. If you want to cut the last the longest length, all the other gauges get away; if you want to cut the first length, the others do not come in contact. There are rules set in the tables, both lengthwise and crosswise, and the tables are iron. The arbors are very heavy and expensive, and adjustable, and each cut-off saw has a tightener, which adds to the expense very materially, and then the gauge that holds the fingers is held very firm with bolts and screws. The rip-saws have a double worm attachment for raising and lowering the tables, and then safety splitters to prevent the boys from getting hurt, which is a very essential thing,

and what we call dead-set gauges, or rests, for ripping the stock against. There is a clamp here, and when we get it just right we have another clamp that we call a dead-set, to draw down here so that it cannot get away. Now, these grooved or V tracks of the gauges we have on our rip-tables are made of about three-quarters by three or four inch steel, and they have to be planed out at a very heavy expense, for this reason: We had many years' experience in using the boughten gauges, and I have been to Michel's, here in Detroit, and different ones that make the stock gauges, and they would not last us twenty-four hours. If you tighten down your gauge to hold it in place, it will break off.

Q. Now, these equipments in the mill he has put down at $40 to $45 apiece?

A. Yes, sir.

Q. And omitted thirteen of those?

A. He has omitted thirteen of them.

1992 Recess until 2 p. m., at which time the examination of the witness was proceeded with, as follows:

Q. Of the thirty cross-cut saws, is there any peculiarity of the saws at all in what is called the swing saw?

A. Yes, sir. The swing saw that we use, I do not suppose there is another one like it in the country. We have five.

Q. Now, those swing saws cut in grooves, do they not?

A. No, sir. With a swing saw there is an iron frame that is held above, which gives it the name of swing. It has a large brace arm, and here is the saw on the lower end and the journal runs through there, and the belt or power is held up there and gives it a chance to vibrate like the pendulum of a clock.

Q. Doesn't it vibrate in a groove?

A. No, sir.

Q. On cross-examination Mr. Spitzley gives seventeen rip and cross-cut saws, and he referred to those, four of them he named in his seventeen and put in at $45 apiece?

A. Those are entirely different things from the thirty I speak of.

Q. I know, but he put them in at $45 apiece; the machines as they were in the shop. Now, what is the cost of the swing and attachment—the swing and the bench?

A. I could not replace them for $200; I don't know as I could for $250; they cost me over $200.

Q. They are in fine condition?

A. Yes, sir.

Q. Better than new?

A. Very best condition; first-class and in good order in every shape and form. I was going to remark that those frames you spoke of, connected with these swing saws, are thirty-two feet long. The ordinary swing saw that a carpenter shop or sash, door and blind factory would build or buy has the simplest kind of a
1993 table practicable, nailed together, nothing substantial about it; whereas in our case this is made of the heaviest kind of hardwood timber, and the swing-table is thirty-two feet long. It

has sixteen legs. It takes 500 feet of lumber to build it, all oak and ash that is worth from $40 to $60 a thousand, and the labor upon that is worth as much as the lumber, or more. It has two bolts 32 feet long in it. It has 75 shorter bolts that are from two to three or four or five feet long. It has 92 mortices and 92 tenons, and you have got to bore 180 holes to put it together, and it has what we call a gauge-rod that is trued up, 32 feet long and an inch square of steel. It has four devices or irons that are gotton out with set-screws, enough to hold this gauge, and it has two of what we call cutting-plate irons; it has eight rest-irons and six supporting irons, and from eight to twenty gauges, besides the saw. This is the frame I am speaking of. The saw is an entirely different part of the machine. It acts differently, but when it is put with the frame it is one thing.

Q. He appraised it in his inventory as only the saw at $45?

A. Yes. There is nothing like them in the country; it is all our own get-up. I have worked years. I studied over that machine for years and years to get it perfected, and I consider it perfected. You go into a sash, door and blind factory and they do not cut but one length at a time where we cut from one to a dozen lengths at a time.

Q. What would you call those five alone worth, of the swing-saw attachment?

A. I consider those five saws would be worth $250 apiece. I might state right here that those machines are not stock machines. You cannot buy them in the country anywhere; not made by Fay or Wood's, or any one.

Mr. BAKER: These frames that you make?

1994 A. No, sir, we have the only one in existence of its kind.

Q. Now, there was a Preston improved saw which Mr. Spitzley put in at $90. What is the value of that.

A. You can buy that saw today on the cars at Battle Creek for $90, but not with the attachments I got on it.

Q. What is the value of the saw in place as you have it there?

A. That saw in place, with the attachments I have built to it, is worth today maybe $200; maybe more.

Q. Did it cost that?

A. I paid $90 for the saw and about $40 or $50 for the extra appliances they put on it, and paid the freight and setting up, and I have added a great many tools to it since—cutters and saws. I do not think $250 would make it. I will put it at $200.

Q. I notice that Mr. Spitzley, for his valuations, referred everything to a man named Jencks. Do you know what machines he represents there?

A. Yes, he represents J. A. Fay & Co., of Cincinnati.

Q. How do they compare in value with the Wood's machines?

A. We use the Wood's, but our past experience in years gone by, when we did have Fay's, was that the Wood's machine was far superior for us. I would not buy a Fay machine today for myself, although there may be those that like them. We took our choice from the Fay's and Wood's and all of them, and we concluded to

buy the Wood's and pay the Wood's price. The Fay machine is much cheaper than the Wood's; decidedly so.

Q. Well, can you give an approximate idea of the difference in their values? Mr. Jencks had given him the value of the machine by telling him what it ought to be, arriving at his conclusion
1995 according to Mr. Spitzley's view of it—Mr. Spitzley asked Jencks for the price and he would refer to the price-list.

A. Why, he naturally would ask what a machine about so and so was worth, and he would refer to the price-list and give it to him.

Q. The Fay price-list?

A. Yes, certainly.

Q. What is the difference in valuation of the two machines, generally?

A. There is 20 to 25 per cent. in the market; that has been my experience.

Q. He also put in the large molder and S. A. Wood's molder at $470. Can you identify that so as to tell really what the value is?

A. Yes, S. A. Wood's 24-inch combined surfacing and matching machine and molder.

Q. What is the Wood's worth that he put in at $470, on the information from Jencks?

A. You want the large molder?

Q. I want the large molder.

A. I was giving you the matcher. One S. A. Wood's improved 14-inch combined matching and molding machine. That machine is worth as it stands today $1,500 at the least calculation.

Q. What is the original machine worth in itself?

A. I do not know of any ever having sold at less than $1,200 on the cars at Boston of the Wood's molder.

Q. You take your valuation, making $1,500 from the equipments?

A. At least that. You understand me, I do not include the knives.

Q. I know. But the actual cost of the Wood's molder on cars at Boston is about three times his valuation?

A. Just about.

1996 Q. Did you include the knives in your estimate of $1,500?

A. No, sir.

Q. How much is it worth, including the knives?

A. You cannot class it in that way, for the reason that our knives are used in common between three or four machines. The same knife applies to four or five machines and I will have to put the knives in at another place.

Q. Now, there is a small Huntington molder, to which he testifies and which he said was worth $130. What have you to say about that?

A. That machine is worth at least $700.

Q. What is the cost without any equipment of a Huntington small molder?

A. That machine we paid $550 for at Newark, N. J. I do not think $700 is enough.

Q. There is a feed-molder worth about $130.

A. Oh, yes; not a molder, a little door-relisher molder.

Q. Fay does make a machine of something of that kind for about $130?

A. I think probably Fay does, and H. B. Smith; all the door and sash machine makers make those little light machines. Mr. Spitzley has one that I should say cost $130.

Q. But not a Huntington?

A. Oh, no, sir.

Q. What is it worth, with the equipment, on the floor of the shop?

A. I said $700.

Q. It would cost at Newark $550. Now, the band-saw files?

A. Filing machines.

Q. The band-saw filer, as he called it; the same as he
1997 used, he said; put it in at $75. Has he got any such band-saw filer in his shop?

A. I did not see any, and I looked for it the other day when I was up there.

Q. What is a band-saw filer?

A. It is an automatic band-saw filing machine—emery grinder, we call it—that costs on the cars at Buffalo $75. Then there is the freight and setting up and the connecting, and a great many extra tools you have to build to go with it.

Q. Equipment in the shop?

A. Yes, the hammering bench, and you have to build anvils, and you have to buy hammers of different sizes for it.

Q. What is the total of the whole thing with the equipment?

A. The machine would cost about, I should say, not less than $200 set up; that is with the hammering attachment that goes with it. You understand there are a good many appliances for putting band saws together that I include with that. I call the whole thing. The machine itself does not represent very much; it is the attachment that goes with it.

Q. That costs $200 in the shop you say?

A. Yes, I will make it $250.

Q. Why do you add on the fifty?

A. Because I happen to think there are the brazing tools that go with it that are expensive.

Q. What are they?

A. Where you braze the saws together—the silver.

Q. You use silver solder?

A. Yes, it is silver.

Q. Now, the Eagan gig-saw. What is that worth in the shop?

A. About $125.

1998 Q. He is pretty liberal to you with that. He gives it worth $72.

A. This machine is worth $100 that we got; it is the heavy size.

Q. You mean costs that?

A. Yes, on the cars at Philadelphia; and we have to put on some heavy frame-work to support it and to put it on the floor.

Q. It costs $25 to equip it?

A. To put it on the floor and get it in running order; yes, sir. There are different sizes of gig-saws; there might be one worth $25 and another one worth $200.

Q. Yes, there are gig-saws and gig-saws. Mr. Spitzley put in no frames and tables. He said he did not inventory any or appraise them?

A. No, sir.

Q. Those are part of the equipment of the shop?

A. Yes, part of the machine; a very important part. Without those the machine would not be but of very little account.

Q. What are those frames and tables? How many of them are there, and what are they worth and what is their value in the shop?

A. You have in mind now the swing-tables or bumping machines?

Q. I mean the swing-saw tables.

A. I have included those in my estimate of the swing saws. That is what makes up the cost of the swing saws.

Q. And the bumping machines, do you include those?

A. I will give you those now. There are eight of those and they are worth $20 apiece at least; eight box-board bumping or glue tables or machines. They are all ironed and tenoned and morticed together and substantially built.

Q. The total valuation is how much?

1999 A. $160.

Q. Then there are four — five long tables that he did not estimate at all?

A. Those, I think, were included as swing-saw tables.

Q. There is a blacksmith forge omitted. He said he saw one there, but it was not set up, and he did not appraise it?

A. Well, that was a forge that cost us about $30, I should say.

Q. Is it set up?

A. It is always ready; it is portable; it is carried around the same as you would a tub or anything else?

Q. Set up and in constant use?

A. Yes, sir.

Q. The power wood-cutting machine he did not estimate at all?

A. That is worth about $150.

Q. Of the emery grinders, he said he saw one but he did not estimate it. How many emery grinders are there and what are they and what are they worth?

A. Four. There are two there worth $75 apiece and two worth $50 apiece, making a total of about $250.

Q. He said he did not estimate any trucks at all, although he saw some trucks there. How many trucks are there?

A. Well, of the mill or factory trucks we call them, 120. They are a very large, heavy frame, with stakes, bolted together, with

steel axles and wheels, and very heavy swivels. We have to have the swivels made to order at a heavy expense.

Q. What is the value of them or the cost of such trucks?

A. Not less than $20 apiece, and we have 120, which would be $2,400.

Q. Are those in good condition?

2000 A. Oh, yes, sir. They have oak and maple frames and are very substantial. They are a great deal heavier and better than we could possibly buy. I have never seen anything like them.

Q. You make them for your own mill?

A. Yes, sir. There are 28 kindling wagons. Those are a two-wheeled truck, like a wagon, only with two wheels and a steel axle. He omitted those; they are worth $20 apiece—$560.

Q. Oh, well, a little item of three or four thousand dollars does not matter.

A. Then there are ten of our own make; trussed box-moving trucks, wheels and swivels. Those would be worth $10 apiece. They cost more than that, because I had to get them up and learn my way at first—$100. Sixty Backus kindling swivel boxes; they are on wheels and swivels as well.

Q. What are they worth?

A. They are worth $12 apiece, or $720 at least. That is all of the trucks, and those were all omitted by Mr. Spitzley.

Q. Now, pony planers. He said he saw two; one he should think would be worth about $135 and the other about $80.

A. Yes, we have three.

Q. What are they worth, and what is a pony planer?

A. It is a little machine for quick one-sided work, if you are only dressing one side; dressing a few panel boards in a hurry; it don't pay to set a large machine up for a small amount of work, and one of these machines is a Wood's 24-inch, with double feed and double pull-out roll. When I say double, I mean two behind the cylinder and two in front of the cylinder.

Q. How much does the Wood's machine cost?

A. That stands me down there $450; all of that.

2001 Q. Apiece?

A. For the one, and the other two, $300 apiece, or a total for the pony planers of $1,050.

Q. Could you buy them and set them up for less—that kind?

A. No, sir; I would not take a contract to do it for that.

Q. Mr. Spitzley did not see any lock-corner machines at all?

A. No, sir.

Q. Did not include it; it is not mentioned in his list?

Mr. ROBISON: He says he does not know what you mean by that.

Q. Well, it is not in his list; I cannot find it in his estimate. What is a lock-corner machine?

A. It is an arrangement for making a lock-corner work; a lot of saws where you run the board through this way (illustrating); it takes out this and on the opposite, to make it so that the two come

together, and you glue them together and make your box, or whatever you are building; it is no difference at all; that would be fan-shaped, but these are straight.

Q. What do you put that down at?

A. $150.

Q. Is that a patented machine?

A. Yes, an improved machine. It is not patented; we built it ourselves.

Q. And the rounding machine. He does not include that?

A. The rounding machine is worth at least $300.

Q. What is it?

A. It is a machine for turning curtain poles and flagstaffs and that class of work. We can turn anything from a quarter
2002 inch in diameter up to three or four inches, and for making our large rolls which we furnish the oilcloth manufacturers.

Q. Do you make a flag-pole with that?

A. We have made lots of them with that—not tapered, straight.

Mr. BAKER: You cannot make them out of hickory with that?

Mr. ROBISON: Mr. Backus does not make any hickory poles anyway.

Q. Can you make a hardwood pole with it?

A. Oh, yes.

Q. Make it in hard wood as well as soft wood?

A. Oh, better. We can make a pole of maple or oak a great deal better than of pine; pine is so soft it does not stand up.

Q. And your machine can make it either in hard or soft wood?

A. Yes, sir.

Q. What are you charging down there for Pingree poles?

A. Unfortunately we have not had any orders from Mr. Pingree for any.

Q. That is what is called the rounding machine. Is it a patented article?

A. Yes, sir.

Q. Do you know whose it is?

A. Rogers'.

Q. The best?

A. Yes, sir.

Q. What is it worth?

A. $300.

Q. Now, there are two dado or groove machines that Mr. Spitzley nor Mr. Cramer had not on their lists?

A. Those are worth $100 apiece.

Q. Are those machines patented?

2003 A. No, sir, our own make. We got up the heads and arbors and tables and everything. All have an automatic lifting attachment of the table.

Q. Mr. Cramer and Mr. Spitzley saw two matching and grooving machines—thought there might be four—which they put down at $65 apiece?

A. Yes, there are ten of those.

Q. Are the others equally good with the four he thinks he saw?
A. Oh, just the same thing.
Q. What are they worth?
A. They are worth $250 each.
Q. Are they a patented machine?
A. No, sir, they are not patented; they are improved; they are our own build, our own get-up; we made the patterns and got them built.
Q. Come to this matter of molding knives you mentioned. He did not put any estimate on them. He said there were some molding knives and knives lying around loose, but he put no estimate on them. He said he saw a room off in a corner that he didn't examine.
A. Well, the room off in the corner that he didn't examine is up on the next floor and is called our saw-filing room, and in that room are about 300 saws hung up on pegs.
Q. What kind of saws?
A. Circular saws for our various machines.
Q. Tell us some of the kinds of saws there are?
A. Rip-saws and mitre saws and cross-cut saws and saws for the Woods machine.
Q. The same as he estimated here as he saw them in the machines at $45?
A. Yes, sir.
Q. How many had you there of that kind of saws that he didn't estimate at all?
2004 A. There are probably 350 saws—say 300 anyway, and that does not include those on the machines. The 300 saws would be worth $1,000.
Q. Now the knives lying around loose he did not estimate at all?
A. Those were in cupboards on shelves. I inventoried them the other day and they go by the inch; we have to buy them by the inch. You can buy the standard knife, that is, a knife that will make something that is universal all over the country, for 60 cents an inch. These knives cost us more than double that.
Q. Made to order?
A. Made to order.
Q. Solid or faced with steel?
A. All solid. We go to the blacksmith shop and give them an order for what we want and they forge it out to the best of their ability and then we take it and trim it up; they charge us for the steel and labor and forging and we fit the knife on emery wheels; it is a very tedious job and a very accurate job to carry out, and they cannot be made by us for less than one dollar an inch; I have called them $1.00 an inch. And I took the precaution to go to De Mann's yesterday and ask him what his molding knives cost him per inch. He turned to his book——
Q. Who is De Mann?
A. A sash and door man on Trumbull avenue. He had them on his book $1.10 as actual cost.
Q. Well, now, what are these knives lying around loose?
A. 3,017 inches of them, or a total cost of $3,017. We put those

knives into three particular machines. Now, there are planer knives besides. There are 6,018 inches of planer knives. Those cost us and we cannot buy them for any less than 12 cents an inch—$728.16.

2005 Q. Now, we have had the Eagan gig-saw. There is an Eagan boring machine, is there not?

A. It is made by the same party, yes, sir.

Q. What is the value of that?

A. At least $150. In that case I should include the bits that go with it.

Q. What do they cost new?

A. $100 in Cincinnati.

Q. And you have included the equipment then in your estimate of $150.

A. Yes. I don't know as that will cover it.

Q. It is conservative?

A. I think so.

Q. Another thing that all omitted were grindstones?

A. There are two of those. One is a power grindstone and one is run with a foot-treddle. They are not very expensive affairs and I presume $30 would cover both.

Q. Machines for sharpening pickets?

A. That is a machine that comes from Ohio.

Q. Patented?

A. Yes; I paid $40 for it, and I paid about $10 for improving it, about $50 it stands me.

Q. Now, the very large Howe platform scales both parties have omitted?

A. Yes, that is a large loading scale which I bought of the Howe people; it is a very expensive rig to put in; it is heavy and has to have heavy timbers and heavy floors and arrangements. It is a scale that is worth $200 on the cars, and I suppose $50 additional would probably put it in—call it $250.

Q. What are knife-balancing scales?

A. Knife-balancing scales, two of them. Call them $20 for the two, one of them cost $18 and one cost $5 or $6.

Q. They didn't see any sand blast. Have you such a thing as that there?

2006 A. There is one sand-blast machine patented, down there in the engine-room, called the sand-blast file-sharpening machine. It is a machine we run our files through before we use them; it takes the rough edge off a file and makes it cut like a razor and our men don't like to use a file unless it goes through that machine first, and we can sharpen the files over two or three times before we have to have them recut. We paid $150 for the patent and to get it up probably about $50 more.

Q. You mean you paid for the patented machine?

A. For the machine patent, including the machine; yes, sir—$450.

Q. You did not buy out the patent for the sand blast?

A. No, sir; pretty near, though.

Q. You had to pay this price to get it?

A. We had to pay that price to get it. I would not go without it for a good deal more.

Q. You do not mean that you bought the patent right?

A. No, sir, I bought the patented machine.

Q. Automatic knife-grinders, they didn't see?

A. One patent improved Springfield automatic knife-grinding water-emery machine. That is worth about $300.

Q. Good condition?

A. A1, sir. Many of its parts have been made new and heavier and all refitted and a new wheel on it. It is automatic, and it takes the knife up and tells the knife when it has got enough and stops it.

Q. The eight bumping machines, or tables, I think we have gone over?

A. Yes, sir.

Q. And the 18 or 19 saw-tables we have passed over. Now, Mr. Spitzley didn't know anything about what a buzz planer was. I tried to show him a picture.

2007 A. Mr. Spitzley has one at his factory, I see. He perhaps don't know it by its name. It is called a joining or buzz planer: it goes by either name.

Q. They didn't see it. It is not among their list, that I can find. What is it worth?

A. $150.

Q. The sanding wheels they didn't see. What are they worth?

A. $150.

Q. What is the large resaw?

A. That is a very heavy machine for resawing lumber up to three feet wide—forty inches wide. We have our blades for that 22 gauge and 19 gauge, and I am now getting some 24 inches in thickness. We get better results on our stock on wide lumber, but it is not near as fast. It is a slow machine compared with our big circular saws. The circular saws will feed the lumber from 60 to 100 feet a minute where this machine will feed from 25 to 60 feet a minute.

Q. How many of those are there?

A. Only one, with five extra blades.

Q. What is the band saw worth?

A. About $1,200, besides the blades, which come to $25, or $20, maybe, apiece.

Q. Now, in addition to the small Huntington, was there a Huntington four-sided molding machine there?

A. Yes, sir.

Q. Is that a patented machine?

A. Yes, sir; that machine cost us on the cars down in New Jersey either $500 or $550; $550, I think.

Q. He gives you $130 for it?

A. Yes, and then there is the freight to add.

Mr. ROBISON: $470 he gave. You asked him if they paid $650

if they didn't pay too much, and he said if they did they got cheated.

Q. Well, you paid $550?

2008 A. They are worth $500 to $550 on the cars, and they are worth $700 set up. I mean bolted down and ready to run. I do not mean the countershafts, or pulleys, or anything of that sort; nor molding knives. Then we have extra heads with that machine; in fact, of all the machines.

Q. How many of the S. A. Wood's 30-inch planing machines are there?

A. Five.

Q. Mr. Spitzley said there was but four. Now, of those he gives you four Wood's planing machines and puts them in at $1,600?

A. That is the first thing you gave me before dinner—five of those machines. He omitted one.

Q. Well, you know you have five?

A. Yes, sir.

Q. Very well. Are they all worth about the same thing?

A. All worth about $2,000 apiece as they stand, including the labor of setting them up and so forth.

Q. I didn't ask you about the Wood's matching machines?

A. There are two of those—14-inch.

Col. ATKINSON: Matching machine and molder are the same.

A. No, sir; there are two S. A. Wood's 14-inch combined surfacing matching and molding machines you have not mentioned yet.

Q. Tell us about them.

A. Those are a very similar but a more expensive machine than the molder, and are worth very near as much as the 24-inch machine. The 24-inch machine Mr. Spitzley put in, I think, at $1,900, and he puts in the 14-inch at $600 less. I don't know just what the difference is, but I would not assume it to be over $150, pos-

2009 sibly $200 less; but I want to say here that they are built probably stronger than a wider machine in proportion; more iron in them.

Q. We have had the Wood's planing machine, 24-inch cylinder?

A. You have had all of those excepting these two matchers, 14-inch, and those would be worth on the basis of $1,900 on cars in Boston for the 24-inch, about $1,700 in place, or $3,400 for the two.

Q. Is there anything in the foreman's office that they didn't look into?

A. Yes, there is the desk, black walnut, and fixtures of the office, gas and electric bells.

Q. What is the whole equipment worth?

A. Oh, $100 probably, taking the bells and everything in there into account.

Q. Now, the Greenly gang rip-saw they didn't have?

A. Greenly heavy patent improved spur-feed gang rip-sawing machine, yes, sir.

Q. What is the value of that?

A. That machine has an extra attachment for manufacturing beveled siding.

Q. What are they worth?
A. That machine is worth $300.
Q. Then he didn't find any siding machine?
A. That is a Chicago Prebble improved combined siding and resawing machine, with planer attachment; that will take a piece of siding, dress two sides, run it through, and make two pieces of beveled siding at the same time.
Q. He didn't have it all; what is it worth?
A. That is worth $500. That is, in place, you understand, with the foundations in.
Q. What is the shooking machine?
A. A shooking machine perhaps better be called a shook
2010 table or stand, it has a mechanism connected with it that perhaps would make it a machine. We have five of those. They are for shooking up the material in the factory. They throw a lot of stuff in the box like that, a man puts his foot on the lever, it draws them up tight, makes them a square bundle and then he nails them up ready for shipment—makes what we call a shook.
Q. What are they worth?
A. $20 apiece.
Q. What are the kindling boxes?
A. Those I have given you. He omitted those. I gave them to you with the trucks.
Q. Is there a drilling machine?
A. Yes, sir. That is a small machine we have there for drilling our knives, for balancing. If our knives get too heavy on one side of the cylinder we have to take a little out of them, we drill them with that, and for ordinary drilling work. That machine set up and with the drills is worth $100.
Q. Do you know anything of the cost of the sewerage there? You know something of the construction of it?
A. Yes, I know we have a large and very expensive sewer; our office sewer we dug clear through to River street.
Q. You draw your own water from the river?
A. You mean the pipes from the river?
Q. Yes. Can you give us the valuation of that?
A. I don't think that water pipe could be put to the river today for $2,500. I know it cost us more than that when we put it through and I don't think it could be done any cheaper. It is a very expensive job; it would have to be all sheet spile, it is quicksand there, a poor foundation to work in.
Q. I think you have the only connection there of that kind from the river front?
A. Yes, excepting the Michigan Central railroad.
2011 Q. I mean any manufacturer. Now, on the estimates they have given us on the engine and boiler machinery, and so on, can you give us anything on the shafting and pulleys, and so on? Can you give us anything on the cost of those?
A. Yes, I can give you my idea. I ought to know something about it. I don't think the engine could be replaced today as it was when we got it for less than $4,000. I do not mean set, I mean at

the shop. We paid $3,500 for the engine, and we had a great deal of extra work to do to it. We have put in a new and much heavier main bearing box, or pillow block, we call it; it has cost us over $4,000. Then we have put in a new follower; it has a new wrist-pin, and made addition to the engine to make it stronger, to the extent of a thousand dollars or more. Then there is the foundation, which represents a good deal of money, which probably cost to put in about $800.

Q. Is there any post foundation underneath?

A. No, sir; all heavy stone foundation, about 12 by 30.

Q. I mean pile foundation.

A. No, sir; we went down as deep as we could consistently, built it up in cement, and then we had to dig a very heavy place again and put in a very heavy wall for our outside bearing box, in the wall, and built a pit for the fly-wheel and cement that up. That probably cost a couple of hundred dollars more. Then we have two pumps that have cost us $800, the two of them. I do not mean the original cost of the pump; I mean getting the pumps set and connected to do their business.

Q. What are they called?

A. Steam pumps. Then there is a steam injector, which Mr. Cramer, the other day estimated at list price, $120. The list price is a great deal more than that. That stands me over $300, yes, I will add another fifty, $350, at the least calculation. That is a No. 8, Shafer & Buttenberg, German patent exhaust-steam injector for forcing water into our boilers. The machine, set up with the connections, has cost us all of $350. If I am not mistaken the list price is $285, but I can verify that with the price-list which I have at the office. I was going to say that the original cost of the pumps and the injectors was very little compared with the setting of them up, that the labor in putting up those pumps, etc., is far in excess of the cost of the machines themselves. It is very expensive work, pipe-fitting and valves. Now, in addition to that in the engine-room, we have one upright copper-tube heater. It is what they call a steamboat heater, about two-inch tubes, filled with them. That has cost us over $300. Then we have in addition to that another heater and purifier combined, at the back end of the boilers, that has cost us as much more, that is, another $300. Then, we have a condensing tank, which is under each boiler. It is about five feet in diameter and twelve feet long or thereabouts, with connections, and represents about $400. Then we have a trap and connections, which represent about $75, and the plumbing on the boilers—we have four boilers which are worth——

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Q. Those were omitted?

Mr. ROBISON: He does not say so.

A. Mr. Cramer put it all in a lump—boilers, engine, emery grinder, sand file-sharpener, and the fans in the mill, and a good many other things.

Mr. ROBISON: He said he estimated them separately, but he did not keep the figures.

A. Those boilers all had new steel bottoms and new heads and new flues and new valves and new pop-valves, and are in first-class condition and are insured in the Fidelity & Casualty Insurance Company. Those boilers will cost $2,000 apiece, including
2013 the setting and connection to the engine; $2,000 apiece, sure. Then there is a tightener to the engine. That is a double ratchet with a shaft and wheel for turning it up; a take-up wheel for the chain to run over the weight, a large flange wheel. That would cost at least $175; it is very heavy. Then there is the main wheel on the main shaft, what we call the drive-wheel, that we drive from the engine, which the engine takes hold of. It is a large wooden rim, about six or eight inches thick, and a large iron hub and iron spokes, bolted together, gotten up specially for us. We tore two or three of them to pieces and we finally had this one built and put it up. It is not an ordinary wheel; it is a wheel that probably would cost $100 to build.

Mr. ROBISON: Is this a fly-wheel?

A. No, it is the main wheel on the main shaft. Then we have a whistle that costs $5. Then we have a gong that is to stop and start the mill, so as to avoid accidents. When it is ready to start at the noon hour the engineer first whistles and then the foreman of the mill rings this bell, telling him all is clear and to go ahead. That is a gong that cost us $15. It cost $18, but we will put it at $15. Then there are four oil tanks and one filtering tank, which represent $75. Those oil tanks are very large. Then there is a steam drum on top of the boilers to connect the boilers all together, which you have to have. These boilers are connected into it. That drum represents at least $600. There is a valve under each drum for each boiler, a shut off, so that we can run all the boilers all together or run two or three of them. Our boilers are all set in separate arches so that we can run one boiler or all. Then there are the engineer's vices and benches, and any amount of tools. It would be hard to estimate them. I do not think I would be at all out of the way if I stated that the tools in the engine-room, independent of the engine, extra tools, would be worth $500 at the least
2014 calculation. Then there is a traveling elevated track above in the ceiling, which is attached to one of the Trails and which has upon it a heavy chain fall for raising the pillow block and turning the engine off the center. This cost, including the chain fall, $60. Then the tops of our boilers and our drum and the steam pipes are covered, which I think would probably cost $100.

Q. With asbestos?

A. Yes. Done by a party here in Detroit. I think H. D. Edwards did part of it and another party did some. I include in the boilers a mud drum. Each boiler has a mud drum and blow-off, and they are all connected with the sewer. Then in the engine-room there are two elevator fans. I will call them $100 or $50 apiece. I think that is all, outside of the hose and fire connections, etc.

Q. Have you summed up the valuation of the boiler and engine room yourself?

A. I have run over it a good many times, but I have not the figures summed up. It is somewhere between $15,000 and $20,000; nearer $20,000; that is independent of the building.

Q. Have you estimated the equipment in the mill for piping the dust and shavings?

A. Yes, there are three fans, and that work is very expensive. I don't think $3,000 will cover the bill for the fans and piping in connection, delivering it into the shaving vault. That is independent of the dust-arrester or any part over that.

Q. It is absolutely essential to have your mill clear of all dust?

A. Yes, those tunnels under the ground, three of them, running the extreme length of the mill, about 30 inches in diameter. First, they are all made of wood and they taper. They are smaller at the extreme end than near the fan. That is a rule we go
2015 by in building fan pipes, as we get away from the fan to reduce the size. They are all built of about two-and-a-half or three-inch plank and ironed on the outside with round and flat hoop iron, and coated with tar on the outside and calked; and the ground is dug up and they are laid in there and our connections are made to them; they go to the fan. The inside is lined with iron. It is practically the same as building a galvanized pipe, only that it is better; it is more expensive; it is where we have our heavy machines and we have to have it solid. Therefore we built it of wood.

Q. You built that yourself?

A. Yes, sir.

Mr. ROBISON: That is what Mr. Cramer called the blower apparatus?

Q. Yes. Mr. Cramer had no idea of the inside equipment of them. Now, what is the cost of that equipment?

A. $3,000. I do not think we could duplicate it today for a cent less.

Q. Mr. Cramer put it in at $1,100. Go on.

A. Now, there is a fan with which we dry our kilns when we want to force them. You understand our kilns are all filled under the floor proper with coils of pipe, miles and miles of pipe in them, and we have to blow our air when we want to force it with this blower. We force in more air in connection with which the pipes give us. We can force the coils and get better results. Then there is a large open blower or heater and coil.

Q. Give your cost of those as you go along.

A. Mr. Cramer, I believe, gave his estimates from a second-hand one he saw at a brewery. Well this is not a second-hand one; it is a new one; and I do not think it could be replaced today for $1,500; that is, connect it up with one of the main shafts of the mill. I will state that our steam pipe to our engine and throttle is eight-inch and our exhaust is ten-inch. Then we have on top of
2016 the exhaust pipe what we call a water-catcher, or steam trap, with a three-way valve to shut off the steam and divert it either to one direction or the other, to the kilns or through the mill,

or up to this exhaust pipe proper. The extra work to the kilns and from the engine, I think, could safely be put at $1,000; the extra plumbing-work, the steam-fitting work and the pipe-work.

Q. What is the eight-inch pipe and ten-inch pipe worth?

A. Oh, it is worth I guess about $2 a foot, or something in that neighborhood. I could not tell you exactly, but I know the elbows are very expensive.

Q. Do you include those in your estimate of a thousand dollars?

A. Yes. I do not know as a thousand dollars would do it; I don't think it would, but we will call it that. Now, I will say further that we have put on that engine since we got it a new patent Detroit Lubricator Company lubricator, that we paid $50 for, which I am not going to say anything about; that is, I will include that in the engine.

Mr. BAKER: Oh, do not leave out anything like that.

A. And we have an oil pump. I am speaking of these things because they were put on the engine afterward. I do not include the main belt in this statement because I have put the belts all together.

Q. Well, take up the belting now?

A. The total belting in the mill—and I won't admit that I haven't missed any, they are a very difficult thing to get—but I have gotten the total of leather belting at $3,864.13. That is the list, 45 off. Some of this belting we have only gotten 20 off. It is made specially heavy, double, and short lap, and out of the backs of the hides. We have been very careful about that, to get the very best belts made by Croul Brothers. Sometimes we only got 20
2017 off, but ordinarily we can get 45 off, and that is the best we have been able to get the belt at. Of the rubber belting, I make $1,133.46, or a total for the belting of $4,997.65, as against Mr. Cramer's $2,100.

Mr. ROBISON: No, he has $4,262.

A. He gave the list as $4,262 and he takes off 50 per cent., which leaves $2,100. I have taken off mine, 45 per cent. and my total is $4,997.65. That includes the belts on the machines and the new belting, about half a roll of new belting which we are cutting off every day.

Q. Does that include the engine belt?

A. Yes. We paid for that engine belt $361.86 and we have tightened that engine belt up three or four times at an expense of eight or ten dollars each time, which makes the belt represent to us over $400, and we would have to do it again were we buying a new belt today. We would have to go through that same trouble until we get the stretch out of it. Mr. Cramer put that in at $343. He got the length of it within an inch.

Q. Now, take up, if you please, the hangers and pulleys and shafting?

A. Our hangers have cost us or could not be replaced today—the total number, 284, upon the basis upon which Mr. Cramer figured it, $1,044 for the lot, which would be $3.67½ apiece.

Q. Well, give us the facts about that?

A. The facts of the case are, they could not be obtained for $10

apiece at an average or anything like it. Some of those hangers cost us $6, some $8, some $10 and some as high as $20.

Q. You have counted them yourself, have you?

A. Yes, sir.

Q. And know them pretty well?

A. Yes, I think I do; I ought to.

2018 Q. Now, give us the pulleys. You have finished with the hangers?

A. Excuse me. I include in these 284 the 51 boxes, which are equivalent to hangers, very heavy boxes, the box on the post in the engine-room, which probably cost $30. It is a very heavy five-inch box; two wall boxes with cast-iron casings in the two walls, one in the engine-room and one in the main mill; sometimes we have to put a box in to support the shafting where we cannot get a hanger in. I have included all of those, they represent hangers so far as value is concerned. They do the same work and do represent hangers only they are called boxes. I should call them at least $3,000, the hangers.

Q. You say you should?

A. I call them that; they are worth that.

Q. You bought them, didn't you?

A. Yes, sir.

Q. Bought such hangers as you wanted yourself?

A. Yes, we had the patterns made and had them built extra heavy.

Q. You attend to that part of the business yourself?

A. Yes, sir.

Q. So when you say you should call them, you mean they have cost you that?

A. Our hangers have cost us over that in the mill.

Q. Now, you can take up the pulleys if you have finished with the hangers?

A. The pulleys have cost us $3,500.

Q. Have you got the number of them?

A. I think I can give the number of pulleys. 357 pulleys and the tighteners and weights have cost us $2,000 more and connection—tighteners and rods that go with them. The shafting represents probably about $1,500; it would cost that to replace it.

Q. What do you call the shafting?

2019 A. The shafting is the line shaft and counters, that is, what you put the pulleys on; that is what carries the pulleys, what carries the power.

Adjourned until 10 a. m., October 20th, 1893.

OCTOBER 20, 1893—10 a. m.

HENRY BACKUS recalled.

Examined by Mr. DICKINSON:

Q. We have gone through the machines as to which Mr. Cramer and Mr. Spitzley had been examined, or as to which an attempt

was made to examine them, and the machines which they had attempted to describe and found they had actually omitted. Will you now state whether there are any machines as to which Mr. Spitzley or Mr. Cramer made no list or minute whatever.

A. Well, Mr. Cramer put in with the engines and boilers the freight elevators and the lumber elevators, where probably I should put them in by themselves; they do not belong in that department at all.

Q. You say they omitted those?

A. They were not omitted. They were put in by Mr. Cramer with the engine and boiler plant, while in reality they perhaps do not belong there at all. No, I will change that. They are not put into the engine plant, but with the shafting and pulleys; into that list. There are two freight elevators for raising and lowering our stock, manufactured and unmanufactured material, from the ground floor up to the fourth story of the building. One of those elevators has cost us easily $1,000, and the other one, say $600. That would be $1,600 for the two elevators. One is a much smaller elevator than the other; one about 10 x 22 and the other about 12 x 14.

Then there are two lumber-conveyors which cost us at least
2020 $1,000. One of them is 55 feet long and the other one 35 feet long. They go up diagonally through the floor. I think the jury saw them the other day when they were down there—with a power attached to them. There is a pneumatic delivery, which Mr. Cramer calls by that name. It is for carrying our orders to and from the office. It is a Root blower, a three-inch tin pipe with copper elbows, discharge and receiving boxes at the factory end and a receiving box at the office end, with power attachment, counter-shaft, friction, etc., which has cost us at least $200. Then there are two wood-conveyors, one running at right angles with the other. They are on the fourth floor, and they carry our wood to the bin where it is sold. I am not figuring the belts in either case. These are for the conveyors, minus the belts, because I figured the belts in the building. I should put those at $1,000—the two of them. They are a very expensive rig to get up. I should put one of them in at $600 and the other at $400. I am wrong there. I was figuring on the lumber carriers at $1,000 instead of the wood-conveyors; one at $600 and the other at $400. The wood-conveyors would be $600—the two. There is one wood-bundling machine for bundling wood. It is a patented machine, which comes from the East, at $30. I forgot whether I gave you the traveling-bed rip-saw downstairs or not that Mr. Spitzley omitted.

Q. I asked as to that myself. I examined Mr. Cramer upon that carefully and Mr. Spitzley.

A. There is one foot morticing machine, about $25. One chucking machine. That is a chucking tool; there are two of them, $8; and there is a punch for doing our tank-work, a very heavy punch, that is worth some $40. There are three spur-feed saws. I forget whether you gave those to me yesterday or not. No. 7 on your list. One Greenly saw you called for yesterday, and there are two others.

2021 Q. Those are the machines I want, that we have not been over at all. You got a list of them?

A. There are three of those spur-feed saws.

Q. I will state for the information of counsel in following the examination, each part of it, that I examined yesterday as to the machines which had been identified in the cross-examination of Mr. Cramer and Mr. Spitzley, and also to the machines that had been omitted as developed in the cross-examination of Mr. Spitzley and Mr. Cramer; that is, developed in endeavoring to identify the machines in their cross-examination, it appearing that they had not seen them at all; and we are now getting what has not been referred to before at all, which has been entirely omitted by Mr. Cramer and Mr. Spitzley, according to our examination, and which we had made no attempt to identify, because there was nothing on their list which seemed to be like them.

Mr. BAKER: That cannot be so, because here are these two wood-conveyors just referred to a little while ago at $600, and they are on that list.

Mr. DICKINSON: There are two other wood-conveyors than that, are there not?

A. There are two wood-conveyors, two lumber-conveyors and two lumber elevators.

Mr. ROBISON: Of course we do not admit, as I understand that all these things that you claim are omitted were omitted by him. He calls them different names, and he says repeatedly that he did not miss any of the big machines in the shop. You asked him for some rip, back-action, double-jointed buzz saws that reached half way across the building——

Mr. DICKINSON: Of course that is your claim.

Mr. ROBISON: And he didn't know them by your names.

Mr. DICKINSON: We could not identify them in any other way.

2022 Col. ATKINSON: I do not remember any witness mentioning that one that Mr. Robison speaks of.

Mr. DICKINSON: The only one that Mr. Robinson wanted to find out that was omitted was a jag-saw, and I had to inform him there was no such thing used in the planing business.

Mr. ROBISON: Yes, if there had been any, I guess you would have found it.

The WITNESS: I would say that those swing cross-cut saws, as they are ordinarily put up, might be considered jag-saws; they go all over; but as ours are put up, they go straight.

Q. There ar- two of those spur-feed saws of another make?

Mr. BAKER: Those two that are omitted you claim?

A. I am giving you a list of what there is in the mill.

Mr. BAKER: That is what I thought.

Q. That we have not been over before?

A. It is pretty hard for me to tell what we have been over. I have made a list out here of every machine in the mill and those we have not taken should be taken.

Q. Those that have not been taken at all, that we have not been over?

A. I can give it to you right here. Of course there are a lot of other things omitted, in our view of it, like the hot-water pipes and so on, which you will come to afterwards. The wood-carrying chutes we did not get yesterday. That is the carrying belts that I have related. They are carrying elevators or carrying chutes.

Q. They are not included in the belting?

A. Oh, no, sir. They are on the roof, running over the roof of the dry kilns. The mortising machine we did not talk about yesterday.

Q. The mortising machine is an omission?

A. Yes; the chucking apparatus is an omission.

2023 Q. Give us the mortising machine?

A. $25. Chucking apparatus, $8. That powerful punch I mentioned, $40.

Q. How about the iron and wood vices?

A. I have those in another place, I will come to them later. Two patent heavy Indiana spur-feed gang rip-sawing machines, which were not taken yesterday, $200 each, $400. That is what I stated a few minutes ago. There are three extension-table gang rip-sawing machines that are worth $900, $300 each.

Q. That are in no list given yet?

A. No, sir.

Q. Now we are getting to business.

A. The Root blower I mentioned this morning, and that was not given yesterday. That was the pneumatic arrangement.

Mr. BAKER: You say that was omitted yesterday, but you do not mean that Mr. Cramer omitted it?

A. The pneumatic arrangement was included in Mr. Cramer's total or estimate. I have not stated the price of it yet.

Mr. BAKER: Mr. Dickinson wants to find out what is omitted from these other estimates?

Q. I want you to show what Mr. Cramer and Mr. Spitzley omitted besides those we have shown——

A. It is so mixed up in the way they give it that it is impossible to tell.

Q. That is what I asked you to get. It is so mixed up in our papers as we have them that I wanted you to have them prepared?

A. I will see that nothing will be put in twice. I have a regular list and I am checking it off as I go along.

Q. Nothing that Mr. Cramer put in or that Mr. Spitzley put in or that we have examined before?

2024 A. By taking a little time I can make out a correct memoranda of the omissions alone, but it is put in such a form that it is almost impossible for me to pick it out. For instance, he has put that pneumatic delivery with the shafting, coupling, hangers, pulleys, tighteners, belts, belt elevators and conveyors, iron doors, spouts and millwright-work. Now, I have not any record here of this omission of Mr. Spitzley's, traveling bed, jointing and rip-saw-

ing machine put in here. My list shows it has not been called for yet. That is a machine that is worth $200.

Q. That is what I examined Mr. Spitzley about and saw that he had omitted?

A. Yes, sir.

Q. I have not asked you the valuation of that, but I will ask that now?

A. $200.

Q. What is the name of that?

A. Improved traveling bed, joiner and rip-sawing machine.

Q. How long is that machine?

A. About 40 feet; here is a picture of it.

Q. That is the one that Mr. Cramer said he did not see. I examined him and showed him the picture and he said he did not see such a machine there. It is there, is it now, in the shop then and now?

A. Yes, sir

Q. Now, Mr. Spitzley put in these resaws——

A. Yes, he put in these resaws and he called them rip-saws. But you have not had me make my price except in one case.

Q. Very well, put your price upon those you have not priced.

A. There is one heavy Jostlin resawing machine, with a Backus improvement; that is a sectional saw, with the Backus teeth and other appliances for the machine. I will call that $1,200.
2025 That machine cost, with the saw, $1,000. We had to pay the freight on the machine from Boston and put it up. One Connel & Dengler resawing machine with the Backus saw and inserted teeth, put up, $900. One Graham resawing machine, with the Backus improved tooth and saw, $600.

Q. Are there four of those?

A. There are four of those.

Q. You said three?

A. Well, we got one yesterday. That is all of the machines.

Q. Let me ask you two or three things that you were examined about before, but have slipped my mind; according to my memory you had not put any valuation on. You said you were coming to the iron and wood vices for fitting tools, but you did not come to them. I cross-examined as to them and found they were omitted, as I remember?

A. There are 11 of them outside of the engine-room.

Q. They come under the head of tools in the engine-room, but outside of them, there are 11?

A. Yes, sir; $65 total.

Q. Now, the Backus & Joslin 54 segment inserted-tooth resaw, what is the valuation of that?

A. That is the one I just put in a few minutes ago, $1,200. That machine cost on the cars at Boston, $1,000, with the saw. Then there is the freight and the setting up of the machine, and paying cartage, which is a very expensive thing.

Q. Then the Connel & Dengler machine?

A. I put that in at $900.

Q. What did Mr. Cramer and Mr. Spitzley put those at?
A. $375 each.
Q. What did they cost?
A. They cost $900 in the mill.
Q. How much on the cars in point of purchase?
2026 A. That machine cost about $700 on the cars.
Q. Now the Backus & Graham machine?
A. That I put in at $600.
Q. Inserted-tooth, is it?
A. Yes, sir.
Q. What did Mr. Spitzley and Mr. Cramer put that in at?
A. He put in three of these saws at $375 and one at $550. He put in one segment rip-saw, he called it, intended to be Jostlin re-saw, at $550, and three large rip-saws, as he termed them, meant to be resaws, at $375 each, or $1,125 for the three.
Q. Now the Chicago improved beveled siding machine. What is the valuation of that with cutter attachments, connected with the sawdust exhaust?
A. I put that in at $500 in place.
Q. Against what of his?
A. That was omitted. He put in one sawing machine on the first floor, $44, and there is no sawing machine there unless it be this one; that is what I take it to be. One circle saw on the first floor, he has got it marked here, $44. There is no saw-table of any kind down there, excepting that long traveling bed and this siding machine.
Q. Now, the bunting machines, eight of them?
A. I put those in at $20 each, $160.
Q. What is your valuation of the large buzz planer?
A. $150.
Q. The sanding wheel?
A. I put those in, two of them, at $150 for the two.
Q. The Woods and Backus broken pressure-bar double-surfacer?
A. Thirty-inch, there are five of the thirty-inch.
Q. Twenty-four-inch.
A. The twenty-four-inch was put in at $1,900, one of them.
2027 Q. What is the value of the dust-arrester? Have you got through with the machinery and articles there now?
A. I am through with the large machinery. There are some numerous extras and smaller articles here that I have a list of.
Q. Well, tell us what those are.
A. I have a great many which I have not put any estimate on yet. It would be a difficult matter to put an estimate on them.
Q. Give us an idea of what they are, run through generally.
A. There are files, emery wheels, ladders, clamps, oilstones, wooden pails, nail boxes, measuring sticks, tank-hoop drivers; that is a machine for driving the hoops on these large railroad tanks; rules or measures, crowbars, box and pack planes, nail-pullers, lumber rules, tie-rings, key drifts, 14 and 18 inch roller screws; those are screws that we have to carry for raising and lowering the rollers of these large Wood machines, that are very expensive;

pene hammers, that is, hammers for riveting, etc. Wrenches in large numbers, iron loading tramways, hatchets, saw-sets, saw anvils, punches, tie-rack hooks, belt-hangers, scarfers, knives, scrapers, studs and hooks, screw-bolt clamps for putting the bolts together, braces, bits and augers and all the appliances to go with them, belt-glueing apparatus, monkey-wrenches, jack-screws, chain falls. Then we have a good many extra gauges for our saws, extra gear wheels, and a large number of extra boxes for our hangers; we have that on account of when a hanger gets worn out, the babbitt in it, we rebabbitt a new box and slip and take the old one out; that saves time and annoyance. We have extra pulleys, extra cross-bars, extra truck and box castors. Then we carry, of course, sandpaper for sanding wheels, lanterns, lamps, water casks,
2028 wood and iron shovels, wood and iron scrapers, and we have a good many large baskets for cleaning up the mill with; hand saws, large iron plate strapping boards, extra Scheimer bits, saw hammers, large strapping plates, saw swedges, car-movers, hammers, the ordinary kind of hammers, diamonds for grinding our emery wheels.

Q. The ordinary kind of diamonds, I suppose?

A. No, sir, what they call, I think, a black diamond. It is set in a steel box, for turning up the emery wheels; they are very expensive. The last one I bought I think I paid $16 for at Strellinger's. Oil cans for use around the machines, adzes, drill-knives, chisels, ratchet screw-drivers, steel ties, ratchet drills. Then we have twelve extra saws for resawing machines kept in constant readiness in case of a break.

Q. Outside of the stored saws?

A. Outside of those that are in the machines. Those are these large circular resaws with inserted teeth.

Q. Have they been included in your statement?

A. No, sir, they have not. Those are worth $100 apiece at the least estimate; twelve of them, $1,200. There are 626 hanger bolts, 321 hanger planks, 1,259 hanger plank bolts, 283 tightener braces. I have included those in my estimate with the tighteners; those braces cost $1 apiece; that is as low as they can be bought for. I take the samples and go down to the blacksmith shop myself, and that is the very best I can do. There are four mule stands, which cost us, on cars in Philadelphia, $45 apiece—$180. There are 14 tight and loose pulley hangers, what Mr. Robison spoke of yesterday as idlers, which I have included in the hangers. Those cost $60 apiece on board the cars in Philadelphia. That would be $840, but that was included in my estimate yesterday of the hangers. There are four yokes which reach around the belts of our tight-
2029 eners, which I have also included in the tighteners. There are 50 iron braces in different parts of the mill, a large number of extra cutter heads, ropes, chains, tightener-shifter, chain-holders, shafts, dope cuts, oil-drip boxes, heavy wrought-iron brackets, lugs or eyebolts; those are all expensive because they are all made of wrought iron and gotten out to form. There are 1,800 extra saw-teeth for these resaws, which cost us on cars in Phila-

delphia seven cents each, or $176. There are bunting or stop timbers to prevent breaking of the machines when we dump a load of lumber. That is about all I have here.

Q. On that list of tools can you put any valuation outside of what you have given at present?

A. Here are a few more that I have omitted. There are Springer water-holders for holding our water, 925 of them. There are string reels, reels for coiling up and where we cut our rope for *tieing*; glue-heating furnaces and pots, one dope casting machine that I put in with the tools in the engine-room, four ground water shut-off stations, so that we can shut off the water from any part of the mill without freezing in winter; 16 *tieing* racks. There are any number of taper gauges which have cost us considerable money, which we use in getting out our work. They are gauges made of wood and screwed together, and they add considerable to the expense of our factory. One set of molding planes. It would be impossible for me to state the amount that those tools are worth without going over them a little more fully.

Q. Will you do that and bring in a result?

A. Yes, sir.

Q. Are you prepared to testify as to the length of pipe and the amount of it?

A. Yes, I can give you a pretty fair idea of it, I guess.

Q. Mr. Cramer I believe lumped the piping in the mill at $1,400. Now, what amount of water piping is there?

2030 A. You mean the steam piping?

Q. Yes, the heater piping, the measurements. Give us the total measurements, if you will, and how is that situated—under the floors?

A. Of the mill pipe and heating pipes there is 7,100 feet of one-inch pipe, 3,000 feet of three-quarter-inch pipe, 1,000 feet of half-inch pipe.

Q. That is in the mill?

A. Yes.

Q. For what purpose is that used?

A. The one-inch pipe is used for heating purposes entirely; part of the three-quarter-inch is used for heating and part for gas. There are three closets complete with all the appliances, one on each of the three floors; there is none on the top floor; 1,000 feet of two-inch pipe, 200 feet of three-inch pipe, 172 feet of four-inch, 100 feet of two and a half, 110 wall hooks, better known as pipe hooks, 14 manifolds; that is, for putting these pipes together to make a heating coil of it; couplings, valves, unions, etc., to connect the same. The total of that is $1,119.74. Now, the plumbing proper; that is, the lead pipes and outside of the closets, $700. The fire appliances, that is the stand-pipes all over the mill and the hose, including some 600 feet or more of two-inch hose, with the nozzles and couplings; total of the fire appliances $600, or total of the mill, including the fire appliances and plumbing of the mill piping, $2,419.74. In the dry kilns there are 6,336 feet of inch and a quarter pipe, 20,160 feet of one-inch pipe, 200 feet of two-inch, 306 feet of seven-

inch, 384 feet of four-inch, 576 wall plates, 2,100 return bends, 680 feet more of inch and a quarter pipe, four seven-inch straight-away valves, four four-inch and four two-inch, one large iron condensing tank under west end of kiln, 30 feet of eight-inch pipe, three eight-inch elbows, 760 feet of iron T rails, for tracks to the kilns,
2031 48 trucks or cars for loading the lumber upon to pass it through the kiln. These manifolds, or large pipes, which I have given, had to be tapped with 576 holes, drilled and tapped in their proper locations to receive our pipes; 100 feet of galvanized pipe, two elbows, one large 30-inch elbow and pipe, 15 gross of screws, railroad spikes, one keg. That is the total of the piping in the dry kiln.

Q. This is what Mr. Cramer put at $1,400, I suppose?

A. Yes, including the mill. That is as I understood it. This mill and dry-kiln pipe was all put in by Mr. Cramer together. Mr. Cramer called the kiln pipe 6,300 feet, and then he changed it to 6,720 feet, my figures show.

Q. What is your total of the feet in the four kilns against his $6,720?

A. The total of the iron pipe in the kilns, not the galvanized iron, is 28,066 feet.

Q. Is that what he gave at 6,720?

A. Yes, sir.

Q. He probably got hold of one kiln instead of four?

A. The total of what I have given you for the dry kilns themselves is $3,241.41. Now you want to add for plumbing, putting in this pipe, the labor, $800 more, which makes a grand total of $4,041.41. That is for the pipe in the dry kiln alone. The total of the pipe alone for the dry kiln and mill together is $6,656.15.

Q. Have you the cost of the sewers?

A. Yes, it has cost all of a thousand dollars to put those in.

Q. Of the pavement on your own property?

A. That does not include the pavement on the street, that is the pavement in the yard.

Q. That is what I say, on your own property?

A. 1,200 yards at $1.50 a yard, $1,800.

Q. And the millwright-work?

2032 A. Putting up the shafting and hangers and that part of the machinery, independent of the machinery, would be at least three thousand dollars.

Q. Cost that?

A. Yes, sir.

By Col. ATKINSON:

Q. I suppose you heard the testimony of the witnesses in the early part of this trial as to the dust-arrester in use down at your plant?

A. Yes, sir.

Q. Will you state to the jury what experience you have had with dust-arresters in connection with your business, what trials and experiments you have made, and what your final action was?

A. Well, we worked a great many years to arrive at some way of getting rid of our dust, or rather catching our dust and keeping it from going onto our neighbors, which we finally brought about in 1882, if I recollect right, when we put up an appliance which worked so admirably that we were solicited from all over the country to sell our device. So we patented it before we were through the experimental stage and then we put them on the market, and when I was in Toledo some three years ago, I was in Mitchell & Rollins' large lumbering institution there and Mr. Mitchell said, Mr. Backus, there is the first device that I have any recollection of buying that has not cost me anything for repairs, or that I have not had to build over, and he said, Let us go into the room and look at it, the door has not been opened for over two years. We went up and it was as clean as could be expected; and we put them in a great many other places.

Mr. BAKER: What firm is that?

A. Mitchell & Roland. I have a letter from him which I received two or three days ago, if you would like to see it.

2033 Q. What other places, as you recollect, use the Backus dust-arrester?

A. C. R. & J. C. Wilson, carriage-makers in Detroit; there is one in the Empire Lumber Company—I don't know just where that is, but in the West, Wisconsin, I think, somewhere; one in the Clough & Warren Organ Company here in the city and in a great many places outside, I could not name them.

Q. That you don't recall?

A. No, sir.

Q. What kind of woods do you use in your establishment, with reference to making the dust fine or otherwise?

A. We always have manufactured a good deal of hardwood, kiln-dried hardwood lumber, which probably causes and makes as much dust as anything you could work.

Q. One of the witnesses who was examined, in comparing your establishment with Murphy & Wasey, said they had a great deal finer dust there than you had?

A. They may make more fine dust than we do of that particular kind of dust, sandpaper dust, or what we call sanding dust, but there is a great amount of fine dust thrown off from just the planing of lumber. You cannot find any finer dust than what you will find at our place down there. The pencil companies of New York, both the Eagle and the Faber, I believe, or the American, I forget, but there are two of them, had a great deal of trouble in catching the fine dust and our machine did catch it when the other devices could not.

Q. Will you state what experiments, if any, you made in your own business, before you adopted this dust-arrester that you are now using?

A. We tried all manners of ways for catching the dust, with wire cloth, and by applying high power and openings in the top
2034 of our shaving-room, and various ways, and even building an ordinary opening and putting this same cloth in front of

it, but it did not give us surface enough, it requires a considerable amount of surface to make it work freely, to give it vent.

Q. You say you tried different devices?

A. We experimented. We did not try any particular devices; we experimented by doing it in different ways until we arrived at this idea and we applied it and it has been a perfect success with us ever since.

Q. So that this is the result of long experience in the business?

A. Yes, we have some of the finest testimonials that could be gotten in relation to it.

Q. What can you say as to the testimony of the witnesses that such dust-arresters as yours chokes up with the dust and have to be frequently cleaned?

A. I was going to say that Mr. Miller, the agent of the Vortex, stated to me after we left the court-room, in the presence of another gentleman and in the presence of Mr. Sherwood, that our dust-arrester was different from the one he put up, that he did not have to whip ours, where they did have to whip theirs. Ours does not choke up. I do not know that we have ever touched our dust-arrester since we put it up.

Q. How many years has it been up?

A. Right after the fire of 1882.

Q. So that for ten years——

A. Ten years to my knowledge and it has not been disturbed or whipped.

Q. What do you do with your dust?

A. We sell it.

Q. What is it sold for?

A. $2.50 for a small one-horse load, delivered.

Q. What uses is it put to?

2035 A. It is used largely for bedding, for packing, for making asbestos covering for boilers, used very largely, we have shipped it in car-loads away for that purpose, and also for the cleaning of floors. They wet the sawdust and throw the sawdust down to prevent the dust from arising.

Q. Is there a market value for all you can make, all you can save?

A. Oh, yes, ten times.

Q. So that it is an article of merchandise and sells readily and is a source of profit?

A. It is a source of great profit to us, it is one of the principal things. Our refuse is one thing that we count on considerably.

Q. You spoke of adopting this dust-arrester for the purpose of keeping the dust from your neighbors. What, if any necessity is there for preventing the dust settling in the mill, what effect has it, if it is not taken up?

A. That is the idea of the exhaust blowers or what we call our Sturdevant blowers to send the air through these pipes and drive the shavings and dust away, to get the dust away from these machines. Then it is discharged into these sawdust and shaving rooms, two separate rooms, by separate fans and separate pipes. If

we did not do that, our mill would be dust and dirt all over, and you could not walk through it scarcely. We would have to shovel the dust and shavings into baskets and carry them away, which would be expensive and very dangerous.

Q. Would there be any injury to your goods, the material that you have there, aside from the disagreeable features you speak of?

A. Oh, yes, certainly; it would cover all of our molding and fancy woods, it would injure them for sale in the market, most assuredly.

Q. Will you explain in what way?

2036 A. The molding particularly, if any dirt or if they become at all damp or dirty—the top of the lumber ordinarily has the fine dust and as the planer knife strikes it to cut it, it knocks out all of that fine dust off the board and that goes with the shavings and there is great trouble, it is the small fine fibre.

Q. Is there any possibility of its staining the wood?

A. It would cover the wood surface and you could not brush it off and leave the wood clean. It is like in the finishing of woodwork, filling the pores with a filler, the same thing as that.

Q. Then it becomes necessary to keep a mill of that kind free from dust?

A. It is a very important matter.

Q. Will you describe to the jury as near as you can, what this dust-arrester is they saw?

A model was handed to the witness.

A. There is a representation of a building, or our dust-arrester, as we have it on the mill. Now, the air comes in here, and rises up into those crevices between the bags or in the bags and the dust, the heavy part drops down, and the air goes out through this mesh of the cloth or burlaps above, both ways, and the air blowing through. Our purpose of having these slats on both sides is to leave a free circulation of air; if the wind blows from this side, it blows this way, and if from the other side, it goes this way, and it keeps those bags free, that frees them from dust, instead of whipping them with a stick as he said he used to do, and then did not do it successfully, but ours is continually free by the working of the air.

Q. By the force of the air, the natural currents of the air from each side?

A. Yes, sir.

Q. And the dust then settles down through all those openings in the bottom?

2037 A. It drops down there, what comes up there. The shavings drop down naturally—drops down into the sawdust-room, or the shavings-room below.

Q. What sort of a pile does it form below, fill the whole room or fall in the shape of a cone?

A. Filling the whole room.

Q. In that respect it differs from the metallic devices?

A. Yes. I can give you the idea, I think. We will say here that the cone dust-arrester, or Vortex, as Mr. Miller explains, calling this

the ground in that shop, whereas ours falls and fills the building all up throughout and we get many times the storage capacity with our device that they do with theirs, we do not have to carry our dust and shavings nearly as high as we would with their device, for the reason that we get rid of it and we get this extra storage.

Q. What effect has that upon the amount of power required to work it?

A. To get the same amount of storage he has to go higher.

Q. Would that require a greater power?

A. Decidedly. It is like lifting a column of water; the higher you lift it the more power it requires. We had some experience with this. We put in at four different times a centrifugal dust-collector in our place—as you gentlemen noticed the corner was torn out of the dust-arrester building, where those blinds were, and there is where we tried our experiments. We put in this centrifugal device four times—we put in the pipe four times, and connected the device with it, experimented with it, and we found it emitting so much fine dust we could not stand it.

Q. By the centrifugal you mean the Vortex?

A. I worked for months at it—down there at 4 o'clock in the morning.

2038 Q. State whether that was the same kind of a device recommended by this witness.

A. Yes, sir. I was down there early in the morning and the minute the mill started I watched it.

Q. You tried that four times?

A. Yes, four different times. The back pressure we found to be so great that it was impossible, with our power, to run it. Our fan belt slipped, and even our engine balked on us.

Q. Have you had occasion to observe the working of the Vortex device anywhere?

A. I don't know as I ever saw the Vortex; but as Mr. Miller said, they are all alike—the same principle. I have seen the Allington and the Curtis and the Smith and the Cyclone and another kind at Grand Rapids—it is right the reverse at Grand Rapids; instead of being built this way it is built this way (indicating), and the air goes over and comes out here and there and the dust goes down. There are probably twenty-five or thirty, and perhaps more, or perhaps not as many of those in Grand Rapids; but that would be my judgment. I have seen a great many; they are all over the city.

Q. After examining these different ones you have seen in operation, what can you say as to their comparative work with your own?

A. Why, as I am situated, and with our kind of business, having had experience with them, you could not sell me one of the other kind; you could not give it to me.

Q. I suppose your object in adopting this dust-arrester was to get the best thing you could in your own business?

A. Most certainly.

Q. Were the others known to you when you adopted this one?

A. There was nothing of that kind out at that time. There was a device in Chicago, gotten out to use steam.

2039 Q. Have all these dust-arresters been invented since your mill was built?

A. No, sir, I think not. I think this identical one, this McKay device, down in New York State somewhere, was patented before our mill burned up—the patent under which the Allenton & Curtis, of Saginaw, are working. I know they are all fighting at each other and straining to make a dollar.

Mr. BAKER: The centrifugal was not patented until 1885 or '6, that was the testimony.

A. Well, it was the McKay patent in New York.

Q. The Knickerbocker Company in Jackson have been making the Cyclones as long as I can remember.

Mr. BAKER: Since you have been connected with the case?

Col. ATKINSON: Well, I have been connected with the case for about thirty years.

A. I don't think they are ma g any more of the Cyclones. I don't think the Cyclone is bein ade any more. Heizer & Son made that at Jackson.

Q. Well, do you think it would be practicable, if so, at an inconsiderable cost, to change your dust-arrester and adopt one of those recommended to you by the witnesses in this case?

A. We could not run it with our present power, and we would have to have a great many of them; three of them would not do it, and that would take even more power.

Q. So that to adopt the device spoken of by the witnesses here you would have to increase the power used in that part of your establishment?

A. Yes, sir. Mr. Smith, of Huyett & Smith, told me on the street here a few weeks ago, Mr. Backus, your dust-arrester is unquestionably the best. We make a dust-arrester, but it is expensive

2040 and bulky, and yours does house the dust. I went up to Widman's, where they had one of Smith's and I saw the engineer. I said, What have you got here, a dust-arrester, and he said, Or a thing that throws out everything onto the ground and the roof, all over. Don't it work? I said. Work—no, wait until I show you. And the minute he opened his door to shove the shavings into the fire, up went the shavings from the dust-arrester.

Q. That is the one at Widman's picture-frame factory?

A. Yes. And he said, You go down and look at Murphy's down there. I told him I had been to Murphy's and I saw two with a very large opening at the top, some four or five feet across, and you get with a dark background, against the brick-work and you can see a continual volume of fine dust shooting thirty feet high.

Q. Escaping into the open air?

A. Yes, they cannot catch the fine dust, they can talk all they are a mind to, they cannot do it, they do not do it. Some of them have a little pipe from the top. The air goes up here and they run a little pipe down into it and they have got it, I think, at Murphy's, but it does not do the business, the fine dust goes with the air. It

is light and the air takes it with it. I have seen many of them here in the city and I have seen them all over the country and I have never seen any in my own experience that did not throw the dust all over the surroundings, where the places were not more or less covered with it—at Widman's it is so and at Force & Dickinson's place; I went there.

Q. Then you have no hesitation in saying from your experience that your device is the best and the only one adapted to your kind of business?

A. It is the only device that will absolutely house the dust and give free relief to the fan.

2041 Q. What is the size of the building where your dust-arrester is?

A. It is in the neighborhood of thirty feet wide by the sawdust-room forty feet deep and the shavings-room the same width, and sixty feet deep; I mean long, not deep. The dust-arrester is over the sawdust and shavings room.

Q. Have you ever tried the experiments spoken of by the witnesses here of having the dust carried below into the furnace?

A. Yes, and caught afire three times from it.

Q. What can you say as to the safety and advisability of that plan?

A. I would not dare, after my experience, to put it in. We caught afire three times from that device and I tore it out the first time, and my father came home from the East and had it put in again and we caught afire again. I took it out again and he came home and put it in again, the third time, and I tore it out, and we had a pretty serious fire; and he said, I guess that is all right, you leave it out. The Lee & Holland Company, of Buffalo, I guess the largest institution of its kind—sash, door and blinds—have thrown out the boiler-feeding arrangement for burning dust and shavings.

Q. State to the jury how it becomes dangerous.

A. The fine dust will lodge along in the pipes, and if you go up on top of the building and throw off this fine powdered dust and the fire catches it, it will crawl right up over it, like crawling up over Niagara Falls—that is, you understand what I mean. The dust will fall, and that is what is dangerous about it; or you keep it contracted in a building so it creates a gas or pressure, and then it is explosive and a fire will carry up this right along the pipe, among this fine dust and get into your building sooner or

2042 later; but of course the device may have been improved since that time, that part of it, but yet there have been cases where they have had similar experiences. Then, again, if there is a back draft, which is apt to be the case with any chimney of any factory—we even have drafts where the drafts are down, we have had them in years *in* gone by, and that blows the fire into these channels and blows it back into the shavings-room.

Q. You say you attribute three fires you had to this device?

A. Yes, we got afire three times, and each time it was traceable right to it.

Q. Then you consider it a very unsafe thing to do?

A. And understand me, we left a disconnected pipe. For instance, as we came through the shavings-room, we left a pipe here open so that when this hood was shut down these shavings would go into the shavings-room, and when we opened the hood that would strike this and divert down, and when this hood was open they would go in this pipe under the boilers. I received a letter from Mr. Mitchell, of Toledo, the other day, and one from C. R. & J. C. Wilson, and they speak in the highest terms of our device, and I would like to read them if it is proper.

Q. Well, if there is no objection you can read them.

Mr. BAKER: You may use that letter if we can be permitted to use some also.

Col. ATKINSON: Well, read it.

A. "Toledo, Ohio, October 4, 1893. Mitchell & Roland Lumbering Company, Toledo, Ohio. Gentlemen: Answering your inquiries of the 2nd inst., we have had the Backus burlap dust-arrester in use since 1885 and are more than satisfied with it. It has not cost us one dollar since its erection and works perfectly as a dust-arrester. Our planing mill is kept free from shavings by two large fans both blowing into our shavings-house with your dust-
2043 arrester, there is no loss of power or back pressure, and our premises are kept neat and clean as we could wish. J. C. Mitchell, treasurer."

Mr. Wilson writes from Chicago, on October 6th, as following: "Before leaving Detroit I forgot to reply to your inquiry regarding your dust-arrester. We are pleased to state that the one we put in some 10 years ago on our Jones Street plant gave excellent satisfaction, so much so that when we moved our works some four years ago we took it apart and rebuilt it in the new location, where it now is in perfect working order. We know of nothing that will serve the purpose for which it is intended as well."

Mr. Wilson called me up at the time he moved this device and asked me what I would charge him for the device to move it. I told him that he had paid for the right to use the device and he had a right to move it, but I said, Before you put in a device of any kind you investigate all the other kinds thoroughly. He did investigate and he put in a centrifugal, and he took it out and put the Backus one back, so he stated to me the other day.

Q. Of what material is the cloth that is used?

A. Eight-ounce burlaps.

Q. Some of the witnesses have spoken of cheese cloth?

A. Cheese cloth is too slimsy. Burlaps has a light fibre hanging down on the inside, which is one of the great features of it. There is a little fine fibre that reaches down and catches this fine dust and prevents it from escaping, whereas the cheese-cloth did not in Mr. Miller's device that he used to handle, the Kuche cheese-cloth arrester, as he stated to me after he left the court-room that day, whereas it was an inch and a half apart to obviate our patent, to get around our patent, and they built them straight up instead of building them in this fashion, large at the bottom so as to let lots of air in

them; they built them parallel and one inch and a half apart, and he said they would fill right up with dust and keep filling
2044 and choking the whole thing, and he said, Yours is automatic absolutely, there is no question about that, and I guess he would admit it today. I was going to remark further that Comer & Sons, of Cadillac, also have our dust-arrester and are very much pleased with it. I sent them new burlaps here a few weeks ago.

Q. Where is your dust-arrester manufactured?

A. We do not, as a rule, manufacture anything; we sell the royalty for putting up, let them erect it in accordance with the directions; we furnish the directions, and if they follow them as we give them it cannot but help but be a success.

Recess till 2 p. m.

2 P. M., OCTOBER 20, 1893.

HENRY BACKUS recalled.

Examined by Col. ATKINSON:

Q. At what time did you make these experiments with the centrifugal devices that you spoke of this morning?

A. It was after the Cyclone dust-arrester was in the field; I could not state just what year, but I think about '85 or '86.

Q. How did you happen to do it?

A. A gentleman came along here from Jackson and he had a machine for which he had applied for a patent on, as I understood, and he wanted to sell the machine. We were looking for something if we could get any improvement, but we did not succeed in getting it.

Q. Do you know what machine that was?

A. It was a centrifugal machine built at Jackson.

Q. Like the Vortex?

A. Yes; practically the same thing.

Q. That would be about what year?

A. 1885 or 1886, in my judgment.

2045 Q. Will you state whether you were induced to try it?

A. We were induced to try it; he paid all the expenses of the shipment of the machine, etc., and he kept changing it and building it larger and smaller, but when he got through the dust came out just the same.

Q. What was the effect of your experiments as to the use of power?

A. We found that it took a great deal more power to run the machine, that is to deliver our shavings and get rid of the air with that machine than it did with the machine we had had in previously.

Q. As I understand, this dust-arrester is on the top of the building, and the dust and shavings settle down into the bottom into bins?

A. Yes, sir.

Q. And the dust and shavings are all removed away from the building by carts?

A. What are not burned.

Q. What can you say as to whether the metallic device which would be higher up and requiring a greater amount of store-room below it, would or would not increase the fire risk?

A. Why it would increase the height of the building and the fire naturally, just about the same proportion.

Q. In the same proportion?

A. Yes; that is, the proportion to raising any building; and then the danger, of course, is very largely down below.

Q. The danger is in the store-rooms for the sawdust and shavings?

A. Yes, if a spark gets in there, it is all day with us.

Q. Something has been said about the dust being explosive?

A. Yes, sir.

Q. What do you know about that?

2046 A. I know there are a great many sawdust-rooms blown up. There was a furniture factory at Owosso, Michigan, blew up.

Q. So that the lighting of a spark in that room, or a live cinder would cause an explosion?

A. I could not say it would cause an explosion in there unless the gases were confined, but it would create and set fire to anything with which it came in contact.

Q. Well the principal danger then is in these bins or store-rooms from communication with fire?

A. Yes, as much danger there as anywhere.

Q. And the sawdust and shavings have got to get down to these bins, no matter what device is used, I understand?

A. Yes, sir.

Q. And one advantage of yours over the other is that the bin is not so high and has not so much lateral exposure as it would have if the metallic device were used?

A. It certainly would have more up above; that is, if the building was raised up.

Q. Your dust-bin, as I understand it, comes very near the south line of your property?

A. Yes, within about four feet of the sidewalk.

Q. That is where there was a horse and wagon standing at the time when the jury examined the premises, I think.

A. Yes, sir.

Q. That is where there was a horse and wagon standing at the time the jury went and examined the premises?

A. Yes, sir.

Q. And the sawdust bin is immediately in the rear of that, or nearly north of it?

A. The sawdust bin—the doors that open there—the jury, I think, were in the sawdust-room there. The sawdust-room comes to the ground; the shavings-room does not come clear to the ground.

2047 Q. How long have Backus & Sons operated this planing mill upon the premises where it is now situated?

A. The original mill was built there in 1871. I think the winter of 1871 and 1872.

Q. Is there any other property connected with your business immediately, except this lot on which this planing mill stands?

A. Yes, sir, we have a warehouse on Fort street on this side of the factory, on the north side of Fort street, between Ninth and Tenth; we have a yard, 30 feet south of River street, between that and the river.

Q. Now, are all these properties used together or used separately?

A. All used separately.

Q. With reference to each other, then?

A. Yes, sir; one would be of little account without the other.

Q. Your lumber yard is on what street?

A. It is on both sides of Eighteenth-and-one-half street.

Q. And runs from?

A. From River street to the channel bank.

Q. How long have you had that property?

A. About as long as we have had the mill. We acquired both about the same time.

Q. What is that property used for mainly?

A. That is for storing our lumber, receiving our lumber by water.

Q. You receive your lumber at the dock and store it there?

A. Yes, sir.

Q. Do you receive lumber also by rail?

A. We do some.

Q. But your principal supplies come by water?

A. We calculate to receive our supplies by water.

Q. How far is that from your planing mill?

2048 A. About a quarter of a mile.

Q. In what way is the lumber taken from your yard to the planing mill?

A. On what we term the dump wagons. Drawn up by horses. It is loaded at the yard and drawn up where we want it.

Q. It is all drawn up by wagons and horses?

A. Yes, sir.

Q. From the lumber yard on the river to the mill we have been talking about?

A. Yes, sir.

Q. Now, where is your warehouse that you speak of situated?

A. It is situated on the north side of Fort street between Ninth street (or Trumbull avenue) and Tenth street.

Q. How long have you had that property?

A. That property was built right after the building of our new mill, after the fire of 1882.

Q. What do you use that building for?

A. That is used for storing stock from the mill. For retail trade largely, all overstock of the mill. For instance, if we ship a carload of lumber and we have a little stock left over that won't go in

the car, or that is not suitable, then it is sent over there. We have always aimed to sell down below at the mill.

Q. Is that an essential part of your business or not?

A. I should not know how to run the factory without the warehouse.

Q. Whenever you have any surplus of any kind that is taken over there and stored?

A. Yes, sir.

Q. And is that the place where you do your principal retailing now?

A. All the retailing we do now with the exception of what
2049 we do at Eighteenth-and-one-half Street yard is done at the warehouse.

Q. Did you have any retail trade that has been interfered with by this railroad in any way?

A. We had done considerable retailing on River street before the railroad came there.

Q. Was that conducted from your lumber yard or from the mil itself?

A. From the mill itself. Sold by the foreman of the mill.

Q. Does that continue?

A. Not a dollar.

Q. That has entirely disappeared with the building of the railroad there?

A. It has practically, if not all, left us.

Q. What is the size of your warehouse?

A. The warehouse is 125 feet by 200 feet long, or thereabouts.

Q. About what was the cost of that building?

A. That represents about $12,000. From $12,000 to $15,000. It is pretty hard to tell.

Q. What is the distance of that from the planing mill?

A. About a block and a half, straight.

Q. In feet, about 600 or 700 feet?

A. From the planing-mill property, as we come around the other way to get to it—it would be a little further from the planing-mill front.

Q. It would be about how far?

A. We have to travel with our teams to get from the planing mill to the warehouse, I should say, about 1,200 feet.

Q. About a quarter of a mile?

A. Yes, 1,500 feet.

Q. About the same distance as your lumber yard?

A. Yes, sir.

2050 Q. Do you own the land there?

A. No, sir, father owns the land.

Q. Mr. Absalom Backus owns the land?

A. Yes, sir, he owns the realty.

Q. What is the size of the lot he owns? Is it practically all covered by the building?

A. Yes, sir.

Q. As I understand it, Mr. Absalom Backus owns all the realty?

A. Yes, sir.
Q. In all three parts of the plant?
A. Yes, sir.
Q. Now, what is the size of the lumber yard?
A. It is about 400 feet wide, and 1,100 or 1,200 feet deep.
Q. Is that improved?
A. We consider it so in our business.
Q. I mean have there been any improvements laid out on it, docks?
A. Oh, yes, we have built out there a very large amount of the grounds. We have filled it in and docked it out, and improved it.
Q. Can you give us any idea of the cost of the grounds there, the docks and improvements? I speak of the improvements now as apart, separate from the value of the land itself.
A. I could not give you an estimate on that. I know it is several hundred thousand dollars.
Q. You mean a good many thousand or hundred thousand?
A. I mean a good many hundred thousand dollars.
Q. I mean the dock improvements themselves, apart from the value of the land?
A. Oh, I presume we have spent anyway on the docks $50,000.
2051 Q. You think that much has been expended on the property over and above its value?
A. I don't know but a good deal more than that. That much anyway.
Q. Is it important at all to you that these different parts of your plant should be near each other? Is distance of any importance?
A. Yes, sir, it is very important that they should be close together. If they are not we waste our cartage. Our teaming would eat us up.
Q. Supposing your mill was a mile distant from where it now is, a mile away from your warehouse and from your lumber yard, how would it affect you?
A. It would cause a good deal more expense in cartage, and we could not handle ourselves. I am now where I can get from one place to another very quickly.
Q. What is the storage capacity of your lumber yard?
A. We have had on that yard, oh, ordinarily about 18,000,000 feet.
Q. 18,000,000 feet?
A. That is the ordinary storage capacity of it.
Q. What is the storage capacity of your warehouse?
A. About 2,000,000.
Q. What is the cutting capacity of your mill per day?
A. We don't have any trouble in cutting 100,000 a day. That depends. It is like almost any other kind of business. If we are rushed we can do more. If we are not rushed we have to be content with doing less.
Q. But you have a capacity of at least 100,000 a day?
A. Yes, sir; that easily.
Q. Will you state whether or not different parts of your plant

have been built and arranged with reference to each other, and the conduct of each other—the mill, the warehouse and the lumber yard?

2052 A. Yes, sir, they constitute one institution. The three are one.

Q. What effect upon the value of your property would the destruction of your planing mill have upon all your property?

A. If we were to be deprived of our planing mill we would have to quit as far as business was concerned. They all work in unison.

Q. Would it or would it not largely affect the value of the warehouse?

A. Oh, yes, sir, that would be inevitable.

Q. And it would render it less valuable, I suppose?

A. Yes, sir, we would have no use for it at all.

Q. How would it affect the value of your lumber yards and docks?

A. Why, carrying on the kind of business we are carrying on, depriving us of our mill, the rest of our property would be utterly worthless.

Q. Would the profits of your yard be more or less if your planing mill was discontinued, and you depended entirely on running it as a lumber yard merely?

A. It would be less. Decidedly so.

Q. Each part of this plant, as I understand, makes every other part more valuable?

A. Yes, sir.

Q. And the impairment in the value of one would more or less impair the value of the other?

A. Yes, sir, what affects one would affect the others.

Q. In other words, you have regarded the three as a unit?

A. We have always considered them together as a unit, as one institution, and our men work in harmony together, and our foremen assist each other.

Q. I was going to ask you whether your labor was ar-

2053 ranged in each with reference to the three, whether there was an interchange of labor?

A. Yes, sir, we give and take all the time.

Q. Whether any impairment of one would seriously interfere with the labors of the others?

A. If we should have to shut down the mill we should have to shut down the warehouse, and if we should have to shut down the warehouse we should have to stop the lumber yard. We could not run one without the other. They were built for that purpose, and it has been our life-work to get things in the condition they were in.

Q. You have been in this business from your boyhood?

A. I have known nothing else.

Q. And your father was engaged in the lumber business before you went into it?

A. Yes, sir.

Q. So that practically it has been the only business of the family within your recollection?

A. Have lived with it and grown up in it.

Q. Was this plant built up and acquired through inheritance, or purchased out of the business itself?

A. It was purchased out of the business itself, and it has grown up by our intelligence as well as by our hard work.

Q. So you have built up this business, and in it have practically acquired all this property?

A. Yes, sir.

Q. Have you had any other source of revenue to pay for this property except what you have made out of it?

A. No, sir, we have had to depend upon our own energies to build up the business.

Q. And you have maintained yourselves and purchased and acquired this property?

A. Yes, sir.

2054 Q. How are the profits of this business, close or large—the competition, I should say, rather than the profits, whether the competition is sharp and vigorous or otherwise?

A. The competition in our business is like all other kinds of manufacturing business. We have to work very cautiously and carefully and work hard in order to make our ends meet and make anything. That, I guess, is the condition of everybody. And we have to get new ideas, and the best of machinery. We have to improve over our competitors, which we have succeeded in doing.

Q. How as to the volume of business done?

A. The more we do the better it is for us.

Q. But suppose a large amount of your trade is taken from you, could you afford, with such a plant as you have, to do a smaller trade with the margins now allowed in business?

A. We have to run our business up to a certain limit, or else we are running behind; and if we do not do a certain amount of business, we are over the bank, on the other side. And we have to have our supernum-ary force, our engineer, foreman, master mechanic. We have had one or two men for years in the factory improving our machinery, reconstructing it, building it anew.

Q. Now, then, anything that would interfere with the volume of your trade would seriously affect it, and if it went to a certain extent would absolutely destroy your power of going on in business?

A. Yes, sir.

Q. You have to do so much before you reach any profit?

A. Yes, sir.

Q. And it is only on what you do beyond that line that you make any profit?

A. Yes, sir, that is it.

2055 Q. Will you state whether or not it is very necessary in the business, on account of the closeness of competition, to save everything like sawdust, shavings, wood kindlings, etc.?

A. That is our aim when we run full. If we could run full we would make a great deal of sawdust, a great deal of kindling, and it all has a sale. We have no trouble in disposing of it.

Q. Your plant has been arranged, then, with special reference to the saving of everything of that kind?

A. Yes, sir.

Q. What do you waste around your establishment?

A. We try not to waste anything. Of course, there is more or less waste, but we sell all our sawdust.

Q. And your refuse?

A. Yes, sir; we tie up some of our wood, and the rest of it we deliver in loose form.

Q. Now, with reference to the realty, suppose the storage of the lumber was stopped at your warehouse, would it or would it not be as valuable for something else? Could you turn it to something else that would pay as well as storing lumber there?

A. I could not. I don't know what I could turn it to. I am not in any other business.

Q. You don't know of any other business it could be put to?

A. No, sir.

Q. Will you state whether or not it has been built specially for the purpose you have built it?

A. Yes, sir; it is all to carry heavy loads. Intended for heavy loads. Our lumber is piled on the ground to a certain point, and there are upright posts with horizontal timbers, and the lumber piled above that, some 25 feet high altogether.

Q. And it is built especially for storing lumber?

2056 A. Yes, sir.

Q. What kind of lumber do you store there?

A. We store dressed lumber principally. We have some fancy woods in the rough.

Q. In the main you have dressed lumber?

A. In the main. We mean to carry ceiling, moulding, flooring and manufactured material more than we do anything else.

Q. How would the stoppage of your business affect the value of your real estate on which that warehouse is built?

A. Well, we should have some trouble, I presume, in disposing of it, or realize the price we consider it worth now in our business.

Q. Is real estate depressed or booming in that part of the city; real estate that is not in use?

A. Well, of course, there is not much real estate moving these times anyway.

Q. And this real estate is well adapted, I understand you, for the purpose for which you use it?

A. Yes, sir; we are 200 feet on the street and 200 feet on the alley. Our alleyways run through; we drive from the street to the alley; we do not have to turn our rigs around in the warehouse.

Q. You say the land of all the plants belongs to Absalom Backus?

A. Yes, sir.

Q. And how does the corporation of Backus & Sons occupy them, under leases or otherwise?

A. We had a thirty-year lease of all the real estate from A. Backus, Jr., and I think some six years of it have expired.

Q. So that you have a 25-years lease, then, of the real estate still to run?

A. I think about 23 years yet to run.

2057 Q. What is the rent paid for the real estate where the warehouse stands?

A. One thousand dollars a year.

Q. And what is the rent paid for the real estate where the mill stands?

A. $5,000 a year.

Q. What is the rent paid for the yard on the river?

A. $12,000 a year.

Q. So that the actual rental of those plants, then, is $18,000 a year?

A. $18,000 a year, sir.

Mr. DICKINSON: The corporation owns all these machines you have been testifying about, all the equipment?

A. The corporation owns all the buildings and their contents.

Q. Everything on the ground?

A. Yes, sir, on the three territories; and the business, everything except the ground.

A JUROR: Do you own the docks?

A. No, not the docks themselves. We lease the docks.

Q. And include that in the rent?

A. Yes, sir.

Mr. ATKINSON: Any buildings on the yard?

A. There is an office and a barn.

Q. And that belongs to the corporation?

A. Yes, sir; a new barn.

Q. Now, you do a retail business, as I understand you, at the lumber yard, to some extent also at the mill, and also at this warehouse?

A. Yes, sir.

Q. Have you any way now of distinguishing from memory the amount done at each?

A. I could not state exactly. I know we have a trade on the River Street front at the planing-mill factory, at the planing-

2058 mill entrance, which our foreman has control of. He sells a good deal of stock there for cash. He gets a good many cash customers, a good deal of the stock that is left over, and he, I think, could tell you better than I could. It is all gone, all gone.

Q. The retail business on that street is gone?

A. Yes, sir, every bit of it; driven it entirely away.

Q. That space was utilized by selling to customers who would come with teams?

A. I will explain: We have a certain class of trade for stock that is manufactured in the mill which is rejected from the cars—a piece of board that is knocked off at the edge, a piece of ceiling tongue that is broken off, a piece of car siding that has some stain upon it, or defective piece that we cannot ship East to New York or Boston; we had a ready sale for all that on River street. But it is a peculiar thing that this overstock of a mill—a customer buying

such stock, a carpenter or joiner, will not go to a lumber yard for certain kinds of material when he can buy it at a planing mill. He has an idea he can get it cheaper, and it is very important to us to get rid of this stock at the planing mill. If we should haul it over to the warehouse we could store it for all time and never sell it, while we had a ready sale for it there.

Q. So that you practically lose the value of a large amount of material by being deprived of that trade?

A. Yes, sir, we are deprived of that trade entirely. And in addition to that, we did sell some stock there, to a considerable extent, of lumber which went with this, that was not sappy or not turned out.

Q. You used to draw your lumber from River street around to the warehouse for storage. That you stored in the warehouse, as I understand you?

A. Yes, sir.

2059 Q. Which way did you go; going west first to Twelfth street?

A. We always went around by Twelfth street.

Q. Around by Twelfth street?

A. Always.

Q. And anything you draw there now you have to go around under the railroad instead of through the unobstructed street, as it was that time?

A. Yes, sir.

Q. Now, I want to ask you whether, in regard to your wagons and horses, etc., your business has been equipped with reference to the three different parts of your plant.

A. Yes, sir.

Q. So that, I suppose, you have aimed to have just enough animals and wagons to do the business in connection with these three parts.

A. Yes, sir; a team will come up from the yard with a load, and will take a load from River street, or from the dock, we will say, to the dry kilns, and put it in front, and take his team right around back and load up with kiln-dry lumber and come down to the mill and take a load from there over to the warehouse.

Q. Now, if you were compelled to change the location of your mill would it interfere with doing work in that way to any extent?

A. We should have to rearrange things, and you can count me out.

Q. You hardly know how it could be done?

A. I would not want to try it.

Q. You heard the testimony of the different witnesses here as to obtaining a piece of ground equally advantageous for the milling business within short distances from where you are located?

A. Yes, sir.

2060 Q. Do you know of any ground that you could use in connection with the remaining part of your plant, lumber yard and warehouse, and that could be acquired for that purpose?

A. There is lots of ground that people could buy, and they could attempt to do something on it, but I don't know of a location where I could put myself in anything like the position I am in today, and life is too short with me to build. I have had a good deal of experience with——

Q. Do you know of any place near by so that you could use the rest of your plant in connection with it, where such a site could be obtained?

A. I don't know of any piece of ground that could be utilized.

Q. Has this new railroad increased in any way your railroad connections?

A. No, sir.

Q. You have only the same railroad connections you had before?

A. We have the Michigan Central, which is ample for us. We have no difficulty in obtaining cars from any line.

Q. This union depot company's tracks are elevated tracks at your place, so that you have no way of getting to them?

A. No, sir, it is practically a bridge or trestle to get over the Michigan Central tracks.

Q. In front of your property?

A. Yes, sir.

Q. I notice, in looking at your property, you have principally two ground floors, one from River street and one from Fort street; is there any advantage in that?

A. Yes, sir; it gives us the same advantage as though we had double grounds. We have two floors on the ground.

2061 Q. And if you had the unimpeded use of both streets there would be an advantage in both floors?

A. Decidedly.

Q. And is your mill constructed with reference to that?

A. We built the mill in accordance to our situation. We used to load our boxes for city trade on River street, and after we moved our office up on Fort street and transferred our loading for our city trade onto the Fort Street end of the mill, we found we made a mistake, for the reason that as our doorways are situated there on Fort street, one here and one there (indicating), in backing in a team and dumping a load of lumber we are continually in the way of our loading boxes, and one team has to wait for another, and that is a serious matter, especially when a man is telephoning from uptown in a hurry, and I was contemplating the transfer of it back on River Street side, but this has knocked me out of that entirely. It has put a quietus on that. It has killed any possibility of that kind.

Q. Has there been anything of the frightening of customers' teams as they come down on River street?

A. There has been a good many runaways there. One of our customers has been run away twice, and he said he would never come there again. I happened along there two weeks ago when I saw two of my men had left a saw, and they were gone out in the

street, and there they were holding a woman's horse, and the woman was trying to hold it, too; there were three of them.

Q. What do you consider the lumber yard down there worth, the realty, the 400 feet running from River street to the channel bank?

A. It is worth at the least calculation, in my judgment, and in my knowledge, for our purpose, located as it is, we put a value on it, at least, of $2,000 per foot front. It is very deep property.

2062 I think it is some 1,200 feet deep to the channel bank.

Q. What do you value the mill property at?

A. I have never considered it less than—the real estate—in connection with the advantages we have of shipping over the Michigan Central, we have excellent facilities, and I am told by the head yardmaster that we got cars during the car famine, we got cars when all our neighbors had to suffer from the fact that we are just beyond where they break up a train, break up the trains, and we get the loose cars as we want them.

Q. Right near the source of supplies?

A. Yes, sir. I have always considered that piece of property really worth $150,000.

Q. What do you consider the realty where the warehouse is worth?

A. That would be worth, probably, $40,000. That is worth $200 per front foot.

Q. That runs from Fort street to the alley?

A. Yes, sir.

Q. And it is about 125 feet deep?

A. 127 feet deep.

Q. And 200 feet on Fort street?

A. Yes, sir.

Q. Is not that valuation of the lumber yard high?

A. Why, it is a very large piece of property. I don't know where you could find a piece like it. I am, perhaps, more familiar with the mill property and the warehouse than I would be down there.

Q. You say your leases were made about when?

A. 1885.

Q. Running for 30 years?

A. Yes, sir.

Q. That is the full life of your corporation, then?

A. Yes, sir.

2063 Q. Your corporation, as I understand, are under obligations for these leases to pay rent that length of time for them?

A. Yes, sir.

Q. Now, Mr. Backus, we have had it from a number of witnesses, but not from yourself, as to the class of work down there in your mill, whether it is a coarse or fine class of work, or whether it includes both now and as it was before this structure was built. What class of work are you doing? I would like to have you explain that fully to the jury.

A. Our business used to be, before the trestle was built there, made up to a large extent of fine mouldings in oaks and in the

fancy woods, and for house-finishings, oak and ash, and clear pine, and some white woods, and we absolutely had to give that up. We had to give up that part of the trade.

Q. That is the class you were doing at that time?

A. Yes, sir.

Q. Now, I would like to ask you this: Whether upon that fine work the margins are close or otherwise, the competition sharp?

A. Not as sharp as they are on the coarser work.

Q. Then the profits would naturally be larger upon that kind of work?

A. Yes, sir.

Q. What effect would the soiling or marring of that sort of work have upon its salability?

A. Well, it must be kept clean, that is all there is to it.

Q. It has to be kept clean?

A. Yes, sir; if you muss or soil it you could not ship it away. If you did ship a man a load of goods of that kind he would not order another, and it is a question whether he would pay for the first load or not.

2064 Q. So it is work that has to be particularly clean, as I understand you?

A. Yes, sir.

Q. Then the soiling would affect it, would it?

A. Yes, sir; or any blemish.

Q. It would affect the salability of the property at once?

A. Yes, sir, that would spoil the whole thing.

Q. How many years were you engaged in that kind of work—particularly fine work?

A. We have always been in it more or less. We used to make a specialty of it, and since this new mill was built——

Q. Your new mill, then, was not a duplicate of the old one?

A. Oh, no, sir.

Q. It was an improved mill to meet your trade and the work you were doing?

A. We aimed to improve on the construction and we put in a great deal more machinery.

Q. Had you, then, a warehouse with the old mill?

A. No, sir, we didn't cater so much to that class of trade before the old mill burned.

Cross-examination.

By Mr. BAKER:

Q. Mr. Backus, have you ever dealt in real estate?

A. To some extent, yes, sir.

Q. Whereabouts?

A. I bought the lot where I live, and I have bought and sold some real estate.

Q. Whereabouts?

A. I bought some on Cadillac boulevard, I believe, and I bought considerable of the property that father owns——

2065 Q. Did you ever buy any property on River street?
A. Not for myself.
Q. For anybody?
A. Oh, I bought a piece for father. I think that I know pretty near what real estate is worth.
Q. Do you know whether or not you have bought any property on River street, either for yourself or for your father, or the corporation?
A. I bought a piece of property several years ago on River street.
Q. What piece of property was it?
A. It was the piece just this side of where the shed now is, next to the mill; a little flat-iron piece; a small piece.
Q. Who did you buy that of?
A. Mr. Appleyard, of Lansing.
Q. Is that a part of this mill property?
A. Yes, sir.
Q How many feet front did you buy?
A. I could not tell you exactly. I know I paid $1,900 for it.
Q. How many feet front, 19?
A. No, I guess there is 20.
Q. Do you know whether it was 20 or not, or are you just guessing at it?
A. About 20 is my judgment of it.
Q. That is the extreme easterly part of the River Street frontage
A. No, sir, that was next to the little strip of the Michigan Central?
Q. The Michigan Central had a strip in there about 17 feet wide?
A. Something like that.
Q. And that intersected your property; you had some east of that?
2066 A. No, sir, that was between us and the Michigan Central proper.
Q. Where was this 20 feet you bought, west of that 17 feet or east of it?
A. West.
Q. It was the extreme eastern part of the River Street frontage, was it not?
A. Yes, sir.
Q. Do you remember when the property next to Mrs. Stedley was bought on the other end of that frontage?
A. I recollect of having bought the Coveau lot away back in 1871 or 1872, somewhere along in there.
Q. What did you give for that?
A. Father bought that.
Q. Do you know what was paid for it?
A. I don't recollect that.
Q. Do you know how many feet there were?
A. No, sir, not in that particular lot I don't.
Q. Now, altogether you have got 238½ feet on River street, haven't you?
A. Yes, sir, in father's name.

Q. In your judgment what is that worth, the front, the real estate, regardless of the improvements?

A. Taking it with our business?

Q. Taking it with your business.

A. Taking it with the business upon it, it was worth, in my estimation, $500 a foot front; that is, you understand, the advantages that we have there with the Michigan Central Railroad tracks, the frontage. It is a piece of property which would be very hard to duplicate.

Q. You estimate it at $500 a foot? That is what I want to get at.

A. Yes, sir.

2067 Q. Now, there is some Fort Street property, seventy-five feet; about how much is that worth a foot in connection with your business?

A. I am figuring that property clear through. I am not figuring the Fort Street front at all. I figure the property as it stands at $500 a foot, running clear through to the Fort street, taking it as a block.

Q. You would not include anything for the Fort Street frontage?

A. No, not in that.

Q. Part of it does not run all the way through. There is a jog in it, isn't there?

A. That makes up for the dock on the other side. There is a corner off there.

Q. You think where your box factory is situated that that is worth $200 a foot?

A. You mean the warehouse?

Q. Yes, sir.

A. Yes, sir.

Q. How many feet frontage?

A. That is 200 feet. It has no railroad facilities, and it only runs to the alley.

Q. And you have about 400 feet on River Street front at the foot of Eighteenth-and-a-half street?

A. Yes, sir.

Q. And that runs from Woodbridge street to the river?

A. To the channel bank

Q. And you value that property at $800,000?

A. Yes, sir. There is not quite 400 feet.

Q. About that?

A. I say as a whole, taking that property I say that that piece of property was worth, if I had it to sell I should put it at $600,000.

Q. $600,000?

A. Yes, sir.

2068 Q. And you would not adhere to your previous figures of $800,000?

A. There isn't 400 feet there. I was figuring on the basis of $2,000 a foot.

Q. Do you consider that river frontage worth $2,000 a foot?

A. I do.

Q. Now, Mr. Backus, have you made any estimate of the masonwork that would be necessary in order to duplicate your building there?

Col. ATKINSON: That we object to as not proper cross-examination.

Mr. DICKINSON: We omitted all that, but not by oversight.

COURT: The rule, as I understand it, is, if the witness was placed on the stand and asked one question, you can go in the entire subject on cross-examination, or if he only produces a paper.

Q. I only want to know whether he has made an estimate or not.

COURT: I think it is proper. Answer the question.

Col. ATKINSON: We will take an exception.

A. I didn't make any estimate of the brick-work, because I had plenty else to do.

Q. You have estimated the wood-work, haven't you?

A. I have had it estimated. I have not measured it all myself. I have had competent parties measure it for me.

Q. Who did you have estimate it for you?

A. Mr. Knapp, the yard foreman, took the contents of the woodwork all over the mill.

Q. So what you have testified to here, you do not testify to of your own knowledge in regard to the contents?

A. I do not testify from my own measurements, but I assume them to be correct.

2069 Q. You assume that Mr. Knapp measured everything correctly?

A. I can put him on the stand and verify the same thing.

Q. What else did Mr. Knapp estimate for you?

A. Mr. Knapp didn't estimate the values, only the measurements, giving me the number of feet in each building.

Q. Now, Mr. Backus, Mr. Spitzley estimated the wood-work at $22,612. What is your estimate for the same, do you know?

Mr. ATKINSON: That we object to, as the witness has not stated he has made any estimate of the value of the wood-work.

Mr. BAKER: He has been testifying to it all the time.

Mr. ATKINSON: I don't think so. He has been testifying to the equipments.

Mr. BAKER: Of course, there is a large amount of detail you have testified to here, but it is very unintelligible to me at any rate. I want to compare your estimate with Mr. Spitzley's. He estimated the wood-work at $22,612; now, what is your estimate for that same work?

A. The office was included by Mr. Spitzley in that amount, and I have not included the office.

Q. You have not estimated the office?

A. Not yet.

Q. What is your estimate, not including the office?

A. $27,086.01.

Q. That includes increased values and increased measurements, does it not? That is the only difference between you?

A. Not altogether; there are some little matters. There is one matter of $350 for painting and glass. I reduced that to
2070 $120. Otherwise the increase has been in the value very slight. It is the amount of feet in the buildings largely.

Q. That is, as reported to you by Mr. Knapp?

A. As given to me by Mr. Knapp.

Q. But the only difference between you is the $18,000 and the $27,000?

Mr. ATKINSON: There is the office also. Your estimate for the office is about $3,000?

A. That is, on the wood-work of the building?

Q. Is that correct?

A. That is, as I understand it. Mr. Spitzley did not include the office. Mr. Spitzley's estimate was $18,887.55.

Q. And yours was how much?

A. $27,586.01.

A JUROR: May I ask counsel right here as to whether these details, these particulars between conflicting witnesses are essential in the case here, whether the jury will be furnished with these figures; because, if not, I want to take out my pencil and take them down.

Mr. BAKER: I shall have no objection to your having all this testimony and looking it over at your convenience.

Mr. DICKINSON: Under the practice here, you have all the testimony anyway. Of course, it is our duty to prepare that testimony for your convenience, and you are to certify to them, to the transcript.

(By Mr. BAKER:)

Q. Now, Mr. Backus, Mr. Spitzley's estimates of wood-work and machinery was $16,891. What is your estimate of that?

A. I have not figured that up. I will do that tonight.

Q. Mr. Kramer made an estimate for engine, boilers and other items in connection with that sort of machinery of $19,660. Do you know what your estimate for that same work is?

A. That stands the same as the other. I will have to take the whole matter and figure it over, if that will do.

2071 Q. Mr. Kramer also estimated $8,585 for shaftings, elevators, pulleys and so on; do you know what your estimate for that is?

A. It is not summed up in a total. I have the items, but not carried out.

Q. So you cannot give us any information about that until you add them up?

A. Until I add up the footings.

Q. Have you got that in the form of an inventory?

A. Yes, sir.

Q. Will you produce it tomorrow in the form of an inventory?

A. In what shape do you mean?
Q. I mean so we can understand what the items are.
A. I can give you a list of the articles with the prices which I have set upon them.
Q. Now, can you give us the valuation, where you differ from Spitzley or Kramer, and the omissions separately, so we can see where the real differences are, so that we can compare it?
A. I will endeavor to do so.
Q. You differ from Mr. Spitzley to some extent upon values?
A. Yes, sir.
Q. And you can indicate those in this list?
A. Yes, sir.
Q. Where you put in a higher valuation, and you can also put in the omissions so that we can see just where the differences are?
A. Yes, sir.
Q. How much royalty did you pay on this dust-arrester of yours?
A. My recollection is, we paid about $800.
Q. Who did you pay that to?
2072 A. The Backus Co.
Q. Who was the Backus Co.?
A. A. Backus, Jr., N. D. Backus and myself—a corporation.
Q. That is, you paid that royalty to yourselves, then?
A. No, it went to meet the expenses of the institution the same as though we had sold it to any one else; treated it in the same way.
Q. How did you pay it, in money or credit?
A. I think it was paid in money.
Q. Do you know which one of you got it?
A. No, it went into the institution.
Q. Which institution?
A. A. Backus, Jr., & Son-, a corporation—a lumber firm.
Q. Wasn't it A. Backus, Jr., & Son- that owned this patent on the dust-arrester?
A. No, sir.
Q. Who did?
A. The Backus Co.
Q. Well, who was the Backus Co.?
A. It was A. Backus, Jr., A. D. Backus, and myself.
Q. Was that a corporation?
A. Yes, sir.
Q. And it had the same stockholders as the A. Backus, Jr., & Sons?
A. A. Backus, Jr., & Sons were not a corporation at that time.
Q. You were in partnership at that time?
A. Yes, sir.
Q. The Backus Co. was a corporation composed of the same parties?
A. Yes, sir, and likely to take any one else in with us at any time. There were two distinct institutions.
Q. What else did that company own?
2073 A. They owned a boiler furnace.
Q. A patent?

A. Yes, sir.
Q. Where did they carry on business?
A. Detroit.
Q. Whereabouts in Detroit?
A. At the office of the firm.
Q. What did its business consist of?
A. Dust-arresters and boiler furnaces.
Q. Is that all?
A. That is all.
Q. Is the company in existence yet?
A. Yes, sir.
Q. Where did they carry on business? Are they still in business?
A. Yes, sir, if any business comes to it.
Q. How long since any business has come to it?
A. I don't know as we have—I guess within about two weeks.
Q. Who was that from?
A. John J. Bagley & Co., I believe.
Q. What did they want?
A. They wanted some grates for furnaces.
Q. Some of the box furnaces?
A. Yes, sir.
Q. For repairs?
A. For repairs. We have had orders from all over the country—Boston, New York, and all over.
Q. When did you get this dust-arrester patented?
A. I think it was in 1882, just before or right after the fire. I think it was before the destruction of our mill in 1882.
Q. Did you put up the present dust-arrester in 1882 when you rebuilt the mill?
A. Yes, sir.
2074 Q. And it stood there ever since?
A. Yes, sir.
Q. Now, the experiments we carried on were before that?
A. No, sir, since.
Q. What did you experiment for if you had the most perfect thing imaginable?
A. To get a better arrester if there was one.
Q. If you got the best one on earth, why does it not sell?
A. It does sell, and stays where it is put.
Q. How long since you sold one?
A. Three weeks.
Q. To whom did you sell it?
A. To Coomer & Sons, Cadillac. We shipped them some burlaps.
Q. You shipped them some burlaps?
A. Yes, sir.
Q. How long had they owned one of your dust-arresters?
A. They had had that in use about nine or ten years.
Q. And you shipped them some burlaps for repairs?
A. No, sir, not repairs. I don't know whether they wanted them for new ones or not.

Q. Do you call that selling a dust-arrester?

Col. ATKINSON: I don't see how the question of when they sold the last dust-arrester can have any effect on the damage done by this railroad. If it can, I cannot see it. It seems to be pure inquisitiveness.

Mr. BAKER: If we are permitted, we will show by this witness that this dust-arrester is an abandoned, played-out one. We will prove it by this witness.

Col. ATKINSON: Go on and see if you can.

Q. Do you call sending some burlaps to Cadillac selling a dust-arrester?

2075 A. No, sir, I consider sending a burlap to Mr. Coomer a simple supposition that they are placed with the dust-arrester.

Q. That is all, then?

A. And they paid us the money. It was all right.

Q. All you know about it is——

A. I say us, I mean the Backus Company got the money.

Q. You haven't been there to see what they have?

A. I have been past there, not lately.

Q. So that as far as your information goes they simply wanted to repair one they have got?

A. I don't know what they wanted of it. I assume it is for their dust-arrester.

Q. How long was it since you have sold a right to erect one of those dust-arresters?

A. Why, I guess we have not sold a dust-arrester in about two years.

Q. Is it not true, Mr. Backus, that you have not really been in the business of selling dust-arresters since these new centrifugal-action dust-arresters came out?

A. It is true our attention has been taken up in other directions.

Q. You have not pursued that business?

A. We would if we had time.

Q. You don't have time?

A. No, sir. We have been compelled most of the time to be in court.

Q. And you find that more profitable, I suppose? You undertook upon your direct examination, did you not, Mr. Backus, to give a list of your dust-arresters that were in use?

A. I stated a few of them.

Q. Can you remember any others?

2076 A. I suppose I could if I were to stop and think about it.

Q. Now, you know pretty well, do you not, where your dust-arresters are?

A. If I were to go out into the business and put the money in it which these other men are putting in, and traverse the country as they do, I could put in lots of dust-arresters. There is no question about that.

Q. How many dust-arresters are there in the city of Detroit, in your judgment?

A. Oh, there might be 25, there might be 50. I hardly think that number though.

Q. And of the entire number in use in this city, your kind is in use in three places, your own place, Clough & Warren's, and Wilson's; is not that true?

A. That is true; but we never tried to sell dust-arresters in Detroit.

Q. And still you have got the finest one on earth?

A. We haven't time to attend to it. Yes, we have got the finest one on earth. And the only one that will house the dust.

Q. Did I understand in your direct testimony that you thought it would increase the fire risk to put the walls of your dust vault eight or ten feet higher, and to put up one of these metallic dust-arresters, one of these centrifugal Cyclones or Vortex on top there and use it, that it would actually increase the fire risk?

A. I wish to be understood this way: If you carry a building four or five stories up, there is more risk than if there is one story.

Q. But compare the two buildings, and the two dust-arresters; you have a dust-arrester there with lattice-work where the wind blows through?

A. Yes, sir.

2077 Q. When the mill is in operation a pressure of air goes through this lattice-work on both sides?

A. Yes, sir, there is.

Q. And the wind only blows through when it is not in operation?

A. The wind blows through at all times.

Q. Well, hardly?

A. The wind blows through whenever there is any wind.

Q. There is a heavy pressure of air going through there?

A. Oh, no, it is so large. There is no heavy pressure.

Q. All the air going through your plant has got to go through there?

A. Yes, sir.

Q. So that when the mill is in operation all the air that goes through your blowpipe into this vault has got to go through that burlap and out through that lattice-work?

A. Yes, sir, that is right.

Q. And as you conceive the danger is that sparks may fly in there where that burlap is and where the fine dust gathers on the outside?

A. It does not matter what kind of a dust-arrester you have got, the dust will accumulate around it, and you put a spark anywhere there is dust and it will set it afire. There is no question about that.

Q. I understood you to say that one of these centrifugal dust-arresters would increase your fire risk over what it is now?

A. I mean to say that if the building was built a story higher or two stories higher there is more risk.

Q. There would be that risk, of course?
A. Yes, sir.
Q. Your father is the patentee of this dust-arrester?
A. Yes, sir.
2078 Q. Do you know what year the patent was taken out?
A. I just stated awhile ago, I think, 1882.
Q. When did you experiment with the centrifugal dust-arrester?
A. My recollection is either 1885 or 1886.
Q. Who made those experiments for you?
A. I made them myself.
Q. You didn't apply to any one in the business?
A. A gentleman in the business applied to me.
Q. Who was it?
A. Some party from Jackson. I can't give you the name.
Q. What company was he connected with?
A. I don't know. There was a party who came from Zanesville, Ohio; they were going all over the country.
Q. Can you tell us some way so we can trace this Jackson man?
A. I can't tell you who he was. He came down with a dust-arrester and agreed to put it in free of charge.
Q. That was not Mr. Morris?
A. I can't tell you.
Q. You don't know who it was?
A. No, sir.
Q. Did he sell you some dust-arresters?
A. No, sir.
Q. Did he have any dust-arresters to sell?
A. Yes, sir.
Q. Did you put one or more of them on your property?
A. He wanted to try it. He made great claims for his dust-arrester, and he got permission of us, of the lumber firm, to try it.
Q. Why did you try it?
A. We tried it on the mill.
Q. Whereabouts on the mill?
A. On this end of the mill, off over the shaving-room.
2079 Q. How big was that?
A. About five feet.
Q. Where was it made?
A. Made at Jackson.
Q. And shipped down here?
A. And reconstructed here.
Q. How long did you have it on there?
A. Oh, we had it on there until the fine dust flew all over us, and we quit.
Q. Don't you know how long you had it on there?
A. Oh, we were experimenting with it all the time, perhaps a month.
Q. About a month?
A. Yes, sir.
Q. You only had one of them?

A. No, he changed the size of it, and gave us a larger one, and then, I think, he made it smaller.

Q. What was the shape of it, one that blew into the end or side?

A. It blew into the side, centrifugal.

Q. Was the opening beneath small?

A. Yes, sir, it was small.

Q. Can you fix the date you did that?

A. I could not tell you, it was so long ago.

Q. Do you know whether that was before or after the Cyclone or Vortex patent was issued?

A. It was after.

Q. How long afterwards?

A. I know that Cyclone dust-arrester built by Heyser & Sons, of Jackson, was being sold at that time.

Q. You remember the testimony of Mr. Miller or Mr. Sherwood that they had to experiment considerably with that dust-arrester?

A. Yes, sir; and they haven't got through yet.

2080 Q. And it took them some time before they got it perfected? Do you know when that was?

A. No, I don't know. When they get through with it it will be a dust-arrester just the same as it is now.

Q. Then they don't know any more about it now than they did then——

A. They are not getting rid of the dust. They are not getting rid of the back pressure.

Q. Theirs is a signal, complete failure, then?

A. No, I would not say that. I mean to say that they are not getting it down so it will do the business that ours will do.

Q. Do you mean to say no dust gets through yours?

A. Practically not, so as to get out through the premises.

Q. Do you mean to say there is no dust all along that burlap on the outside there. When you get in and look at it is there not dust all around it between the frames?

A. Oh, there will be some little oozing out, but it does not get onto the building.

Q. Some of the dust is so fine it is like motes in the air, it will go anywhere? There is no machine that will arrest it?

A. There is none that goes out in the air with ours.

Q. You seem to be positive; will you explain where that dust comes from on the outside of your dust-arrester?

A. I can explain that to you. That is where the bag got caught when the men were fixing it. When he fixed the bag he didn't clean it out.

Q. It comes from some repairs your men made there? Do you mean to say you can strike one of those burlaps and dust will not come through it?

A. I don't say that.

2081 Q. Haven't you testified on this stand that the way you clean it out is by the action of the wind through them making them flop?

A. That is the way we do clear them.

Q. That is the way you do clear them, and when they flop, the dust adhering to them, won't some of it come through?

A. You can make a little of the fine dust come through; we don't strike or flop them.

Q. The wind does that for you?

A. The wind does that for us, but the wind does not vibrate it to the extent that it would if you hit it.

Q. That does not change the fact that you have got to vibrate those burlaps to shake the dust down?

A. The action of the wind is more mild. It does not shake it as if you hit it. The wind does not throw any dust out of that.

Q. Do you mean to say your dust-arrester is so perfect that the dust will not come through those burlaps unless some workman goes and cuts a hole in it to make repairs?

A. No, but I do testify it is the nearest perfect of any I have seen.

Q. You had in a large number of these dust-arresters all over the country, did you not?

A. We had in a good many of them.

Q. How many of them did you ever sell?

A. I could not state here, but I think about eighty.

Q. About eighty?

A. I think so.

Q. And of the eighty you sold you can remember only three or four?

A. Oh, no, I can remember more.

Q. Is it not true, as a matter of fact, that nearly all of the dust-arresters you have put in have been taken out and supplanted by this new invention?

2082 A. I could not tell you anything about that. We have sold them, and got our money for them.

Q. Don't you know, as a matter of fact, that at least 90% of those you sold or put in have been taken out and new ones put in?

A. I don't know anything of the kind.

Q. Do you know that it is not so?

A. I don't think it is so.

Q. You don't think it is so?

A. No, sir.

Q. What do you know about it? Do you know of any being taken out and others put in?

A. I know of one, I think, was burned out. The parties' place burned out, but they didn't have ours in.

Q. Then, do you mean to testify you don't know of any that was deliberately taken out and this new one put in?

A. I don't know of any except the Peninsular Car Company's. They put in the other device.

Q. There is one you do know?

A. Yes, sir.

Col. ATKINSON: They had yours in?

A. Yes, sir, but they didn't carry out instructions, and afterwards they put in thirteen or fourteen of the smaller ones, and kept putting them in.

Mr. BAKER: That is the biggest institution of the kind in Detroit?

A. Yes, sir——

Q. So that you are compelled to admit, are you not, that the biggest institution in Detroit using dust-arresters have taken yours out and put in these new ones?

A. I could not see any reason for their taking ours out.

Q. I don't ask you for the reason, I ask you for the fact.

A. I will tell you how that is: When there is a large amount of competition, and a good many men in the field, and a great
2083 many soliciting, a device may not be any better, and may not be as good, and yet they keep at a man until they get him to make a change, but they can't get me to make a change.

Col. ATKINSON: You have no solicitors out?

A. No, sir.

Mr. BAKER: Did you ever have any out?

A. Yes, sir.

Q. How long since you withdrew them from the field?

A. When we got otherwise engaged.

Q. You got otherwise engaged about 1885 or 1886?

A. Oh, no.

Q. When did you get otherwise engaged, then?

A. About 1886 or 1887, along there.

Q. About 1886 or 1887, that is when these other canvassers came in the field?

A. Oh, that didn't cut any special figure. We stood just as good a show among the trade as any of them did.

Q. Who canvassed for you?

A. Mr. A. Backus, Jr., largely.

Q. Any one else?

A. Yes, sir, we had a Mr. Phillips; I think that is all.

Q. Mr. A. Backus, Jr., traveled around the country putting them in?

A. We didn't put them in. We sold the royalty. We sent a man a little piece of paper with printed instructions, and a diagram, how to build it, and so much royalty on a machine when it was built and tried, and sixty days' time, and there was not a single instance that I know of in which we didn't get our money within ten days.

Q. What did you charge for them?

A. Twenty-five cents a yard for the right to put up the burlaps. We didn't furnish the burlaps.

Q. They had to buy their own burlaps?

A. Yes, sir.

Q. Where does Mr. Phillips live?

2084 A. Northville, or Lapeer.

Q. Does he live there now?

A. I could not say.

Q. What is his first name?

A. I could not say. He is a member of the firm of Phillips & Sons. They are out at Lapeer, I think.

Q. Whereabouts did he travel for you?

A. He went down through New York State, and Boston; in that locality, I think.

Q. Have you got a list in your office of those you put in or sold the right for?

A. I don't think so.

Q. Do you know of any that was put in at New York city?

A. I recollect two in the pencil companies being put in there.

Q. Which company?

A. I think it was the Eagle and the American, or the Faber, I could not tell you which. One put it in and the other saw it and they liked it so much the other bought it.

Q. Are those the only two you recollect of in New York city?

A. There was some at Green Island, New York, and Newall, at Chicago. I don't recollect any more in New York.

Q. Ever put any in at Toledo?

A. The Mitchell Lumber Company put in a big one there.

Q. Any others?

A. I think there was one or two others put in there, but I don't know the parties' names.

Q. A man by the name of Peters put one in down there?

A. No, sir.

Q. Where does he live?

2085 A. Peters came up to Detroit himself and looked at ours, and said he was going to put it in. And he went back and put in a device something similar to ours, but he would not admit it was our device.

Q. He would not pay you for it?

A. He built one of his own construction, which infringed on our patent, as near as I could come at it.

Q. And he has recently taken them out and put in the Cyclone?

A. I don't know anything about it, only what I heard.

Q. He never came and bought a right of you?

A. No, sir.

Q. Did the Diamond Match Company ever have one in?

A. Not that I know of; not ours.

Q. They never had yours?

A. No, sir.

Q. Did the Michigan Car Company ever have in yours?

A. No, sir; I know Mr. Dey always talked about having one of our furnaces in, but he could never get the depth of sewerage, the depth he wanted, but he wanted one badly.

Q. Do you think you can have those accounts made up by morning?

A. I will work all night on it. I have worked every night for a couple of weeks, and I guess I can stand it tonight.

Q. I will defer my examination on the different items until you get that made up.

A. I think I apprehend what you want.

Q. I want to compare these two estimates so it will be intelligible to the jury and the rest of us. I want to find out what Mr. Backus'

estimate of this property is. I may want to ask you some questions in regard to it.

A. I think I will be able to give you just what you want.

Then adjourned to half past nine a. m. next day.

2086 OCTOBER 24, 1893—9 a. m.

DANIEL R. GRISWOLD, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. What is your business?

A. My business all my life has been dry goods, but I am out of business just at present.

Q. Where do you live?

A. Battle Creek is my home.

Q. Will you state whether you have been at the Backus mill for any time of late since the erection of the superstructure?

A. I have been there more or less for the last two or three months.

Q. Will you state where you have been located when you have been there in the mill?

A. I have been in various parts of the mill, a good deal of the time on the third floor.

Q. State whether you have made any special observation of the passage of trains and locomotives on that structure?

A. I have.

Q. When did you commence to make that observation?

A. About the first of September, 1893.

Q. Did you have any assistance especially devoted to observing the trains?

A. No, sir, no special assistance; there were other parties with me part of the time.

Q. Didn't you have the young men here?

A. Yes.

Q. How long did you take observation of the passage of trains?

A. Not continuously, but at different hours of the day since September 1st.

2087 Q. State whether memoranda have been taken of the observation of the passage of those trains?

A. Yes, sir.

Q. From day to day?

A. Yes, sir.

Q. Under your supervision?

A. Yes, sir.

Q. Will you please state, referring to the memoranda you have made, of the number of trains that passed, what has been your observation as to the passage of trains, referring to your memoranda of dates and so on?

A. Well, sir, I could not swear positively to the memoranda, as it is kept here, because I was not there at all hours.

Q. When you were not there Mr. Roach was?

A. Yes, sir.

Q. We cannot put two witnesses on at once, but I will supplement your testimony with theirs.

A. On September 1st we were thirteen and a half hours and there were 85 engines that passed the property. September 2nd we were there 24 hours, and there were 135 engines.

Q. Engines with or without trains?

A. Some of them with and some of them without. On that day there were 135 engines, 313 coaches, 79 freight cars. On the 3rd, 12 hours, 44 engines, 98 coaches and 24 freight cars passed. On the 4th, about four hours, 6 engines and 25 freight cars. On the 5th, 8 hours, 44 engines, 83 coaches and 32 freight cars.

6th, 8 hours, 33 engines, 73 coaches, 27 freight cars.

7th, 15 hours, 91 engines, 198 coaches, 64 freight cars.

8th, 24 hours, 127 engines, 332 coaches, 98 freight cars.

9th, 23 hours, 128 engines, 283 coaches, 109 freight cars.

10th, 5 hours, 14 engines, 32 coaches, 13 freight cars.

11th, 17 hours, 110 engines, 252 coaches, 29 freight cars.

2088 12th, 22 hours, 125 engines, 276 coaches, 100 freight cars.

13th, 24 hours, 145 engines, 335 coaches, 83 freight cars.

14th, 24 hours, 146 engines, 336 coaches, 115 freight cars.

15th, 24 hours, 142 engines, 323 coaches, 67 freight cars.

16th, 24 hours, 142 engines, 337 coaches, 102 freight cars.

17th, 24 hours, 96 engines, 224 coaches, 23 freight cars.

18th, 24 hours, 119 engines, 232 coaches, 80 freight cars.

19th, 24 hours, 129 engines, 308 coaches, 104 freight cars.

20th, 24 hours, 125 engines, 281 coaches, 94 freight cars.

21st, 24 hours, 134 engines, 333 coaches, 97 freight cars.

22d, 24 hours, 149 engines, 329 coaches, 97 freight cars.

23d, 24 hours, 136 engines, 327 coaches, 108 freight cars.

24th, 4 hours, 18 engines, 46 coaches, 19 freight cars.

26th, 7 hours, 40 engines, 75 coaches, 43 freight cars.

27th, 24 hours, 134 engines, 284 coaches, 109 freight cars.

28th, 24 hours, 127 engines, 271 coaches, 100 freight cars.

29th, 24 hours, 120 engines, 274 coaches, 92 freight cars.

30th, 24 hours, 123 engines, 300 coaches, 105 freight cars.

Oct. 1, 21 hours, 83 engines, 186 coaches, 19 freight cars (Sunday).

2nd, 24 hours, 114 engines, 259 coaches, 77 freight cars.

3rd, 24 hours, 132 engines, 234 coaches, 99 freight cars.

4th, 24 hours, 129 engines, 290 coaches, 104 freight cars.

5th, 24 hours, 145 engines, 359 coaches, 54 freight cars.

6th, 24 hours, 120 engines, 233 coaches, 91 freight cars.

7th, 24 hours, 139 engines, 342 coaches, 94 freight cars.

8th, 24 hours, 81 engines, 193 coaches, 15 freight cars (Sunday).

9th, 24 hours, 119 engines, 248 coaches, 70 freight cars.

10th, 24 hours, 121 engines, 242 coaches, 105 freight cars.

11th, 24 hours, 145 engines, 387 coaches, 94 freight cars.

12th, 5 hours, 22 engines, 56 coaches, 22 freight cars.

Q. That concludes the observation made by you and Mr. Roche?

A. And other parties.

2089 Q. In your observation did you observe whether the locomotives that passed there threw smoke and sparks?

A. Sometimes, sir; very frequently.

Q. Did you take any observation of that?

A. Yes, sir. Of course in the throwing of sparks by locomotives, you could not observe very much except in the night; during the day it was not observable. We have a memorandum of that, sir.

Q. The papers upon the desk are your daily memoranda?

A. Yes, sir.

Q. And this is the summary you have just given us?

A. Yes, sir.

Q. Well, give us some information upon that point, if you have it?

A. Now, we had memorandums of these when they were smoking excessively. Oftentimes they were smoking so furiously and the wind in the proper direction, that there was a great deal of gas emitted and it filled the mill full of gas.

Q. This black smoke?

A. Very dense black smoke, yes, sir. When they were just smoking in an ordinary manner we made no mention of it, it was when it was in an excessive way.

Q. Give us what you can, where the smoke and gas filled the mill?

A. I have not a memorandum of that on this sheet.

Q. Give us what you have there?

A. On September 1st, according to our record, we were there 13 hours and a half and there were eight locomotives that passed without shutting off, exhausting; there were 21 of them that were smoking intensely, and four of them that emitted sparks, and they switched in front of the mill that day five times.

Q. What do you mean by switching?

2090 A. Well, they have two switches right there on the trestle, in front of the mill, and they run their trains up and switch them there.

Q. I think the only switching there is on the elevated structure is directly in front of the Backus property?

A. So far as I know.

Q. You observed that switching?

A. Yes, sir.

Q. In the course of your observation, was it a common occurrence for them to switch in front of the mill?

A. They did that very generally throughout the month of September, but not so much since the first of October, and that was done principally in the evening in making up their freight trains. I will go on and give the table which I have made up here.

September 2nd, 4 engines that exhausted in passing, 5 that were smoking intensely, and they switched twice.

On the 3rd we have a record of only one locomotive that was exhausting.

On the 4th we have 4, we have 1 that passed with the fire-box open, and they switched six times.

On the 5th 9 passed without shutting off, 3 smoked, 1 threw sparks, 1 with fire-box open, and 4 switchings.

On the 6th, 10 that did not shut off, 3 smoked, and 5 switchings.

7th, 12 that did not shut off, 4 that smoked, 1 that threw sparks, and 4 switchings. I do not mean to be understood that there were four trains that switched, but they were switching there four times; it may have been making up one train.

Q. When you say they switched, you mean they stopped there?

A. Stopped there on the switch, yes, sir; the switch was turned four times.

2091 9th, 5 that did not shut off, 8 that smoked, 1 that threw sparks, and 10 switchings.

On the 10th, which we observed only five hours, 1 engine that did not shut off, 1 that smoked.

On the 11th, 4 that did not shut off, 13 that smoked, and 2 switchings.

Q. You speak of the switchings being done largely in the evening, when they made up the freights?

A. Yes; that is, all the switching that I observed there at all. I did not see any passenger trains switched there, I don't remember that I did.

Q. Now, as to the smoke that was there throughout the day?

A. Oh, yes. You would not observe that so much, of course, in the night.

On the 12th, 38 that did not shut off, 9 that smoked, and 7 switchings.

13th, 13 that did not shut off, 5 that smoked, 2 that threw sparks, 4 switchings.

Q. When you refer to the engines throwing sparks, that is when you saw the sparks, the fire, I suppose?

A. Yes, sir.

Q. At any time did you observe the falling of cinders during the day on the mill and in the mill property?

A. Yes, sir.

Q. Well, we will come to that later, so that the sparks were falling in the daytime but could not be seen.

A. On the 14th, 28 that did not shut off, 9 that smoked, 1 that threw sparks, and 2 passed with the fire-box open, and 3 switchings done.

15th, 22 that did not shut off, 19 that smoked, 1 that threw sparks, 2 switchings.

16th, 18 that exhausted in passing, 15 that smoked, 5 that passed with the fire-box open.

2092 17th, 11 exhausted, 10 smoked, 1 threw sparks, 8 with fire-box open.

18th, 11 exhausted, 14 smoked, 2 threw sparks, 5 with fire-box open, 4 switchings.

19th, 14 exhausted, 14 smoked, 1 threw sparks, 3 with fire-box open, 12 switchings.

20th, 10 exhausted, 11 smoked, 2 threw sparks, 1 with fire-box open, 7 switchings.

21st, 7 exhausted, 13 smoked, 1 with fire-box open, 2 switchings.
22nd, 6 exhausted, 10 smoked, 5 with fire-box open.
23rd, 11 exhausted, 10 smoked, 2 threw sparks, 5 with fire-box open, 10 switchings.
24th, 3 exhausted, 4 smoked, 2 with fire-box open.
26th, 11 exhausted, 4 smoked, 3 with fire-box open, 4 switchings.
27th, 18 exhausted, 17 smoked, 5 with fire-box open, 12 switchings.
28th, 18 exhausted, 151 smoked, 14 with fire-box open, 7 switchings.
29th, 27 exhausted, 18 smoked, 1 threw sparks, 12 with fire-box open, 1 switching.
30th, 33 exhausted, 23 smoked, 1 threw sparks, 16 with fire-box open.
October 1st, 19 exhausted, 18 smoked, 1 threw sparks, 6 with fire-box open.
2nd, 11 exhausted, 11 smoked, 4 threw sparks, 8 with fire-box open.
3rd, 23 exhausted, 19 smoked, 1 threw sparks, 11 with fire-box open.
4th, 21 exhausted, 20 smoked, 16 with fire-box open, 1 switching.
5th, 25 exhausted, 32 smoked, 12 with fire-box open.
6th, 9 exhausted, 19 smoked, 22 with fire-box open.
2093 7th. 13 exhausted, 21 smoked, 29 with fire-box open, 2 switchings.
8th. 12 exhausted, 12 smoked, 1 threw sparks, 20 with fire-box open.
9th. 23 exhausted, 23 smoked, 9 with fire-box open.
10th. 24 exhausted, 20 smoked, 13 with fire-box open.
11th. 35 exhausted, 32 smoked, 1 threw sparks, 27 with fire-box open.
12th. 5 hours, 7 exhausted, 3 smoked, 7 with fire-box open.

Q. When you say they exhausted, you mean they were pouring out black smoke and gas?

A. No, sir, I mean they are using steam when they exhaust.

Q. They are discharging through the smokestack?

A. Yes, sir.

Q. Puffing?

A. Yes.

Q. Throwing steam and cinders?

A. Well, I could not testify to that, that they were throwing cinders, without I could see the cinders; but in the night I could see the sparks when they did throw them.

Q. In your examination about the mill, did you observe cinders after the passage of trains, in and about the mill, such as are thrown from locomotives?

A. I did, yes, sir.

Q. And when the fire-box was open I suppose it threw fire from the fire-box?

A. Then the coals dropped out underneath. We saw those sev-

eral times where the coals dropped out from underneath the fire-box and through the ties.

Q. How did you come to do this?

2094 A. Well, I was here as a friend of Mr. Backus, and I was around about the mill, and took hold of it and done it, that is all.

Q. By Mr. Backus' requesting you, that a disinterested man should make the observations?

A. Yes, sir.

Q. And asked you to serve?

A. Yes, sir.

Q. And you had no connection with Mr. Backus, and are not in his employ?

A. Not in any shape, only as a friend.

Q. You simply had leisure and did this work, I requested to have it done?

A. Yes, sir.

Mr. DICKINSON: May I, in this connection, read from Mr. Ellis' testimony on the last trial as to that grade in front of the Backus property and have it admitted?

Mr. BAKER: There is no necessity to read that, but I will state it and it may be taken as an admission. The grade of the elevated railroad, commencing on the old union depot grounds and running up to Twelfth street, is 52.8 feet per mile, and from Twelfth street to the Michigan Central crossing it is 22 feet to the mile.

Mr. DICKINSON: And that is the grade, as admitted, as it passes the Backus front.

Q. Now, in the passing of trains by there, have you observed the length of the trains in coming in, the passenger and freight trains?

A. Well, they will range all the way from three to ten coaches in the passenger trains, and the freight trains will run from 15 to 45 perhaps.

Q. You frequently saw them with the trains extending down as they passed there, and the engine comes up on the grade, past the Backus mill, with the train extending down past Twelfth street?

2095 A. Ordinarily in the evening they backed up from the yard.

Q. Please answer the question. When the freight trains passed have you observed the length of the trains extending, as the engine approached, in front of the Backus property, that the length of the train extended down to Twelfth street?

A. Why, ordinarily they backed in the freight trains, and about the time the first car would reach the front of the property, of course the locomotive is out of our view, but I should think is down as far as Twelfth street.

Q. And in coming in how is it?

A. They back them in usually.

Q. Back them up that grade usually?

A. Usually, yes, sir. I think all that I have seen coming in, come in in that way.

Q. Passenger trains, on the other hand, come in with the engine at the front?

A. Yes, sir.

Q. And how far down do the long passenger trains extend?

A. Well, I don't know how far it is down to Twelfth street, but ten coaches will reach quite a little distance. The Wabash trains have been coming in with eight and ten coaches.

Q. You have observed them laboring somewhat coming up that grade?

A. Yes, sir.

Q. As engines do?

A. Yes, sir.

Q. You have been where you could observe railroading all your life?

A. Yes, sir.

Q. And coming up the grade from Twelfth street, you have observed them laboring as engines will?

2096 A. Yes, sir.

Q. Throwing smoke, exhausting, and making a good deal of effort?

A. They certainly have, sir.

Q. Have you seen them having any special trouble coming up that grade?

A. Yes, there were a few times, particularly on a wet day, they had to make a good deal of effort to get up there.

Q. Have you observed, when you saw them switching, that they make up trains right on this switch?

A. Yes, ordinarily when I observed them they pushed up the freight trains from the yard, perhaps fifteen or twenty cars, switched them in front of the mill onto the middle track, uncoupled the locomotive and ran back to the switch, switched to the side track and went on up to the station to get the balance of the cars that were up there, brought those down and left them on the main track, uncoupled, and would go back to the switch and switch onto the middle track, hitch onto the cars they brought from the yard, run them up to the switch, turned back and take them back onto the main track and couple onto the cars they brought from the station and go out.

Q. All done right in front of the Backus mill?

A. Yes, sir.

Q. Have you observed whether some cars are brought up there and switched in making up, that never go into the depot at all?

A. A great many of them; evidently when they bring up fifteen or twenty cars from the yard, they hitch onto them and go up to the station and get the cars there loaded, make up their train and go out.

Q. Make up their train right there on the switch without taking their cars onto the switch and leave them stand there?

2097 A. Yes, sir.

Q. What class of freight did you observe?

A. They brought up cars loaded with lumber and granite and brick and lime.

Q. Cattle cars?

A. I don't remember that I saw any cattle cars.

Q. Just take the usual run, don't take any exception, but just the usual run of freight business as you have seen it?

A. Yes, sir.

Q. This is what you state?

A. Yes, sir.

Q. Lumber cars, stone and brick?

A. Yes, I have seen them.

Q. Any machinery?

A. Yes, sir.

Q. Heavy freight of that kind?

A. Yes; I remember one time they brought up a flat car loaded with car trucks.

Q. What is done with these heavy freights, carried into the depot?

A. No, sir.

Q. What is done there with them?

A. The train is made up and they go on out down the trestle, I suppose, and go off on the road.

Q. Have you seen cars, loaded with lumber, for instance, made up and standing in front there?

A. Yes, sir.

Q. Loaded with machinery?

A. Yes, sir.

Q. Loaded with stone?

A. Yes, sir.

Q. Loaded with lumber?

A. Yes, sir.

2098 Q. Have you observed anything of the minimum or maximum time that trains and cars have been left standing in front there?

A. One train brought up there was left something over three hours.

Q. What was it?

A. Freight cars, loaded.

Q. How many cars were standing there?

A. Of course, I did not examine them to see if they were loaded; I supposed they were from the fact that they made up their train and went out with the train. That is the longest time I think I saw them stand there.

Q. On the average they would stand how long?

A. Half an hour, perhaps.

Q. Was this repeated in the same day?

A. Every evening, sir, usually. As I said, since October there has not been so many trains made up there as in September.

Q. Not since the commencement of this trial?

A. No, sir.

Q. Probably not, but your observation through September was correct, was it?

A. Yes, sir.

Q. You are absolutely certain of the observations?

A. Yes; I think they are correct. Of course you understand that as far as this list I have read is concerned, every one of those have not been taken by myself, because I could not be there day after day for twenty-four hours, but they were taken by the young men that were with me.

Q. Have you observed in the passing of trains back and forth that after the commencement of this hearing they ascertained you were keeping tally and were making observations?

A. Well, they seemed to observe that.

2099 Q. Did you have any conversations about it?

A. I don't think I did.

Q. What makes you think they observed that you were making observations?

A. Well, from the way they kept watch of us.

Q. What do you mean by that?

A. Whenever they passed the mill property they would be always looking out to see.

Q. Was that unusual; didn't they do that before?

A. They did not do that when we first commenced to take them.

Q. What class of engines are there that go up there, what roads?

A. The Wabash, the F. & P. M., the D., L. & N., and the union depot company's locomotives.

Q. Are the heaviest locomotives used on the Wabash and Canadian Pacific in coming in there?

A. Yes, sir.

Q. What, use the heaviest, long-run locomotives?

A. Yes, when they come in with a train.

Q. You did not observe that the trains were all switched up there by the union depot company engines?

A. They are not ordinarily. The empty passenger coaches were, I think, perhaps, but when the trains came in they were drawn in by the locomotives of the road.

Q. That is when the short or long trains come in up to the depot, they are drawn by the heavy long-run locomotives?

A. The passenger trains entirely, sir.

Q. Let me call your attention to a conversation with an employé. Did you call attention at any time to their not shutting off and have a conversation with an engineer or switchman?

A. There was a man on the trestle there one day, but I

2100 could not tell whether he was a switchman or brakeman or engineer.

Q. Never mind, then, it would not be competent unless you knew. Did you see him turn the switch?

A. Yes, I saw him turn a switch. We mentioned the matter of their coming up without shutting off and he said it was impossible;

they could not run up that grade without using steam, without exh usting.

Q. Did you observe at any time that the numbers of the locomotives of the union depot company, the designations upon the headlight, were removed?

A. I did.

Q. Generally done on the locomotives?

A. No, sir.

Q. Only upon the union depot ones?

A. Upon those. I know at one time they were painted off. When I first saw them they were marked Fort Street Union Depot Company, I think, and afterwards the numbers were painted off on the headlights and the name was painted off, and it was painted The Fort Street Union Association, or something of that character.

Q. Will you say if that was a correct representation of the ordinary union depot engine before the designation was painted off? (Showing witness photograph.)

A. That is one of them as I saw it first.

Q. Is that about the ordinary size of the union depot engines that are run up and down there?

A. Yes, I should call that one of the engines.

Q. That was the designation upon the engine?

A. It was when I first saw them.

Q. (Showing witness another photograph.) Will you say if that is another of the same with the number painted off?

A. Yes, I should say they were.

2101 Q. Where in the photograph shows a line where the name originally stood?

A. Yes, sir.

Photographs offered in evidence and three of them marked Exhibits "Griswold 1, 2 and 3."

Q. Do you remember at any time in front of the Backus property that before the commencement of this hearing, or about the time of the commencement of this hearing, they had a switch building right on the trossle?

A. Yes, sir.

Q. Do you remember seeing it there?

A. Yes, sir.

Q. What became of it after the hearing?

A. Well, it was removed. I can tell you when it was removed. I have not the date upon this paper, but the switch-house was taken away.

Q. It was after you went to work to make the observations preparing for this hearing?

A. Yes, sir.

Q. Will you please state, with reference to the Backus building or any part of the Backus building, where the switch-house stood in front of it?

A. Well, I should think it was very nearly the center of their property, perhaps a little to the west of the center.

Q. The perspective of the photograph would seem to show it was beyond it. It was certainly in front of some part of their property?

A. It was between their dust-room and the main building of the mill.

The photographs were shown to the jury.

Q. What did they do where the switch-house stood? Did they make any changes there in the track?

A. They made no changes, but I think they planked it
2102 over; I should judge so; the planking looked new in there.

Q. Will you please look at this photograph which I show you and see if it shows the switch in front of the Backus mill and the switch-house as it stood? The perspective is not good in the photograph. That would seem to put the switch-house further down. There is no doubt it did stand in front of the Backus property.

A. That is a fair representation of it, looking down the track instead of across it.

Q. I suppose you can see the place where it stood, where it is planked over?

A. Yes, sir, it looks like it, only it is looking down toward it instead of across it.

Q. The switches that appear here upon the photograph are where, with reference to the front of the Backus property?

A. Just near here, that you see there, a little east of the center of the property; there were two switches right back of the switch-house, and there is where they ordinarily did the switching.

Q. Right there also in front?

A. Yes, sir.

The photograph referred to is marked "Griswold 4."

Q. You see that behind the switch-house, as it appeared on the photograph, there were two switches?

A. Yes, sir.

Q. And in front of it, in front of the Backus mill, also was the switch that appears by this photograph?

A. Yes, sir, and that is some thirty or forty feet away from the switch-house or more; perhaps 100 feet.

Q. Now, I show you this photograph and ask you if it is a correct representation of the Backus property and the switch-house, with a train upon the track?

2103 A. Yes, the locomotive and train is standing east of the mill toward the station.

Q. The main building is there shown and the dust-room is shown?

A. Certainly.

Q. And the switch-house in the left-hand corner of the picture?

A. Yes, there are two switches there.

The photograph was marked Exhibit "Griswold 5" and shown to the jury.

Q. Did you ever observe any hot journals there, with the waste dripping down, afire, passing in front?

A. Yes, a train passed there one day with a hot box on the locomotive, burning very badly.

Q. Coming in, I suppose?

A. Yes, coming in toward the station.

Q. And the tow dropping?

A. Well, I noticed that from the fire-box.

Q. I say the tow from the hot box?

A. Oh, yes, the packing.

Q. And the fire?

A. Yes, sir.

Q. How often have you observed that? I suppose that is liable to happen at any time?

A. I never observed that but once.

Q. Now, have you observed, in the course of your observation, the drifting in of cinders upon the property?

A. I have seen cinders there; yes, sir.

Q. Can you give us any samples of the cinders that you have seen in front of the building during the course of your observations? Take September 7, for instance (handing witness a package).

A. These cinders were picked up on September 7th on the roof of the shed next to the tressle; next to Woodbridge street.

2104 Package marked Exhibit "Griswold 6."

Q. Was it a familiar sight to you to see cinders about there in front of the mill?

A. Yes, a great many of them.

Q. On the mill and window-sills and in the mill?

A. Yes, sir, saw them frequently.

Q. At the time you made this special observation of the cinders, did you, on that day, put the cinders in this envelope?

A. Yes, sir.

Q. They are the same cinders?

A. I suppose they are?

Q. Have you had it in your custody since?

A. Yes, sir.

Q. All the time?

A. Yes, sir.

Q. You say you suppose they are. Did you put the cinders in there?

A. Yes, sir.

Q. Is it just as it was when you put them in there?

A. Yes, sir.

Q. Look at the cinders and see if they are the same.

A. I looked at them, but I could not recognize the cinders as the same. I have no doubt they are.

Q. They are the same class of cinders you picked up on that day?

A. Yes, myself and Mr. Krombach. Mr. Krombach picked them up, and I put them in the envelope.

Q. You saw the process?
A. Yes, sir.
Q. You saw the cinders on the shed in front of the trestle?
A. I did.
Q. Now have you brought any samples of cinders that you picked up in the mill?
2105 A. Yes, in the mill yard. We picked up some cinders right at the door of the mill.
Q. Are those the cinders you picked up in this envelope I show you?
A. We put them in this envelope.
Q. Those are the ones?
A. Yes, sir.
Q. That is the door of the mill in front, facing the trestle?
A. Yes, sir.
Q. On the ground floor?
A. Yes, sir.

The package was marked Exhibit "Griswold 7."

Q. Did you at any time find any samples of cinders near the shaving-room?
A. Yes, I picked them up there several times.
Q. Well, we only want samples of every day, that is all we want in. Did you pick that up and where?

(Showing witness another package which was marked Exhibit "Griswold 8.")

A. I picked it up near the shavings-room door, between the shavings-room and the mill. There is an alleyway.
Q. You mean picked them up in the alley?
A. Yes, sir.
Q. Not in the end of the dust-room next to the street?
A. No, sir, away out in the alleyway?
Q. On the sawdust?
A. Yes, sir.
Q. How with reference to the engine-room, how far from River street. You picked it up, as I understand you, between the dust-room and the main mill, how far is that up toward the engine-room, half way?
A. Yes, I should think it was a little more than half way perhaps.
2106 Q. Are those the isolated instances, or is it a common thing for the cinders to be about there?
A. I have seen them there very, very often.
Q. The wind blows them away when there is a strong wind?
A. I should presume it would have that tendency. We saw more cinders there after a strong south wind that blew them toward the mill.
Q. Is it an ordinary thing for cinders to fall down there from passing trains?
A. I saw them there very often, almost every day.

Q. How about having seen in your peregrinations about the mill, cinders upon the lumber, and soot?

A. I have seen that repeatedly, the lumber covered with cinders and black soot. Of course, it would show very much more plainly on planed lumber than it did on the rough lumber.

Q. Have you observed whether a planed board can be put out there without being covered with soot?

A. I have seen a load stand out there for an hour or two and be covered with soot.

Q. Then again I suppose when the wind is off the mill, there would not be so much?

A. Certainly not.

Q. Have you yourself seen the smoke from the engines in the mill?

A. I have.

Q. To what density?

A. Well, quite dense, with a strong south wind during the summer when the windows were open, the smoke was very dense so that you could smell the gas very strongly. I noticed that several times.

Q. Have you observed the trains passing throwing smoke or not, whether there is a shadow thrown in the mill?

2107 A. Yes, a shadow like a cloud passing over the sun.

Q. And the passing of trains or engines?

A. Yes, sir.

Q. I suppose this is greater or less in accordance with the smoke or steam that is thrown out?

A. Yes, sir.

Q. And does the passing train, whether it throws smoke or not, cast a shadow upon the mill?

A. Yes, sir, it does.

Q. And upon the rooms in the mill?

A. Yes, a flitting shadow like a cloud passing over the sun, darkened for an instant and passed by. It has that effect.

Q. It has that effect in any case, whether there is smoke or not?

A. Yes, more particularly on the lower floors than above, of course.

Q. Do you mean the two lower floors?

A. Yes, more particularly on the two lower floors.

Q. The main floor and the second floor where the main machinery is?

A. I have noticed it more there, yes, sir.

Q. Of course, you say that this shadow is thrown whenever a train or engine passes?

A. At a certain hour of the day. Of course at night it would not be so noticeable. It was always observable, of course. Interferes with the light.

Q. How does the noise of the passing trains affect the conversation in giving directions or orders in the mill? Does it interfere with the conversation?

A. Well, it would particularly near the front of the mill, the windows, when the windows are open.

Q. I suppose you have the room ventilated by open windows during the summer?

A. I presume so, they are open during the summer.

2108 Q. The mill is principally lighted from the River Street side, is it not?

A. Well, I should think so, principally.

Q. Have you observed the effect of this trestle at all and made any observations of it and the railroad there in front, upon the lower ground floor, in regard to the light?

A. Yes, I have noticed that it cuts off the light very materially.

Q. The trestle itself does there?

A. Yes, sir, the trestle and the passing of trains.

Q. I suppose the light is more affected when the train passes?

A. Yes, I observed it that way.

Q. Men would be at work and the shadow fall upon the work as they are performing it?

A. Yes, sir.

Q. Have you observed the men in setting the gauges?

A. Yes, sir.

Q. In the fine work?

A. I have noticed them do that and noticed they would stop and wait until the train got past before they completed the work. I noticed that yesterday.

Q. You have observed that at any rate so far as your observation goes, that it did interfere with the setting of the gauges?

A. Yes, sir.

Cross-examination.

By Mr. BAKER:

Q. Do you live in Detroit now?

A. I have been in Detroit for a few months.

Q. How long have you lived here?

A. Well, I have been off and on here since about the first of April, not here all the time.

Q. You are in the employ of Mr. Backus, I suppose?

2109 A. I am not.

Q. Are you a relative of his?

A. I am not.

Q. What are your relations?

A. Friendly.

Q. How long have you been acquainted with Mr. Backus?

A. O, for several years; I could not tell just the length of time.

Q. What have you done for him in connection with this case beside watching this railroad down there?

A. Well, I don't know that I have done anything special. I have assisted him certainly, etc.

Q. You have assisted him in preparing this case?

A. No, sir, I have not assisted him in preparing the case.

Mr. DICKINSON: You assisted him somewhat in the inventory?

A. I assisted him somewhat in the inventory, no further than in preparing this part of the case. I did assist him in this.

Q. Did you assist him in anything else?

A. In preparing the inventory.

Q. Anything else?

A. I don't think that I did, sir.

Q. You don't remember anything else?

A. I don't think that I did in anything else.

Q. You watched the trains down there, and the engines pass, personally, did you?

A. I did part of the time.

Q. Can you tell us how long it takes an engine ordinarily, as they run there, to pass along in front of the Backus property?

2110 A. Well, sometimes they would go very rapidly, and sometimes they would go slowly. I don't think I timed them at all, I know I did not.

Q. You did not see how many seconds it took to go by?

A. I didn't hold a watch on them.

Q. Did the trains usually pass right by?

A. Ordinarily.

Q. That was the ordinary course?

A. Yes, occasionally the trains stopped, but not ordinarily.

Q. About how many miles an hour would they run, take a passenger train, for instance?

A. Well, I could hardly tell that; perhaps at the rate of six or eight miles an hour.

Q. They did not go through there forty or fifty miles an hour?

A. I should not think they did.

Q. Something like six or eight miles an hour?

A. I should think so, perhaps more.

Q. And a freight train, when they are switching there, go about the same rate?

A. No, sir, they were very slow.

Q. The freight business was principally done in the evening when they were making up trains?

A. Ordinarily.

Q. Just at night?

A. Yes, ordinarily.

Q. About six o'clock?

A. From seven to nine, perhaps.

Q. And the rest of the time the trains were principally passenger trains?

A. Yes, usually. Occasionally they would push up a freight car or two, something of that kind, but they were ordinarily passenger trains.

2111 Q. Could you notice the character of the freight that was usually received at the freight shed at the union depot grounds?

A. No, sir.

Q. You could not tell anything about that?

A. No, sir.

Q. But lumber was not loaded up there?

A. No, sir.

Q. The only lumber and heavy freight you say you saw were on cars that were shoved up from the yard below, when they were making up trains?

A. Yes, sir.

Q. Would they make up a freight train on the center track?

A. The cars that they pushed up from the yard they would switch onto the center track and leave them there until they went up to the station and got the loaded cars from there and brought them down on the side track.

Q. I understand you then that the engine would bring up some cars from the yard, put them on this center track, leave them there and go on and get what cars were at the freight shed in the union depot ground, bring them down and put them together and go out?

A. Yes, sir.

Q. You don't know anything about the ownership of the engines?

A. I don't.

Q. You don't know whether the union depot company itself owns any engines?

A. I do not.

Q. Only that you saw the name?

A. That is all.

Q. And the name was changed in some of them?

A. Yes, sir.

Q. When was that done?

A. I cannot tell you the date.

2112 Q. Since the first of September?

A. No, sir, I don't think since the first of September.

Q. Along last summer some time?

A. I think along in the summer.

Q. The designation now is something that designates an association of some kind?

A. It would indicate that.

Q. At any rate, it is not the Fort Street Union Depot Company?

A. Well, they have some switch-engines.

Q. Do you know how many that are in use there?

A. I have seen only two, I think, that are marked in that way, that come up on the trestle.

Q. I know, but you can tell a switch-engine from an ordinary road engine?

A. There are switch-engines in the yard; I have noticed quite a number down there at work, but I have not been down there.

Q. Would these freight trains be handled by switch-engines?

A. Ordinarily by either one of the two union station engines or Wabash engine No. 43, I think it is, that is a switch-engine.

Mr. DICKINSON: Not by the ordinary switch-engine you speak of down in the yard?

A. No, sir.

Q. It is a larger engine used for switching purposes?
A. Yes, sir.
Q. For a time they had a small sentinel box on the track there, and that is what you call the switch-house?
A. Well, they did have a box there, a switch-house.
Q. Just large enough for a man to stand in?
A. Oh, large enough for two or three men to get into—three or four, perhaps.
Q. About how big?
2113 A. I should think it was eight feet square. I had not been to it, only as I saw it from the mill.
Q. It is represented there on the photograph?
A. Yes, sir.
Q. It is just large enough to hold one or two men and to protect them from the storm while he is awaiting work to perform in handling the switch?
A. Yes, sir.
Mr. ROBISON: If that is eight feet square, the man is at least four feet square?
A. I don't know the size of it. I should think perhaps five or six feet square.
Q. Where have they moved that to?
A. I don't know.
Q. It is not there now?
A. No, sir.
Q. The switching, I understood you, down there, has not been as much as before?
A. Not since the first of October or the last of September.
Q. Of course you don't know what has occasioned that change?
A. I do not.
Q. They have a freight-house in the union depot yards on the Congress Street corner that is in use yet, and freight trains are made up, are they not? Freight trains are made up there on that center track the same as heretofore?
A. I have not observed them for the last few days, but they did make them up when we kept this record, but not as frequently along at the last.
Q. These cinders you gathered, you got some on the shed that is right alongside of the trestle-work?
A. Yes, sir.
Q. Some on the floor below near the mill doors?
2114 A. Yes, sir.
Q. And some near the shavings door?
A. Yes, sir.
Q. I suppose you swept them up with a broom?
A. I did not.
Q. How?
A. Picked them up.
Q. You never swept any up?
A. Never swept any up.
Q. Picked them up one at a time?

A. Yes, sir.

Q. How many times have you done that?

A. I could not tell you the number of times. Several times I found them there.

Q. Now, you say that a train passing there makes a shadow about like a passing cloud?

A. Yes, sir.

Q. I suppose a cloud does go by there once in a while?

A. I have no doubt of it.

Q. Do you know what the directions of the compass are there?

A. Well, very nearly.

Q. Is the track east or south of the Backus mill?

A. The track is south of the Backus mill.

Q. Now, you say the smoke goes into the mill there somewhat when there is a wind from the south?

A. Yes, sir.

Q. The wind blowing up the river?

A. No, sir, blowing across it.

Q. How often have you noticed that?

A. Oh, several times during the time I have been there. I could not tell you the number of times, but quite a number.

Q. I suppose the wind blows most of the time across the river into the mill there?

2115 A. In the summer I think that our prevailing winds are from the southward.

Q. Well, across the river, whatever that is?

A. Well, that is southward.

Q. The prevailing wind is from that direction?

A. I think ordinarily the prevailing winds are from the south.

Q. I suppose the Michigan Central yard is in operation on both sides of this mill all the time?

A. It was the last I noticed.

Q. Were you ever in this property before the union depot's elevated structure was built?

A. I don't think I ever was.

Q. You do not know to what extent the smoke went into the mill?

A. I do not.

Q. Before this was built?

A. I do not.

Q. Of course, the Michigan Central engines are moving about in that yard right across the street, continuously since you have been there?

A. Yes, sir.

Q. A great many trains pass over that crossing along the east side of the mill?

A. I presume they do; I noticed a good many.

Q. Hundreds of trains go by there every day?

A. I think they do; I don't know how many.

Q. What do you mean when you say that the fire-box is open? Whereabouts do you mean that it is open?

A. Under the engine.

Q. You do not mean that it was open where the fireman was putting in the fuel?

A. No, sir.

Q. It was open underneath where they take in draft?

A. Where they take in draft and take out the coals or
2116 cinders as they go out—what is known as the fire-box.

Q. They have a damper underneath the engine, have they not, by which they take in air?

A. They can shut that up.

Q. Sometimes that is closed when they come up there and sometimes it is not?

A. Sometimes I have noticed it closed, and sometimes not.

Q. Well, you have seen no engine there burning wood?

A. I do not know that I have; I should think not.

Q. Did you write that letter I now show you?

A. That is my signature.

Mr. DICKINSON: Now, if there is anything about that letter——

Mr. BAKER: I do not care about the letter coming out now; I will use that hereafter.

Redirect examination:

Q. You have been asked with reference to the Michigan Central. Do you know the distance from the nearest Michigan Central track that is used for railroad purposes, from the main mill?

A. I do not know how far it is, but I should think to the main track it is 150 feet, I do not know but more.

Q. You did not measure it, did you?

A. I never measured it, no, sir.

Q. What would you say, from your observation, as to its being 200 feet?

A. Well, perhaps three. I never measured it; I never took any special notice of the distance there.

Q. They have a shed on that side, and they have a side track in from the Michigan Central?

A. I think they have three side tracks.

Q. And along that side the whole distance the Michigan Central, of course, runs at grade, upon the ground?

2117 A. Yes, sir.

Q. There is a shed with a side to the Michigan Central the whole distance along, is there not?

A. Yes, sir.

Q. Will you look at that photograph I show you and see if that is a pretty good representation of the Michigan Central tracks with reference to the mill?

A. Yes, I should recognize it from that.

Marked Exhibit "Griswold, 9."

Q. Now, when there is no wind at all and the atmosphere is heavy, is there a falling of the smoke?

A. Yes, sir.

Q. When there is no wind at all the smoke may fall in there?

A. Oh, certainly.

Q. Now, looking out and taking an average day, like this, for instance, you find a majority of days are days when there is no wind either way—when it is quiet?

A. A great many such days.

Q. Upon those days have you observed that railroad smoke would fall?

A. If the atmosphere is heavy of course the smoke will fall to the ground.

Q. Have you observed there in front of the Backus mill, on those days that are not clear and bright, that the smoke does fall and go into the mill?

A. Certainly.

Q. The trestle-work carrying a locomotive, and the smoke being thrown out with the cinders, the heavy class of smoke falls?

A. Yes; and there is another thing, there is quite a draft; if you will stand there by the mill when there is no wind you will find quite a strong draft always there.

Q. And find the smoke coming in?

A. Yes, it would be in any case of that kind.

2118 Q. So that in the majority of cases when the smoke is thrown out it goes into the mill, doesn't it?

A. Unless there is a very strong contrary wind.

Q. Yes, but I say in the majority of cases, day in and day out, the year through.

A. Yes, sir.

Q. The smoke omits from the engine and goes in there?

A. Yes, very apt to indeed.

Q. Can you tell me now who there were engaged in making these observations? You have daily journals of them, have you, in this package?

A. Yes, sir.

Q. How many men aided in doing that?

A. Two young men, Mr. Roche and Mr. Youngs.

Q. Are they both here?

A. Yes, sir.

Q. They, with you, made these observations which you have summarized in the memorandum which you have read?

A. Yes, and Mr. Knapp was there occasionally.

Q. Is he here?

A. Yes, sir.

Q. Now, Mr. Roche and Mr. Youngs and yourself made this daily journal, the observations of the trains you have testified to and which you have summarized in the paper which you have referred to, marked Exhibit "Griswold, 10?"

A. Yes, and I think the foreman of the mill, Mr. Krombach, was there for several hours on different occasions.

Q. Are any of his memoranda here?

A. I think there are, yes, sir.

Q. You have made this up from them?
A. Yes, sir; and Mr. H. N. Backus was there and took some.

By Foreman BAKER:

2119 Q. I would like to ask a question or two in regard to the making up of the trains on the switch. The witness testified that they are made up between seven and nine o'clock. Was the mill running or closed down for the time?
A. The mill was closed down at the time these trains were made up.
Q. Then, as to these cinders that have been collected and are here in evidence, how many times were those cinders picked up to make that number you have in the envelope, the yellow envelope, for instance (referring to Exhibit "Griswold, 6")?
A. Those were all picked up at one time; they were gotten on the shed.
Q. Do you know how long they took to accumulate?
A. I do not.
Q. You don't know whether it was twenty-four hours or six months?
A. I don't know that. I should not suppose it would be six months, because I was there all the time and should have observed them if there had been any such length of time or been any number of days.

WILLIAM A. ROCHE, sworn on behalf of respondent.

Examined by Mr. DICKINSON:

Q. What is your business?
A. I have been clerking for A. Backus, Jr., & Sons.
Q. How long have you been there?
A. Well, I was there for about seven months last year and I have been there since May of this year, with the exception of one month.
Q. Were you engaged from the first of September, through September and October, in taking observations of the passing trains?
A. Well, not the first of September; I started on the 14th.
2120 Q. You started on the 14th and aided in making these observations?
A. Yes, sir.
Q. And set down the result of your observations upon the memorandum here?
A. Yes, sir.
Q. And assisted Mr. Griswold?
A. Yes—well, Walter Youngs and I.
Q. Youngs and you assisted Mr. Griswold?
A. Yes, sir.
Q. In the observations you made of the passing trains and of the exhausting and the other information you set down upon your memoranda, did you make a correct observation?
A. Yes, sir.

Q. You know that you are right?
A. Yes, sir.
Q. You heard the testimony of Mr. Griswold?
A. Yes, sir.
Q. Are you positive that your observations in setting down the information from day to day, are correct, which you have made in conjunction with him?
A. Yes, sir.
Q. And what did you do with the observations after you made them?
A. They were turned into the office.
Q. Turned over to Mr. Griswold, I suppose, ultimately?
A. Yes, sir.
Q. Have you observed the approach of trains there in approaching the front of the Backus property?
A. Yes, sir.
Q. Have you observed any laboring of the engines in coming up the grade in front?
A. Well, we could not see the engine on account of the
2121 dust-room, but we could hear it when it was coming up.
Q. And as they came in front pulling the trains up?
A. Yes, sir.
Q. You have seen them laboring and exhausting?
A. Yes, sir.
Q. What has been your observation as to the smoke going into the mill or falling upon the mill?
A. Well, with the wind across the river, if they were smoking to any extent, the smoke was carried in through the mill.
Q. And how upon the heavy days when there was no wind on the elevated structure?
A. On a heavy day, if they were smoking heavily, the smoke settled beside the track down along the mill.
Q. In the mill during this season?
A. Yes, sir.
Q. Have you observed the gathering of cinders on and about the mill?
A. Well, I never noticed that.
Q. You did not give special attention to the cinders?
A. No, sir.

No cross-examination.

WALTER H. YOUNGS, sworn on behalf of the respondents.

Examined by Mr. DICKINSON:

Q. What is your business?
A. Shipping clerk for A. Backus.
Q. How long have you been engaged there?
A. About eleven years.
Q. Have you assisted Mr. Griswold in taking the observations of passing trains and the issuance of smoke and the switching in front of the Backus mill?

A. Yes, sir.

2122 Q. And of the throwing of sparks, and when the fire-boxes were open, and so on?

A. Yes, sir.

Q. What did you do with the observations that you took?

A. I made memoranda of them and put them on paper.

Q. And turned them over to Mr. Griswold?

A. Yes, sir.

Q. And what did you do with the observations that you took?

A. I turned them over to Mr. Griswold.

Q. Were those observations that you made correct?

A. As near as I could make them.

Q. Have you any doubt that you set down correctly the number of engines passing that you covered?

A. Yes, they are all correct.

Q. And the number of coaches and freight cars and the times the engine passed when it was not shut off and when it was exhausting and smoking.

A. Yes, sir.

Q. You have no doubt of the correctness of the memoranda you made of your observations?

A. No, sir, everything was all right.

Q. Have you noticed the smoke omitting from these engines as they came up?

A. Yes, sir.

Q. Have you noticed its effect upon the mill?

A. Yes, sir.

Q. Have you noticed that it entered the mill?

A. It has several times.

No cross-examination.

WILLIAM B. KNAPP, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?

2123 A. 872 Lafayette.

Q. How long have you lived in Detroit?

A. Thirteen or fourteen years.

Q. What is your business?

A. I am working for A. Backus, Jr., & Sons.

Q. How long have you been there?

A. I think perhaps twelve years, or eleven or twelve. At the present time I have charge of the yards below, the lumber yards, and also looking after lumber coming in, buying some lumber, etc.

Q. And have been engaged there for twelve years where you have observed the passing of trains?

A. During a portion of that time, yes, sir.

Q. What have you been engaged in the other portion of the time?

A. There was no railroad there when I first went there.

Q. No, but since the railroad went there, about ten years ago?
A. Ten or eleven, I think.
Q. What has been your business at the yard?
A. Well, I have charge of the yard. I am all over there and in the office and out doors.
Q. You have an office in the yard?
A. Yes, sir.
Q. You were engaged for a short time in aiding Mr. Griswold in making these observations?
A. I was up there at the mill on several occasions when that was being done, yes, sir.
Q. Did you take part in it?
A. I did once or twice, only when some of the rest of them were away.
Q. Did you make correct observations of the passing of trains?
A. Yes, sir.
2124 Q. And the emission of smoke and the number of engines that passed there, and whether the fire-box was open, and whether they were exhausting, and the number of cars, during the time you did take observation?
A. Yes, sir.
Q. What did you do with the observations?
A. Whatever observations I made are in there.
Q. You made memoranda of them and turned them over to Mr. Griswold?
A. Yes, sir.
Q. Then some one else took your place for the day or when you went away?
A. I was only there on several occasions for a little while when some one else stepped away.
Q. When you stopped some one else came on?
A. Yes, sir.
Q. Your observations are correct?
A. Yes, sir.
Q. You reduced them to writing?
A. Yes, sir.
Q. And you gave a correct statement to Mr. Griswold?
A. There it no doubt about the correctness of the statement as far as any memoranda I made are concerned.
Q. You are down there in the yard where trains pass to and fro a good deal, are you not?
A. Yes.
Q. Will you please tell the jury as to your observations as to the throwing of cinders by the passing engines, as you observed it in the lumber yard?

Mr. BAKER: I will take an exception to that as being in another place.

Q. It is competent, but I will make it a little more so. You are engaged in the lumber yard through which passed all trains and

engines that pass up on this tressle, the track runs right down through this yard?

2125 A. Yes, sir.

Q. That goes up and meets the tressle below Twelfth street?

A. Not all trains that go up the tressle come in over that road. Some trains come across from the Canadian Pacific road.

Q. Yes, but all the Detroit, Lansing & Northern trains come through the yard there?

A. Yes, sir.

Q. And the Flint & Pere Marquette?

A. Yes, sir.

Q. And the Wabash?

A. Yes, sir.

Q. How wide is the right of way through there? They pass through the lumber yard?

A. I think it is sixty feet.

Q. Now, have you observed from day to day, or from time to time, in your experience since the railroad ran through there, as to the quantity of cinders they threw and how far they threw them upon the lumber? They pass through the center of the sixty feet, do they not, that right of way?

A. Yes, sir.

Q. Have you observed the cinders upon the lumber?

A. Oh, yes, quite frequently; it is an every-day occurrence.

Q. Whether it is any part of your duty when the lumber is removed, to remove the cinders so that it is called to your attention?

A. Yes, that is something that has to be attended to always in handling lumber, to keep it as free from cinders as possible.

Q. Well, do you find that these passing locomotives there

2126 throw cinders, and how far did you find the cinders upon the lumber; how many feet from the center of the track?

A. Well, of course as you go from the track they would be less, but the distance I do not know that I could give it that they would reach on either side.

Q. I do not want you to have it by measurement.

A. Perhaps 150 feet, or possibly 200.

Q. That you find cinders in the lumber; and to what extent as you approach the track, say within fifty feet, are the cinders upon the lumber piles?

A. There would be a good many at that distance.

Q. What do you mean by a good many?

A. I don't know as I could measure them.

Q. Give us some idea.

A. Well, the lumber would be covered pretty well over with them at that distance in a short time.

Q. How long a time?

A. Three or four days or two or three days.

Q. Then you have to remove them; it is a part of your business to watch the lumber?

A. Whenever the lumber is handled, yes, sir, they are removed.

Q. Now, have you observed at what distance fire has burned into the lumber from the track, from the cinders?

A. I should say forty feet.

Q. And to what extent?

A. The top of the boards, on the surface.

Q. Did you notice the cinders burn into the board?

A. I have noticed the cinders burned into the board perhaps one-third of their depth or half the depth of the cinders.

Q. And to what extent does this occur through the lumber yard through which these trains pass?

A. I have noticed it in several instances; I don't know how many times.

2127 Q. Can you give us an idea? I do not speak of the farthest to which cinders are thrown upon the lumber, but say fifty feet away from the passing trains; can you give us some idea of the extent of the cinders that are thrown?

A. Well, I don't know how I could do that. They would sprinkle through, that is about all I could say. They would be sprinkled through at that distance very soon after the lumber had been piled there.

Q. Would they permeate and get into the tiers?

A. Oh, yes, all through.

Q. You find it all through as you remove the lumber, and from your ordinary business you know it is all through the lumber as you remove it?

A. Yes, sir.

Q. Taking down the pile?

A. Yes, sir.

Q. It works through in the tiers?

A. That is right, sprinkles all through.

Q. Have you observed in the passing engines there, any engines that did not throw sparks in the night and cinders in the daytime?

A. No, sir.

Q. They do it invariably?

A. I never saw one that didn't.

Q. Will you tell the jury something of your observation of the lumber that comes in from Saginaw or elsewhere, as to the extent of cinders on the cars in the trip down merely?

A. Well, there would be a quart or two in most any open car.

Q. Of what class of cinders?

A. Fine cinders such as are thrown from the smokestacks of the locomotives.

2128 Q. Look at the contents of Exhibits "Griswold 6 and 7" and see if they are fair samples of the kind of cinders you saw?

A. Yes, sir. There would be with those a great many that would be much finer in addition to these.

Q. Yes, these are the large cinders; a great deal as fine as soot, I suppose, sifted in?

A. Yes, sir.

Q. You are accustomed to unload cars that come in with lumber, are you not?

A. Yes, sir.

Q. Is it anything to do with the duty of the inspector or person who attends to the unloading of the consignments of lumber to remove these cinders?

A. Yes, sir.

Q. From a quart to two quarts in an open car?

A. Yes, sir.

Q. Didn't you gather something down there like a pailful or so?

A. We did at one time, but not recently.

Q. Is there any change in the kind of cinders or quantity that is thrown by a passing engine now?

A. No, sir, not that I have observed; about the same variety all the time I guess.

Q. Have you observed in the mill, when you have been up there, whether the engines in passing the mill throw smoke and cinders?

A. They do; yes, sir.

Q. Is there any difference to speak of in the character of cinders that are thrown from the locomotives on the tressle from those down in the lumber yard?

A. I have not observed any difference.

Q. In the passing of trains daily do they always throw cinders?

A. I think they do; I never saw an engine that did not.

2129 Q. And in the night these cinders seem to be alive and on fire, of course?

A. Yes, in some instances.

Q. Have you observed the effect of the smoke upon the mill from the passing engines?

A. There is some there almost every day.

Q. And that is the ordinary case every day?

A. Yes, sir.

Q. How about there being volumes of smoke in the mill?

A. Well, sometimes engines in passing that point, as at any other point, I presume—at that point I know of—smoke worse than they do at other times.

Q. Do you think their pulling up the grade has anything to do with it?

A. Well, whatever the cause is——

Q. The engine has more of a heavy load?

A. They throw more cinders if they are working hard.

Q. And more smoke?

A. They throw more smoke, I think, when they are not working so hard; that is, it is more dense.

Q. You are frequently up at the mill; this is a part of the plant, the lumber yard—you are one of the employés in and about the mill?

A. I am back and forth several times a day.

Q. Have you observed the effect of the passing shadows on the light?

A. When these trains are passing, of course it casts a shadow, and

if they are smoking, why that darkens the surroundings to a certain extent.

Q. You have been in the employ of Backus & Sons and about there for 12 years and know about it before the building of the tressle?

A. Yes, sir.

2130 Q. What is the difference in your views on the light, as to the facilities with which the work is done?

A. We had better light on that side of the mill before the tressle-work there.

Q. Tell us whether it affected the light seriously?

A. Yes, it affected it quite considerably, especially on the two lower floors on the mill.

Q. Well, the second floor is where the fine machinery is?

A. Yes, sir.

Q. What have you observed as to the throwing of cinders in and about the mill and around there, before the building of this elevated structure and since?

A. Well, I know that the cinders are there now, and I never saw them before on that side.

Q. No trouble with cinders in there before, in the mill?

A. No, sir.

Q. No trouble before with smoke in the mill?

A. No, sir.

Cross-examination.

By Mr. BAKER:

Q. The lumber yard down there is just an open lot, is it not?

A. Yes, sir.

Q. There are no buildings on it to speak of?

A. No, sir, except a few small buildings.

Q. You pile lumber right close to the track?

A. Yes, to the line of right of way.

Q. And on both sides?

A. Yes, sir.

Mr. DICKINSON: Is that a single track through that lumber yard?

A. No, sir, I think there are what they call two main tracks and then there is another track that runs around onto Letts' coal dock.

Q. A switching track, and there are two main tracks?

2131 A. Yes, one each side of the center of the right of way.

Q. Trains go there back and forth continuously?

A. Yes, sir.

Q. The yard is open all the way to the river on one side and Woodbridge street on the other?

A. Yes, sir, except the lumber.

Q. And you have always piled lumber right close up to the track?

A. Yes, sir.

Q. Would you put any covering on top of the lumber piles?

A. Always cover it up.

Q. That is, you cover it up with poorer lumber or arrange the lumber itself so as to shed water?

A. So far as it is possible, yes, sir.

Q. About how high do you build them there?

A. Oh, I think about 16 feet, perhaps.

Q. About the same hight of the smokestack of an engine?

A. Well, I should say in that neighborhood; I don't know as I observed that.

Q. Of course this track was in use for this purpose long before the new union depot was built?

A. Before the Fort Street depot; yes, sir.

Q. And the traffic, I suppose, has increased some since then, through the roads that come in there?

A. Yes, sir.

Q. They come through there oftener than before?

A. Yes, increased, I should think, perhaps thirty passenger trains or something like that each day. That is, a day of twenty-four hours.

Q. Do they do switching through the lumber yard?

A. Not to any great extent; they do some.

Q. Is there a switch on this right of way?

A. Yes, sir.

2132 Q. A switch that goes to this Letts side track?

A. No, sir.

Col. ATKINSON: This right of way you speak of is on the lumber yard?

Mr. BAKER: Yes.

Col. ATKINSON: At Eighteenth street, as I understand you?

Mr. BAKER: Yes.

A. There is a switch on Eighteenth street; yes, sir.

Q. They do not do very much switching there now?

A. Every day a dozen times or so.

Q. A dozen times or so?

A. I never counted them, but I know they do switching.

Q. Is there a switch there on the right of way on the lumber tracks, from which tracks radiate into the freight yards of the old union depot company?

A. There is one; yes, sir.

Q. That is the switch they use?

A. Yes, sir.

Q. So that an engine that goes in there that uses that switch stands on the right of way in the lumber yard?

A. Yes, sir.

Q. And considerable switching is done there up to the present time?

A. Well, during past years. Since the tracks were built up to the Fort Street union depot they have done some switching there.

Q. But for some years before that they omitted to do switching there?

A. Yes, I think so.

Q. I suppose there is no mill or sawdust or shavings or anything around the lumber yard?

A. There would be some, of course, coming off the lumber, but not to any great extent.

Q. The lumber goes right down to the dock and there
2133 is a ferry-boat that lands near by there, one of those big freight-boats?

A. The Landsdowne; yes, sir, just above.

Q. Just a little above, isn't it?

A. I think it is; yes, sir.

Q. And then there are steamers going up and down there all the time?

A. Yes, more or less.

Redirect examination.

By Col. ATKINSON:

Q. You say you have charge of the lumber down there?

A. Yes, sir.

Q. And have you any work that connects you with the mill at any time?

A. Well, I am back and forth every day for one thing and another.

Q. Are you acquainted with the way in which the lumber is taken from the yard up to the mill?

A. Yes, sir, loaded on trucks and hauled up there.

Q. Has that been interfered with any by the building of this track in front of the mill; does it make it any more inconvenient or dangerous?

A. Well, there is more or less inconvenience, of course, in the way of dirt and smoke.

Q. You had the open street before and now you have to come up under the tressle?

A. Yes, sir.

Q. To drive up. In passing under the railroad, is there not a dripping from it onto the lumber?

A. Yes, the grease from the cars and the locomotives drops down to some extent.

Q. Is there any dropping from the ties of accumulated grease and oily matter?

A. Well, I don't know that I ever noticed it. I know that
2134 the grease dropped down, but I never noticed whether it came from the ties. I suppose it came from the cars indirectly at least.

Q. Aren't there pans under this tressle-work for catching all those things?

A. No, sir.

Q. No pans have been put there, then?

A. Not unless it was done since yesterday.

Q. Now, your drivers ride on the loads, I suppose, as they come up from the mill yard to the mill?

A. Yes, sir.

Q. Do they continue to do that since the tressle-work was built, or do they have to get off?

A. Well, I have seen them walking. I don't know that I heard them say why it was; I don't think I did.

Q. You don't remember the reason for it?

A. No, sir.

Q. But you observed that they walked when they got up under the tressle?

A. I have noticed them walking on several occasions, but I never thought anything about what it was.

Q. Do you know whether there is anything in the height of the tressle or anything of that kind that compels them to get off and walk part of the way?

A. I never heard them say anything.

Q. You have not observed yourself enough to know?

A. No, sir.

Q. Have you had anything to do with taking lumber from the mill to the warehouse on Fort street?

A. No, sir, I have nothing to do with that.

Q. Do you know how that it is done of your own knowledge?

A. Yes, it is loaded onto wagons in front of the mill and hauled along by way of Twelfth street to the warehouse.

Q. Is that done by the teams that are under your charge and supervision?

2135 A. Yes, sir.

Q. So that the same teams do all this transferring from the lumber yard to the mill and from the mill to the warehouse?

A. The teams perhaps may start from the yard with a load and deliver it at the mill and then take a load to the warehouse and come back to the second floor, and stop and get a load there and bring it down by way of Twelfth street to the lower part of the mill and then back to the yard for another load.

Q. So that they interchange, then, from one place to another in doing their work?

A. Yes, sir.

Q. Do you know anything of the retailing trade formerly carried on from River street with the mill?

A. I know they do some, but to what extent I don't know.

Q. What effect has this tressle-work in frightening horses?

A. Well, I don't know, not to my knowledge, no, sir.

Q. You have not observed any cases yourself?

A. No, sir.

Q. The horses passing under there. You spend most of your time at the yard, as I understand?

A. The greater portion of it, yes, sir. If I have any business up there I run up and attend to it and back again.

Q. You speak of the cinders falling and burning part way through some boards of lumber down in the yard?

A. Yes, sir.

Q. I suppose that necessitates watchfulness to prevent fire?

A. We are always watching for fires down there, of course.

Q. Now, if a cinder that has burned as far as you speak
2136 of in a board should light in the dust-room, what would be the effect?

A. Well, it would burn it up; it would be impossible to put out a fire there.

Q. I suppose it would be more dangerous as the material became more combustible, like dust or shavings?

A. Yes, sir.

Q. Do those piles that you place along the right of way remain there a great length of time?

A. No, sir; they are constantly being changed.

Q. So that then you practically have green lumber piled along the railroad as a rule?

A. Just as soon as it is dry enough to use it is taken away again.

Q. So that the dry lumber that would be likely to ignite easily is not left near the railroad track?

A. No, sir; if it gets especially dry before we wish to use, it is taken away.

Q. That is what I mean. Well, these cinders that fall in the yard usually fall upon comparatively dry lumber?

A. Yes, sir.

Recross-examination:

Q. Did the cinders down there in the yard ever set any lumber afire?

A. Well, that I don't know.

Col. ATKINSON: I want to ask one question more, first. Have you had any fires at all?

A. At the lumber yard?

Q. Yes.

A. Yes, there have been three or four there.

Q. Three or four fires started from what cause?

A. Well, in one instance it was a fire that I put out myself; that was in the summer season and I should say about thirty feet
2137 from the track where we had been unloading some lumber, the sawdust had jarred off the lumber and the fire caught in the sawdust there; it didn't burn to any great extent because there were men working right there and it was put out.

Q. What did it catch from?

A. Well, it must have caught from locomotives passing, because there was no other fire anywhere in the neighborhood.

Q. Then it is a fire that originated from the falling of cinders or sparks?

A. I attributed it to that; there was no other cause.

Q. Have you had any other fires?

A. There was a freight car caught fire there at one time directly after a train had passed it that was working very heavily, and there were two fires——

Q. A freight car standing on the track?

A. Yes.

Q. On the side track?
A. Yes, sir. Then there were two fires in the lumber; whatever caused it I don't know; I was not there at the time; when I came it was burning; it was in the night in both cases.
Q. Do you know of any other cause than the passing trains?
A. No, I don't.
Q. Didn't you have a barn burn there?
A. I was away at the time; there was a fire there. I had forgotten that there was a barn burned up.
Q. That was in the lumber yard?
A. Yes, sir.
Q. Do you know how far that is from the track?
A. I think about 35 or 40 feet perhaps.
Q. Do you know whether that fire was attributed to the railroad?
A. I don't; no, sir.
2138 Q. You don't know the cause of it?
A. No, sir.
Q. Do you know of any other cause except the passing of trains?

Mr. BAKER: I object to that. He says he don't know what the cause was, it is not a matter of conjecture.

Q. Whether you ever heard of any other cause than that.
A. No, sir.
Q. If it was burned up from some other reason we don't want to charge it to the railroad company. In how many years have these fires occurred that you speak of?
A. Since 1883, I think, this road came through there.
Q. Since the railroad was built there?
A. Yes, sir.
Q. You say there is a constant watch kept to prevent fires?
A. Yes, both night and day.
Q. Only green lumber left there near the tracks?
A. So far as it is possible to have it that way.
Q. Now, you know something of the material they use at the mill, I suppose?
A. Yes, sir.
Q. How does that compare as to being dry or green with the lumber down in the yard?
A. That has to be dry before it goes there.
Q. Do you know whether much of it is kiln-dried in addition to the seasoned?
A. Well, the kilns are working all the time; what percentage is kiln-dried I could not say.
Q. Is it of a lighter or heavier material generally? That is, cut up into smaller parts than down in the lumber yard?
A. Oh, yes, it is worked to the finisher.
Q. It would be more subject to ignite then?
2139 A. Yes, sir.
Q. At the mill than in the lumber down in the yard?
A. Yes, sir.

Q. I suppose around a planing mill that way there is always some little accumulation of shavings and combustible matter?

A. Yes, sir.

Q. It is impossible to avoid it?

A. It is impossible to avoid it entirely.

Q. In handling lumber is there a sawdust remaining on the boards, that gets shaken off as the lumber is handled, so that it accumulates around a mill of that kind to some extent?

A. Yes, sir.

Q. No board is ordinarily free absolutely from sawdust?

A. Not until after it is dressed.

Q. So that if you handle lumber itself there is necessarily a dust shaken from it?

A. Yes, sir.

Q. And when that is dried is it highly combustible or otherwise?

A. Very much so.

Q. Where are the kilns for drying lumber?

A. On the Fort Street side of the mill.

Q. They are quite large and extensive, are they—the dry kilns to the Backus plant?

A. Yes, about 75 by 90 or 100 feet, I think, there are four of them.

Q. Do you know what their capacity is at one time, the quantity of lumber they would take?

A. I think each kiln would take 60,000.

Q. That would be 240,000 altogether, then, full capacity?

A. I think so.

2140 Recross-examination.

By Mr. BAKER:

Q. When is the lumber put in these dry kilns, before or after it is worked?

A. Usually before it is worked, but sometimes after.

Q. It comes right up from the yard and is put in the kilns?

A. Yes, sir; that we usually haul directly from the dock front into the kilns. Sometimes the rough lumber from the yard is taken that way, the lumber that is ripped first, worked to width, and is taken from the River Street side to the kilns.

Q. Well, the lumber that comes up the River Street front is lumber that is worked in those machines on the first floor on River street, where it is resawed or dressed before it goes to the kilns.

A. It is ripped before going to the kilns, not often dressed before being kiln-dried.

Q. Ordinarily the lumber that goes through the dry kilns is hauled up the other way?

A. No, I think the greater percentage of it by far is ripped to width before it is kiln-dried.

Q. Then it is put into the kilns?

A. Yes, sir.

Q. Well, do you not mean to say that the superstructure there is so

low that a man cannot sit upon a load of lumber and drive along there?

A. I never noticed it, I never thought anything about it until the matter was spoken of just now.

Q. And the lumber is all hauled up with trucks and heavy draft horses, I suppose.

A. Yes, sir.

Q. You don't use any of Col. Atkinson's fast, skittish trotters, down there?

2141 A. Not often. Our horses are working there all the time.

Col. ATKINSON: I wish there was some use for trotters, Mr. Baker, and we would both be better off.

Q. You haven't noticed any of those truck teams running away with a load of lumber there?

A. None of ours have; aside from that I don't know anything about it.

Q. Well, this fire that you speak of that started in some sawdust, you think that was about 40 feet from the railroad track?

A. Why, I should say between 30 and 40 feet, I don't know as I could tell exactly.

Q. Was it on the ground in one of the alleys between the piles or on the lumber itself?

A. It was on the ground.

Q. Where some sawdust had rubbed off the boards and had accumulated where the wagon had stood?

A. Where they had been unloading cars.

Q. You had unloaded cars there?

A. We did at that time.

Q. And where the car had stood and the lumber had been handled, some fine sawdust collected on the ground?

A. Yes, sir.

Q. And you think that was 40 feet away from the track?

A. I should say about that.

Q. How did it get so far away from the track?

A. That is from the main track, I have reference to.

Q. This is on the side track?

A. Yes, there was at that time a side track that run in there.

Q. A side track on the Backus property?

A. No, sir, a side track on the right of way, and lumber

2142 had been handled from it in that way, about 40 feet from the main line.

Q. How much sawdust was there accumulated?

A. The ground was sprinkled over with it, I don't know to what extent.

Q. At one time that ignited?

A. Yes, sir.

Q. Do you remember when that was, what year?

A. No, but I think that was about five years ago this fall.

Q. Now, you say that there was another fire or two fires in the lumber yard there in some lumber?

A. Yes, sir.

Q. When were they?
A. Well, one of those I think was in 1885, and the other I think in 1886.
Q. How far from the track?
A. About 200 feet.
Q. Which way?
A. South.
Q. That is towards the river?
A. Yes, sir.
Q. Did you have a barn there?
A. Not anywhere near where those fires were.
Q. But you did have a barn down towards the river?
A. Over on the other side of Eighteenth street.
Q. How far away from the track?
A. That is, I think about 30 or 40 feet.
Q. Did that barn burn down at one time?
A. Well, it burned down while I was away, I was not at home at the time it burned. I know it was there when I went away, and the embers were there when I came back.
Q. How far from the barn were these two fires you speak of, one in 1885 and one in 1886?
2143 A. I should presume three or four hundred feet.
Q. Where was the fire, how was it burning, whereabouts?
A. It was on the edge of the yard, close where the Michigan Salt Company's shed now stands; that is, the railroad side of the lumber yard, and there were several piles of lumber burned.
Q. How far from the boat slip?
A. I presume likely 200 or 250 feet.
Q. About half way between the boat slip and the railroad track?
A. No, I think it was nearer the track.
Q. You don't know how that fire originated?
A. I don't.
Q. It was burning in the lumber itself?
A. Yes, sir.
Q. How much was consumed?
A. I think about 100,000 feet, one fire.
Q. That is one pile?
A. No, sir, several piles of lumber; one caught from the other, I presume.
Q. About 100,000 feet altogether?
A. That is my recollection of it; several piles anyway.
Q. Well, the same amount in both cases?
A. No, sir, the second fire burned only one pile, I think.
Q. How far was that from this other fire?
A. I think about 50 or 75 feet.
Q. Which way, towards the river or the railroad track?
A. Towards the track.
Q. You don't know how that started?
A. I don't.
Q. About how many feet were burned there?
A. I think one pile, about 20,000 or 25,000 feet.

2144 Q. Were those two fires in the night?
A. Yes, sir.
Q. Were you there the next morning?
A. I was there before the fire burned out—before morning.

Redirect examination:

By Col. ATKINSON:

Q. This boat slip you speak of—what was that used for? Mr. Baker leads us to possibly infer that the fires might occur from the cinders from some boat, instead of from the railroad. Did you have a boat that came into the slip there?
A. No, sir.
Q. You did not have any steamers come into that slip at all.
A. I think Mr. Baker had reference to the railroad slip.

Mr. BAKER: Yes.

Q. Oh, the railroad slips. How are those boats, high or low-pressure?
A. Low pressure.
Q. And they do not discharge any sparks, do they?
A. I never saw them, no, sir.
Q. You have never seen any sparks from the railroad ferries?
A. No, sir; the low-pressure boat does not exhaust through the stack; the high-pressure boat exhausts through the stack, creating draft enough to throw the sparks through the stack.
Q. That is the difference. Then these fires could not very well originate from the sparks from the ferry-boat?
A. I never saw a spark come from a low-pressure boat, through the stack.
2145 Q. You say you never observed any from any of these ferries, as I understand you?
A. No, sir.
Q. You think you would be likely to observe them if they had occurred to any extent?
A. Yes, sir.
Q. Now, you take these three properties there that are under the management of Backus & Sons; what can you say as to their being used all together or as separate properties?
A. They are all together.
Q. All constitute practically one business?
A. Yes, sir.
Q. And if the mill should be destroyed would it affect in any way the uses of the other property?
A. All the material that is used in the warehouse, or very nearly all, is prepared in the mill, and it is stored in the yard to be cured before being used in the mill.
Q. Then each part is essential to the whole; all are used practically together?
A. The three make one.

Q. And anything that affects the use of one affects the use of all, then?

A. Yes, sir.

Q. Your lumber yard there lies immediately adjoining the union depot grounds, does it not?

A. Yes, west.

Q. So that that is the first property west of the union depot grounds that remains in private hands, having a river front?

A. I think that is true.

Q. All the rest of the property from Eighteenth street up to Third on the river is in the hands of the railroad companies, or is there any intervening private ownership there?

2146 A. No, sir, it is not; it is all railroad property.

Q. So that in case of a new railroad coming into the city, seeking private property on the river, the Backus property would be the very first that it could get west of Third street?

A. Yes, having a river front.

Q. That is what I mean. And this right of way that we have been speaking of runs across that property?

A. It does.

Q. About how far from River street?

A. I think it is about 450 or 500 feet.

Q. From River street?

A. I think so.

Q. So that the Backus property has about four or five hundred feet in depth and about 400 feet on River street, between the railroad and River street.

A. The railroad divides the property about in half.

Q. They have a block, then, about 400 feet square on each side?

A. Just about that.

Q. One has the river front and the other has the River Street front?

A. Yes, and both but up to the railroad.

Q. The railroad cuts them in two?

A. Yes, sir.

Recross-examination:

Q. About how many thousand feet of lumber do one of these trucks carry in hauling lumber up to the mill?

A. I think about 3,000 feet.

Q. About how many loads will a team take up in a day?

A. Twelve loads; that is, from the yard to the mill.

By Col. ATKINSON:

2147 Q. Those loads are put up, I think, by other men, and are all ready for the teams to move with them?

A. Yes, sir.

Q. So that most of the day, then, is spent in their moving from one point to the other; the teams are not standing still to any extent?

A. Not at all, except to hitch and unhitch from one wagon to the other.

Q. Then, I take it, if your mill was much farther from your lumber yard you would require a great many more teams to do the business?

A. The team service would have to be increased with the distance.

Q. And would there be any other inconvenience that occurs to you besides the team service, from placing the mill at a greater distance from the yard?

A. Well, the nearer it is, the less expense.

Q. I suppose there is an interchange of labor also from one point to the other, and oversight?

A. If either place is short of help, the other furnishes help.

Q. That would be rendered more inconvenient by a greater distance of one part from the other?

A. Yes, sir.

Mr. BAKER: How long does it take a team to walk from the yard up to the mill?

Q. I think about fifteen minutes.

Recess till 2 p. m.

PETER HENKEL, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?

A. On the corner of Fort street west and Fifteenth street.

2148 Q. How long have you lived there?

A. About thirty years.

Q. How long have you been engaged in business in the city of Detroit?

A. It is now fifty years.

Q. And what kind of business have you been engaged in here?

A. In the grocery business principally.

Q. And other things?

A. Yes, provisions, the flouring business, milling business.

Q. You have been engaged somewhat in buying and selling real estate?

A. Yes, more or less.

Q. You have seen the growth of the city, then, for fifty years?

A. Yes, sir.

Q. And know real estate situations and relative values pretty well throughout the city?

A. Yes, sir.

Q. Do you know the property known as the Backus property on River street, where their planing mill is situated?

A. Yes, sir.

Q. You have been there and seen it?

A. Yes, I have been there many times.

Q. You know its situation relative to the Michigan Central?

A. Yes, sir.

Q. And its proximity to the business center of the city?
A. Yes, sir.
Q. And with the railroad facilities and proximity to the river?
A. Yes, sir.
2149 Q. Take the real estate there, what would you say was its value?
A. You see it is a very large piece of ground there, and adjoining the Michigan Central, and it is handy, and I think for manufacturing purposes it is worth about from $90,000 to somewhat over $100,000.
Q. You speak of the ground itself?
A. Yes, sir.
Q. Without the elevated structure that now passes it on River street, and situated as it was before that structure passed, what is your opinion as to its being a very eligible site in the city for Mr. Backus' business?
A. I consider it an excellent site for the Backus business, of course.
Q. In estimating its value you have put upon it only the value of the bare ground, and not what it is to Mr. Backus?
A. I say for manufacturing purposes, probably for any other purpose it would not be worth as much.
Q. What, in your opinion, has the valuation of the property been affected, if at all, by the building of this railroad structure in River street along its front, with the passage of the trains of the union depot over it every day?
A. The depreciation, you mean?
Q. Yes.
A. You see, it is an obstruction to the largest front of that property, and a very large obstruction, almost a confiscation—I would call it a confiscation if I owned it, all that property, a perfect confiscation—and I consider it a damage at least one-half of the whole.
Q. Of the real-estate values?
A. Of the real-estate value, yes, sir.
2150 Q. What have you to say as to the damage it would be to the manufacturing business now carried on there—the business itself, outside of the real estate?

Objected to as immaterial and incompetent.
Objection overruled.
Exception for petitioner.

Q. The Backus mill property, now the planing mill?
A. I consider the damage about the same as I stated before.
Q. At least a half?
A. A half, yes, sir; because I think it is almost impossible for Mr. Backus to do any fine lumber business there in any shape.
Q. Why?
A. On account of the smoke, cinders, obstruction to the light; he could not handle fine lumber there at all.
Q. You are no way interested in the matter?
A. No, sir.
Q. And are not interested with Backus at all in business?

A. No, sir.

Q. Since you knew you were to be summoned as a witness did you visit the mill?

A. I have been there many times.

Q. Have you been there since the structure was put up?

A. Yes, sir.

Q. Have you seen the effect of the smoke from passing trains yourself?

A. Yes, sir.

Q. And to what extent have you seen the smoke in the mill?

A. It darkens the mill, and it is almost impossible for Mr. Backus to keep the windows open on that side; the smoke will run through the mill every time a train passes, and those trains pass a good many times.

2151 Q. Did you see anything of cinders around there?

A. Yes; that is what I stated before—he cannot handle any fine lumber there.

Q. In your visit to the mill did you see the cinders about the lumber?

A. Yes, sir.

Q. To what extent—enough to injure or mark it?

A. I seen the dust from the smoke in some of his fine lumber so that I could write my name on it, and it was all blackened up, it penetrated into the lumber—not that it was laying on the outside, but it really blackened and penetrated into the lumber.

Q. Now, in buying the property for a manufacturing site, having railroad facilities as it has with the Michigan Central, and then having run by it this superstructure for the passage of trains of the union depot company, what have you to say as to whether, in your opinion, there will be a market for the property with that obstruction there, for fine manufacturing purposes?

A. Well, for fine manufacturing purposes it would be almost worthless; but for common, rough manufacturing purposes it would be a very good situation.

Q. With your experience of fifty years in the city of Detroit, and your observation of the growth of the town and eligible sites for business purposes, manufacturing and otherwise, if you were looking for a site or desiring a site, would you buy such a place as that for fine manufacturing purposes?

A. Certainly not.

Q. Would not have it?

A. No, sir; not the way it is situated now.

Q. Not with the superstructure by there and the running of trains as you observed it?

A. No, sir.

2152 Cross-examination.

By Mr. BAKER:

Q. What do you call fine manufacturing purposes?

A. Well, for instance, I would not put our mill there—flouring mill.

Q. A flouring mill is fine manufacturing, then, as you understand it?

A. Yes, sir.

Q. Your flouring mill is on the corner of Randolph and Woodbridge?

A. Yes, sir.

Q. And it is not anywhere near a railroad?

A. No, sir.

Q. Did you ever have a flouring mill alongside of a railroad?

A. No, sir; not that I owned.

Q. Do you know another mill in this city that is not alongside of a railroad?

A. No, sir.

Q. Do you know a flouring mill in the United States except yours that has not got railroad connections?

A. Yes, sir.

Q. Whereabouts?

A. Out in the country, I have seen some of them.

Q. Some country grist mill?

A. Yes, sir.

Q. But I mean a large mill where they manufacture flour to a large extent—they all have railroad connections, don't they?

A. I hardly recollect any of them.

Q. Have you ever been in Minneapolis, the greatest flouring center in this country?

A. I have not been there. I know one thing, Mr. Baker, that
2153 when there is considerable smoke around our mill on Randolph street that we often have to close the windows.

Q. That is from the manufacturing institutions in your vicinity?

A. Also from the steamers that pass along there, and from the railroads also.

Q. Certainly.

A. I know that it is a great injury to the mill.

Q. If you have a flouring mill or manufacturing institution or residence in a thickly settled city, you are apt to find more or less of it, anyhow, aren't you?

A. Well, not in a thickly settled city.

Q. Well, you found it down there?

A. I find it down there where we live from that very railroad. That railroad has depreciated my property down there over one-half.

Q. The railroad has?

A. Yes, that very railroad.

Q. How far is the Milwaukee railroad from your property?

A. I mean Fort street west.

Q. Where is your property down there?

A. On the corner of Fifteenth.

Q. Oh, there is where you live?

A. Yes, sir; before this railroad passed along there we could hang clothing out to dry and we had very nice fruit, and now we hardly can grow any fruit at all on account of the smoke and cinders

that are brought along there by this very railroad, we can hardly keep a window up.

Q. You would be a great deal better satisfied then if there never had been a railroad built down there or a manufacturing institution of any kind?

A. Well, I would not say that exactly. We had manufacturing institutions there before.

2154 Q. Now, don't you think it would be better to have these institutions all moved out of there so that you could enjoy your fine house?

A. Well, so far as living down there it would be better, yes, sir.

Q. Yes, it would be a great deal better?

A. Yes, as far as living down there.

Q. And don't you think that your relation to the railroad, your proximity to it, affects your judgment some as to the damages, for instance, in this case?

A. Not at all.

Q. Now, you never run a planing mill, did you?

A. No, sir.

Q. Have you ever been in the Saginaw valley?

A. Yes, sir.

Q. Have you been in the planing-mill and saw-mill district there where railroads run right through the institutions and all about them and everywhere?

A. I have not been there since 1856.

Col. ATKINSON: I don't think there is any such case.

Mr. BAKER: That shows you have not been there.

Col. ATKINSON: I have been there a great many times.

A. You asked me before if I have been in the Saginaw valley. I was there in 1856, but have not been there since.

Q. You were never in Minneapolis?

A. No, sir.

Q. What large manufacturing district have you been in? Have you ever been in Pittsburg?

A. Yes, sir.

Q. In the manufacturing district?

A. I have been in Cincinnati and Chicago and Louisville.

Q. They have about ten times as much smoke down there as we have here, don't they?

2155 A. Well, not any more than what there is in that vicinity where the Backus mill is.

Q. The more manufacturing institutions, the more smoke?

A. I presume there is.

Q. You say you think that property is practically destroyed for manufacturing purposes. Do you know that since this elevated railroad was built there the Diamond Match Company have made very large improvements on their property, that the mill had been idle for years and they have just improved it and remodeled it and put in a plant there.

Objected to as incompetent.

A. It probably would not injure the matches, neither the wood that they use.

Q. Yes, but it is a manufacturing institution?

A. Yes, sir.

Q. Don't you also know that since this superstructure was put up there, that the Peninsular Stove works have made very large additions to their works?

Objected to for the same reason.

Objection overruled.

Exception for respondents.

A. It has been a damage to them.

Q. Well, they go right on with their business and enlarge it?

Same objection, ruling and exception.

A. That I don't know.

Q. You have not been out there recently?

A. I have not been down there since a year ago.

Q. Have you been up River street since this superstructure was built?

A. Yes, but not in front of the stove works.

Q. And on the other end?

2156 A. On the other end of Backus'; I have been there several times.

Q. Have you been under the railroad crossing there or been on the Michigan Central tracks?

A. Yes, sir.

Q. You go up as far as there and walk from there down to Twelfth street?

A. I have been as far as Backus', because I did not want to go any further. I do not like to cross railroads, and it is not a pleasant walk down there; I had no particular business.

Q. When did you make that visit?

A. Oh, that visit I would make almost every Sunday, just for my pleasure, when the weather is good I take a walk on River street and on Fort street.

Q. How far is it from your house to this railroad?

A. It may be 600 or 700 feet.

Redirect examination:

Q. You were asked about manufacturing institutions and flouring mills situated upon a railroad. Do you know of any manufacturing institution anywhere in the United Stated situated upon a railroad that does not work upon iron-work and things that cannot be affected by this sort of nuisance from smoke and cinders?

A. It has never been my particular business to look for anything of the kind.

Q. They usually have a switch run in?

A. Yes, sir.

Q. And situated as the Backus property is to the Michigan Central?

A. No, it is very seldom they are so close up to the railroads.

Q. Now, did you ever know of any manufacturing in-
2157 stitution of any kind situated alongside of an elevated structure that run by the second story?

A. Yes, sir, in New York city.

Q. What kind of manufacturing institutions there?

A. Well, mostly stores, I don't recollect manufacturing.

Q. What effect did it have upon that property there?

A. Well, this effect, that some of those business places rent for about 25 to 50 per cent. less than they did before.

Q. And those very light passenger coaches of the lightest kind running upon a light trestle?

A. Yes, sir.

Q. Not heavy trunk lines with heavy locomotives. You speak of the New York elevated railroad?

A. Yes, sir.

Q. Used for passengers only?

A. Yes, for instance, on Greenwich street, I have been there before this elevated railroad was built there.

Q. Did I understand you to say that you had been in Minneapolis?

A. No, sir.

Q. Mr. Baker asked you the question whether you didn't know that the railroads ran right by the flouring mills. I will ask you a question, embodying the truth of the whole question as to the railroads, if you do not know that the mills are provided with stationary engines by which the cars are drawn up to the mill so that the locomotives never come near them?

Mr. BAKER: That is on the side tracks; I am talking about the railroads.

Q. On the side tracks they run the cars in, instead of taking the locomotive in that will throw smoke and soot, they run them in with a stationary engine.

A. They generally back them in, and the locomotive keeps away from the mill entirely.

2158 Q. The mills there run them in with stationary power and keep the engines out. That is all.

Recross-examination:

Q. Did you testify that you don't know of any manufacturing institutions alongside of a railroad except those that work in iron? Mr. Dickinson included some such thing in his question, and I want to know whether you so testify?

A. I don't recollect any.

Q. Do you know where the Pullman car works are out on the Milwaukee road?

A. Yes, sir.

Q. Do you know where the Peninsular car works are out on the Milwaukee?

A. Yes, sir.

Q. Do you know where the Murphy & Wasey chair factory is?
A. No, sir.
Q. Right in a V of railroads?
A. No, sir.
Q. Do you know the Dwight planing mill and factory on the Michigan Central, hardwood lumber and so on; have you ever been there?
A. No, sir.
Q. Then all you mean to say is that you do not happen to know of any such thing, that you do not know yourself of a wood-working institution that is alongside of a railroad.

Col. ATKINSON: Do you rank the Pullman car works and the Peninsular car shops as institutions not working in iron?

Mr. BAKER: They work in wood-work, and the nicest wood-work in this country that I have seen.

A. But they use it themselves.
2159 Q. Use what?
A. The wood-work.
Q. Why, they make the cars in these car works.
A. They do not have it lying for sale or anything of the kind.
Q. Well, I do not know about that, I do not know how long they keep it; I guess they build under contract, and as soon as they are done they are shipped away?
A. I do not believe it will affect hard wood quite as much as soft wood, as pine especially.
Q. What I was trying to get at, whether it was your idea that there were no such institutions, no wood-working institutions that wanted railroad facilities or that had railroad facilities.
A. I did not say so.
Q. You did not mean to testify that way?
A. No, sir.
Q. How close is your dwelling to the Michigan Central?
A. That is, from the Fort Street bridge there, probably 500 feet.
Q. Then you are nearer the Michigan Central than you are the union depot company?
A. Nearer the Wabash than to the Michigan Central.
Q. Are you not nearer the Michigan Central than you are the Wabash?
A. Nearer the Wabash.
Q. I meant on a direct line. From the railroad bridge to your house, isn't it a shorter distance than it is from your house to the Wabash?
A. It is a shorter distance from my house to the Wabash, it is about six or seven hundred feet, and I think it is 1,500 feet from the Michigan Central.
Q. Was the Michigan Central there when you built your house?
2160 A. I think it was, yes, sir. I did not build the house, I bought it.
Q. How long have you lived there?

A. Something like 30 years.
Q. In the same house?
A. Yes, sir.
Q. Was the Brooke & Daley saw-mill there when you built your house?
A. Yes, sir.
Q. What else was there on the river front?
A. There were several saw-mills there on the river front, but the cinders from a saw-mill is different from where they use coal; they use their refuse in a saw-mill, and it is different from using coal.
Q. Then the saw-mills did not obstruct the river view quite as much, I suppose. There was more open space so that you could look at the river?
A. Yes, sir.
Q. There was a good deal of vacant property down there those days, too, was there not?
A. Not any more than what there is now, but they did not obstruct the view quite as much as the Union elevator, it is a higher building.
Q. There is a block of houses built up on the block that lies between the River road and Fort street, isn't there, that used to be largely vacant?
A. No, sir.
Q. It never was vacant in your time?
A. No, there were a good many small houses standing there.

By Col. ATKINSON:

Q. Do you know the other property used in connection with this mill by Backus & Sons, the lumber yard?
A. You mean the property further down the river, on Seventeenth street.
2161 Q. Yes, the lumber yard.
A. I think it is Seventeenth, or is it Eighteenth?
Q. Eighteenth, I think.
A. Yes, I know that.
Q. And their warehouse on this side of the bridge over the Central?
A. Exactly; yes, sir.
Q. Now, do you know how they are used in connection with each other by Backus & Sons?
A. Yes, sir.
Q. Practically all used as one plant, are they not?
A. Exactly; yes, sir.
Q. Now, what, in your judgment, would be the injury to all that property, taking it as a whole, to its rental value by reason of this structure?

Objected to as wholly immaterial and incompetent.
Objection overruled. Exception for petitioner.

A. I think if Mr. Backus has to give up one of the three, especially the mill, he would have to give up the others also.

Q. Take the three properties as a whole, used together, how would it affect their rental value, say, how does this structure affect it; what percentage, in your judgment, would it decrease the rental value of those properties?

A. That on Fort street probably would be entirely useless for any other purpose.

Q. That is the warehouse?

A. Yes, sir; and on Seventeenth street, I don't know—the property would not be affected so much, because it is dock property and always would be rentable for something.

Q. Bring something?

A. Yes, sir.

2162 Q. But taking the three together, do you think the Fort Street property, the warehouse around there, would be practically rendered useless for any other purpose?

A. I don't believe that Mr. Backus could get along without all three together.

Q. And the rental value of the mill, you say, would be decreased at least one-half?

A. One-half.

Q. And I suppose the other property would be rendered somewhat less valuable, although it might rent for something?

A. A good deal less.

Q. Now, what would be your judgment approximately of the injury to the other property, to the rental value? I am confining myself to that now.

A. The warehouse—I could not say for what purpose that could be rented or used. It probably would be entirely worthless; they might have to take it down. The dock property could probably be rented for the same purpose, for storing purposes.

Q. Would it lose any portion of its rental value?

A. Not for lumbering; it could not be used quite as well, because the railroad runs along there, it is damaged along there also, but for stone and lime or anything of that kind it could be rented.

Q. But this structure running along River street injures the lower property as well as the other, does it not?

A. It injures Backus' business entirely.

Q. Injures the whole business in all its parts?

A. Yes, sir.

By Mr. ROBISON:

Q. You said that your store was injured by smoke and cinders and one thing and another?

A. The mill.

Q. Where is that mill?

A. On the corner of Woodbridge and Randolph.

2163 Q. What railroad?

A. Well, the D. & M. railroad is close by there, not a great ways off.

Q. It is a flouring mill, isn't it?

A. It is further east, quite considerably east, where the locomotives stop—the yard I mean.

Q. That is a flouring mill?

A. And the steamers injure us more than anything else, the steamers that pass up and down the river.

Q. How far is your mill from where the steamers pass?

A. Probably 300 or 400 feet.

Q. And the railroad—you don't think there is any injury from that?

A. The yard is considerably off.

Q. How far?

A. Oh, it is probably 800 feet off, or nearly 1,000.

Q. How far from the river, in front of your house, does the Wabash run down there?

A. It may be 400 feet.

Q. Now, are you not mistaken about its being further from your house at Fifteenth street to the Wabash road than it is from there to the Michigan Central on a direct line?

The COURT: You got that reversed.

Q. He says it is further to the Michigan Central.

A. It is nearly a half mile on Sixteenth street to the Michigan Central.

Q. I don't mean on Sixteenth street, I mean across lots from your house to the nearest point of the Michigan Central.

A. That is still farther.

Q. The map does not show it.

A. I think it does if you look at it close. You see, I live on the west side of Fifteenth and Fort, and the Michigan Central is between Eleventh and Twelfth.

2164 Q. When the Michigan leaves the bridge it runs in a diagonal direction, does it not?

A. Yes, sir.

Q. When you get directly opposite your house, running southwest, say?

A. I think it is both ways a half mile.

Q. Then the map I looked on is certainly wrong.

A. Well, I could not tell within a few feet.

Q. No, certainly not.

Col. ATKINSON: I don't think he gets your idea by both ways he means Fort street and Sixteenth.

A. No, I mean Eleventh street and Fifteenth.

Q. The Michigan Central crosses Fort street at what street Twelfth, isn't it?

A. It passes between Twelfth and Eleventh.

Q. You live on the corner of Fifteenth?

A. Yes, sir.

Q. Well, that is a little over three blocks and a half?

A. Well, they are good long blocks.

Q. Yes, but it is three blocks and a half?

A. Yes, it may be a little less than half a mile.

Q. But it is considerably further on Sixteenth street.

A. If you have a map here you can tell at once. I think it is about the same distance on Sixteenth as it is on Fort.

Q. Between Twelfth and the bridge and Sixteenth the road comes nearer to your house—about half way between Twelfth and Sixteenth, take from the railroad and go across lots to your house?

A. Very little; yes, sir.

Q. You say that this railroad, in your estimation, has injured Backus' property one-half, there on the railroad?

A. On account of the Wabash, yes, sir—not only on account of the smoke, but the obstruction.

Q. Light and everything?

2165 A. If you obstruct the front of my business place you might just as well have the whole of it in any shape, it don't make any difference where it is.

Q. The market here obstructed your view to your store?

A. It did, and I applied to the supreme court several times and it cost me over $1,000 in lawyers' fees. The lawyers got the best of it and I got the worst of it.

Q. And the market stayed?

A. And the market stayed; yes, sir.

Q. You say that the property on Fort street is injured half in value?

A. I didn't say so.

Q. Well, how much do you think that has been injured?

A. I say if the mill was useless the property on Fort street would be useless.

Q. How much is it injured as it stands now?

A. I think it is injured just as much as the mill is.

Q. One-half?

A. Yes, because if Backus uses that property on Fort street for storing fine lumber and handling fine lumber, if he has to bring it somewhere else than to his mill, it would certainly diminish it in value to Backus.

Q. Well, you don't think the railroad down there—the railroad itself—injures that property up there, do you?

A. On Fort street?

Q. Yes.

A. I didn't say so.

Q. But it is because of the injury to the mill property?

A. Because of the injury to the mill property.

Q. He could manufacture fine lumber somewhere else and store it over there as well as he could if it was manufactured in this part of the city?

A. Well, but it would make so much more expense every day.

2166 Q. To draw it over there?

A. Yes, and that, of course, would be a big injury.

Q. You think it is injured one-half?

A. According to the situation now.

Q. Yes, just as it stands?

A. If Backus wanted to use that property in connection with the mill, I say it is injured one-half.

Q. What is it worth anyway?

A. But if you don't want to use it in connection with the mill it might be worth different.

Q. How much is it worth as it stands?

A. I could not tell you what it is worth. Does he own the real estate where the warehouse is?

Mr. DICKINSON: Yes, he owns it.

A. I could not tell you exactly what the damage there would be.

Q. Well, what is the property worth there? You have an idea of what property is worth on Fort street?

A. On Fort street, according to the depth of the lots, probably worth in that vicinity $100 or $120 a foot.

Q. As it is now?

A. That is according to the size of the present lots.

Q. You think that property is worth from $100 to $120 a foot?

A. Yes, sir.

Q. And if Backus' mill—you think that is worth just as much as the property next to it—all property along there is worth about the same price, isn't it?

A. No, sir, no such thing as that; Backus' situation or lot there is worth considerably more.

Q. Worth more than the property next to it, is it?

A. Yes, sir.

Q. What is the property next to it worth?

A. That is more than I can tell you, but what I saw sold
2167 there or what I heard, I heard that was sold to the Michigan Central and to the Wabash, I believe it has been sold at a very high price.

Q. More than it was worth?

A. Well, probably it is; I could not say. Some of it had been sold for five or six or seven hundred dollars a foot.

Q. Don't you know the market value of property right along where Backus' warehouse is on Fort street?

A. I have not seen any sold there on Fort street, that is, on the other side of the bridge; I mean on the west side of the bridge.

Q. This is on the east side of the bridge?

A. This is on the east side of the bridge.

Q. Along there where that warehouse is you don't know the market value of land?

A. I think the market value is from $100 to $120 a foot.

Q. That is the same as you say Backus' is worth now?

A. Yes, where the warehouse is; I don't mean to say where Backus' mill is.

Q. If this elevated road had not gone along there Backus' property would be worth $240 a foot, you think, where his warehouse is? It would be worth twice as much as the other property?

A. I think you are mistaken with me.

Q. You say that Backus' warehouse property is worth now from $100 to $120 a foot?

A. I say to Backus, yes, sir; it would be worth about half of it, in connection with your mill, you understand, to Backus—I didn't say that property was worth one-half; I mean for the purpose of using it in the hands of Backus.

Col. ATKINSON: You didn't say the market value?

A. I didn't say the market value.

By Col. ATKINSON:

Q. You have lived down there in that region for a long
2168 time, you say. From what direction are the prevailing winds in your part of the city?

A. The prevailing winds are generally southwest.

Q. So that the smoke from the Michigan Central, even if it was as close as the Wabash, would not be likely to annoy your place?

A. No, sir, it has never annoyed me any before.

Q. The Michigan Central runs to the northwest?

A. Yes, sir.

Q. And the other runs to the southwest?

A. Yes, sir.

Q. That is so also, isn't it, with the Backus property?

A. Yes, sir.

Q. Then have you had occasion to notice whether a road elevated like this structure is more liable to deposit cinders and dust than a road that is lower than the business property?

A. Yes, sir, it throws the cinders and smoke about three times as far as one on the ground, and especially with the Michigan Central, it is deep.

Q. The Michigan Central is lower than the grade instead of being higher?

A. Yes, sir.

Q. And on the side that the wind carries the cinders from, rather than towards, the mill?

A. Yes, sir.

GEORGE W. ROBINSON, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?

A. In Detroit. I have lived here for about 28 years.

Q. What business have you been engaged in?

2169 A. Most of the time in the lumber business; all the time, I might say, or nearly all the time.

Q. You carried on a planing mill, did you not?

A. Yes, sir.

Q. And you are familiar with the planing-mill business?

A. Yes, sir.

Q. You have been engaged in all sorts of lumbering in the rough and in the manufactured state?

A. Yes; I have been dealing in all classes of pine lumber and sometimes hardwood, but chiefly in pine.

Q. Where have been your places of business?

A. I have been operating a yard where the Wabash tracks are, the union depot company tracks at the foot of Twelfth street, or just a little below the foot of Twelfth street, between Fort and River, on Tenth street, and Twenty-fourth street and the Michigan Central railroad.

Q. Where was your planing mill when you were engaged in it?

A. Twenty-fourth street and the Michigan Central.

Q. Mr. Baker has said something about the planing mills of the Saginaw valley. Do you know something of them?

A. I know something of them; have been there a number of times, in some of them.

Q. What kind of mills are they?

A. Well, the greater part of the planing mills of Saginaw and the valley are planing mills proper, and are not connected with other manufacturing institutions such as box factories, but the greater number of them are merely planing mills. There are some box factories but not many of them connected with the planing mills proper.

Q. They are small affairs comparatively?

A. The greater number of them are; there are some very large mills.

2170 Q. Anything up in the Saginaw valley to compare with this Backus mill?

A. Not that I have ever been in.

Q. Have you seen any?

A. I have seen at a distance from the road the Germain property, which did look to be very extensive before it was burned down, but I never was in that property and don't know exactly what it was.

Q. You don't know what they did there?

A. No, sir.

Q. Now, are any of the planing mills there situated upon the main track of a railroad?

A. Not that I know of; not that I have ever been in myself; they have side tracks. I think there are one or two small planing mills, very small planing mills, in Bay City that I passed going in, but they were very small affairs and I paid little or no attention to them; merely some local affairs.

Q. Do you know the Backus mill property?

A. Yes, sir.

Q. Do you know its relative situation to its lumber yard and its storehouse?

A. I am well acquainted with it.

Q. Do you know the whole thing is run together as one plant?

A. Yes; all who are acquainted with the business know that.

Q. That it is one institution, one feeding the other and working harmoniously together?

A. That is the way I have always understood it, and in fact have seen them haul from the yard to the mill and from the mill to the warehouse, as I understood, being located as conveniently together as they possibly could get them at the time the land was purchased.

Q. What have you to say from your knowledge and from
2171 what you know of the mill and the plant, as to whether it is advantageously situated in the city? I am speaking now of the time prior to the superstructure being built there, the elevated railroad.

A. I would say that it is arranged as nicely and as to as good advantage as anything I know of, or better than anything I know of in the city, the arrangement of the docks being near to the mill and the mill not very far from the warehouse, and the whole plant being in the heart of the city, was nicely arranged for business.

Q. Do you know of any more eligible plant for the business carried on, such as Mr. Backus carried on in the city of Detroit, than he had there?

A. No, sir, I do not.

Q. Do you know something of the extent of the Backus business, and the amount of raw material he handled in connection with the capacity of the mill?

A. I have inquired of them.

Q. You compete with them in the lumber business to a certain extent?

A. Yes, if they have a good customer I try hard to get him. And the business is very large. That is, I have seen a number of teams hauling lumber from their docks to the mill, and the amount of lumber on the docks and the amount of lumber going into the warehouse, it must be a good large business.

Q. How as to their acquiring large assortments of lumber as they carried on the business up to 1893, prior to the building of this superstructure?

A. I know they have brought in large quantities.

Q. Well as to working up large assortments of lumber and acquiring them on hand?

A. I know that from the mill and the capacity of it that they have advantages in manufacturing that are not equalled by any other concern in the city.

2172 Q. Anything in the State, we will say.

A. Anything I have ever been in. There are a few of them I have not been in in Saginaw, but I think the Backus mill will compare favorably with any mill in the State I know of; it will compare favorably with any mill I have been in and exceed, I think.

Q. You have been in the mill as it was when it was running to its full capacity, in the fore part of 1892?

A. I could not say whether I was ever in the mill when it was running its full capacity, but when it was taking in a large amount of lumber. I hardly know what the full capacity of that mill would be.

Q. But you would consider it very large?

A. Yes, sir.

Q. Running up into millions of feet?

A. Oh, yes.

Q. And what kinds of lumber were worked up there?

A. I have paid more attention to the pine lumber than I have to the hardwood, although I know they have been buying largely of hardwood and have seen considerable hardwood both in and around their mill and in the warehouse, but I have paid very little attention to that part of it.

Q. Do you know whether in this business such as is carried on in the Backus mill, or was carried on in the Backus mill, the competition is very sharp in the markets of the country?

A. The competition in lumber is sharp.

Q. The competition in the products of such mills as this is sharp, is it not, in the markets of the United States?

A. Yes, sir.

Q. And upon what must a concern of this kind depend for its profits or its life?

A. Well, it would be very largely in manipulating the
2173 different grades of lumber and the working them and cutting them to advantage.

Q. Narrow margins, I suppose?

A. Very narrow.

Q. And there must be a great volume of business in order to make it succeed?

A. Naturally, in the lumber business, there has to be a very large volume in order to make a success of it.

Q. And is the manner of the arrangement of the mill and the appliances and machinery and that sort of thing a matter of importance in making both ends meet with these narrow margins?

A. Oh, yes; a mill and lumber business conducted without the appliances necessary would be a losing operation.

Q. I suppose there is profit in the fancy work in fine woods, in inside workings—pretty good margins?

A. Yes, sir.

Q. Now, upon that class of work, inside or fancy work, suppose in the product there are some blemishes, does it affect the market value?

A. Yes, sir.

Q. Defects, blemishes or faults? And do discolorations affect it?

A. Yes, anything that will go to make a defect in the better woods affects the value of it. For instance, we may have a very nice piece of lumber that would be very nice for oil finish, but if there is a defect in it it has to be put into painted work which will not sell for nearly the price if it had no defects.

Q. A thing that has a small defect in it, it does not hurt the service of the goods, the actual utility of the goods, but does it not take off a percentage of from 25 to 50 per cent. in the salable market values?

A. Yes, sir.

2174 Q. Although the utility of it may not be injured by the blemish?

Q. It may be perfectly good for painted work when it is not good for oil finish. The greater part of good material is used for oil finish today.

Q. Have you any interest at all in the Backus matter?

A. Not a cent.

Q. Now, have you seen the workings of this superstructure and the railroads going up there?

A. Yes, I have seen them.

Q. In your judgment, does it affect the mill for the purpose for which it was carried on, prior to the building of the superstructure and these railroads running by there upon this trestle?

A. If it was my own individual matter, I feel confident that I would try to move out.

Q. You would not attempt to carry on that kind of business that Mr. Backus had carried on there?

A. I would not unless really compelled to, I would not with a view of thinking there was or that there could possibly be a profit in conducting a business hampered by the road as that is at present.

Q. I suppose that the elements that exist there with the two or three or four roads running over there, and the concern being yet in its infancy, the union depot company having just started, I suppose the tendency will be worse instead of better in the increase of business in the railroads?

A. It would be natural to suppose so.

Q. Now, as a planing-mill man, engaged in planing-mill business, or in this fine wood-work such as is carried on there, would you, in looking for a site for the purpose of building a planing-mill to compete with your brethren in that kind of business in the markets of the United States, erect a mill on this place, on this superstructure?

2175 A. No, sir.

Q. If this were given to you, if you could have the property or the site there and desired to erect a planing mill, would you take it if you were compelled to build a planing mill upon it?

A. No, sir, I would not.

Q. To do this fine wood-work, such as they do there?

A. No, sir, I would not.

Q. How was it before this structure was put up there?

A. As far as I could see there was not anything to hinder them from doing a profitable business; the docks were not away so far but what they could haul at a reasonable expense, and the street was open so that customers could come in and get what they might wish and people would have access to the mill; whereas, at present, all those advantages, except the nearness of the dock, are done away with, and I think if I were wanting to buy any lumber I would not drive around on the River road underneath that structure, nor undertake to go and see a man or firm, no matter how much I would wish to deal with them. I would not go in there to purchase lumber, that is annoying in a great many respects, and particularly to a person going in there; it is almost impossible to hear a conversation when the trains are passing; and ordinary tone of voice cannot be heard in the confusion.

Q. You have observed the smoke and the pouring of the smoke down into the windows there at times from the passing trains?

A. In cloudy weather on a great many days the smoke falls; it not only falls, but it makes it cloudy and dark.

Q. What have you to say to the need of light in this fine planing-mill business?

A. In order to do any good work you must have good light.

Q. Is it an absolute essential?

2176 A. It is absolutely necessary. You must have light or you cannot do your work right in the planing-mill.

Q. In this case of light and steady light, are they not, in setting the gauges, liable to make a mistake and make these flaws in the work?

A. They are, and a machine may get out of order, as a machine will occasionally in running, and if the light is not good enough to detect it quite a quantity of lumber may be destroyed before it is observed.

Q. That is, make these blemishes to which you have referred?

A. Yes, sir, a machine may get out of its proper gauge a very little, or may be off the center, or from anything that may be on a piece of board; there may be a chip, and if it is dark that may not be observed until several boards or pieces may be run through the machine, and just as many of those as are run through with that flaw in the planing-machine knife are spoiled, and they must be sent back and made into something else or else thrown away. It may be such a class of lumber or moldings that cannot be well made over, and they are culls instead of first-class in such a case.

Q. Well, the moment there is any considerable quantity of that, with the narrowness of margins and the competition in the trade, I suppose it takes off the profits and makes it a losing instead of a paying business?

A. It takes but a short while to take the profit off from a thousand feet of lumber.

Q. And make out of a large business a losing one instead of a paying business. Relatively, what is the proportion of profit made in molding as compared with other coarser lumbers, correct and perfect molding?

A. Well, the percentage is much higher. I can hardly say what would be a correct estimate. I will say this, that is where the

2177 profits of a business of that kind comes in; where a large part of the profits come in is in the manufacturing of those moldings and fine work; it is not in the coarser lumber.

Q. Running the ordinary business of a planing mill, without this additional instance of fine work in molding, is there any profit now in the condition of the trade?

A. It is so very small we can hardly discern it.

Q. But in making fine work I suppose there are other pieces that come off that are used for culls or in coarser business?

A. Yes, that is correct; we may if we have proper machinery, and proper facilities and what might be quite a common board or even what we term a cull board, we may take from one side of it a

piece that would be worth more than the entire board, when it is manufactured into a piece of molding or casing that would sell at a higher price.

Q. Now, in the bringing in of lumber by railroad cars, with which you are familiar, will you state whether, from its progress over the railroad, the lumber is at all covered with cinders in coming in?

A. The lumber on flat cars, as it was usually shipped years ago and is occasionally shipped now, but very seldom, that is the better grades, has always a large amount of cinders on it, with the cars nearer to the engine, but in the rear end of the train, perhaps not very much, but if a flat car should happen to be near the engine, it is sometimes covered heavily with cinders.

Q. How near the engine?

A. It might be anywhere from the first to the fourth or fifth car back. It would decrease in quantity as it would go back from the the engine.

Q. In the bringing in of lumber into the city by rail, is it
2178 a part of the duty or is it not in the invariable rule that the first thing to do, if it comes in an open car, is to clean off the cinders?

A. If it is good lumber we always do that as far as we can.

Q. It is expected to come in with cinders?

A. Generally. We sometimes get in some with very little on.

Q. Is that the rule or exception?

A. That is perhaps the exception. There is scarcely a car comes in but what has cinders on it.

Q. That being so, what is the rule when fine lumber is shipped now?

A. The rule, when we are shipping fine lumber, is to always ship it in box cars.

Q. What is the reason?

A. On account of the cinders and partially the weather, but the cinders have as much to do with it as anything, I think, that is in the rough state.

Q. Give the jury some idea of the amount of cinders that are thrown from the engine upon these cars?

Q. As I stated, in cars away from the engine there is very little, but I think I hardly ever saw a flat car but what had some on, some finer and some coarser, but I have seen on cars that apparently were near the engine, in quantity, if I was able to judge, in size, as much as a half ton of coal cinders. They would not weigh so much——

Q. In bulk, gathered together?

A. Yes, I have seen them so. They would work down through the car until almost when the last board was taken off, we would find cinders, where they would work down through, and we have always to be very particular to sweep those off before we send them to a planing mill. We cannot get them all off always, but there is a very large quantity of cinders on those cars.

2179 Q. Are you familiar with the dust that arises in a planing mill?

A. Yes, sir.

Q. To what extent have you run planing mills yourself?

A. I have been connected with them for several years. I am not running any at present, but at different times I have been engaged in it and I think thoroughly understand the running of a planing mill.

Q. What is the character of this fine dust that is made in a planing mill, as to explosiveness?

A. As to that I have not any experience.

Q. Very well, we will pass that. Now, have you seen the character of the machinery in the Backus mill?

A. Yes, sir.

Q. What have you to say as to its character and perfection?

A. In my opinion the machinery in the Backus mill will equal any planing mill I have ever been in, if not surpass it.

Q. It is kept in first-class condition?

A. As far as it is possible for the observer to see.

Q. Something has been said as to the cost of patented machines that are put in this mill. What have you to say as to the relative value of a machine bought at the shop, if you please, in Albany or wherever it may be procured, and the value of the machine as set up and running with the equipment added and adjusted in the Backus mill?

A. As far as I could see, it would be very foolish for Mr. Backus to take out one of his machines that is in proper trim, having been properly adjusted, and take a new one from the shop and put it in its place. It would be very foolish indeed, I think.

Q. Well, put it in this way, relative to the cost of the ma-
2180 chine as purchased in the market and the cost of the machine as set up, and adjusted in the Backus mill, or as has been said, Backusized?

A. I consider that the machine properly adjusted is of more value than the machine bought.

Q. And the adjustment of it in the mill and equipping it costs considerably more than the original machine?

A. It costs considerable to set up a machine and put it in running order, even the best of them.

Q. What is the relative value in this kind of business of a machine that has been tested in the mill and is adjusted in its relation to the other parts of the mill and machinery, and a new and untried machine?

A. Perhaps I can hardly give a correct idea of the relative values but it is much more valuable.

Q. Now, with relation to the cost and value of the machinery in the mill, as you have seen it in the Backus mill, running and in an adjusted condition, with all its equipments, what have you to say as to the value of that machinery, if the Backuses are compelled to remove the mill and take all the stuff out. What is the value of it, what would it be worth to sell, compared with its cost or value?

A. It is almost impossible to sell second-hand machinery, there is such an opinion about a great deal of second-hand machinery that is sold being worthless, which is worthless, not having been

properly taken care of, that it is a detriment to any second-hand machinery.

Q. Then I understand you that even Backus' machinery, taken out of the mill, and its adjustments, that it would be practically worthless in the market to sell?

A. It would depreciate very largely in its value. It might be worth something, but it would be so little that it would sell for very little.

Q. It would be something like a misfit coat?

2181 A. Or even worse.

Q. What would you say of this property irrespective of the superstructure of the new railroad, if that were away, what would you say was the value of this site, of the real estate outside of the plant—situated as it was with the side track connection to the Michigan Central, just as it is situated with reference to the center of the city, its situation relative to the river and other facilities of that kind?

A. The first part of my testimony would cover the question. Before the superstructure was placed there it was considered a valuable plant.

Q. But the real estate?

A. The real estate and the machinery and all connected with it was considered valuable and with the structure as it is now, in my opinion, not valuable.

Q. Would you care to place a value upon the real estate without the mill as it was heretofore?

A. Well, I have placed a valuation on that property, but I have not thought much of it of late; but I think the valuation I placed on it at one time was from four hundred to four hundred and fifty dollars per foot.

Q. As a manufacturing site?

A. Yes, on the River road.

Q. That is, taking the front on the River road without reference to Fort street?

A. Without reference to Fort street. I have considered it, on account of it being such a Michigan Central frontage and available to the Michigan Central, that that offsets the narrow front on Fort street.

Q. Have you been there since this structure was up and seen the effect of the dust and cinders that you have referred to?

A. Yes, I have seen it.

Q. How often have you been there?

2182 A. I have not been in the mill but once, I think, but was there long enough to convince myself——

Q. Were you there at the time of the passage of trains?

A. Yes, sir.

Q. When was that?

A. I was in there yesterday.

Q. Did you see the effect of the smoke coming into the mill?

A. Why, there was not perhaps as great a quantity of smoke yesterday as I have seen at other times when passing the property,

but there was more of an effect yesterday by the passing of trains and the darkening of the mill as the trains went by.

Q. Were you in the main planing mill, on the second floor or the first floor?

A. Yes, sir.

Q. That is, I do not mean the ground floor?

A. I would not say that there was a great deal of smoke yesterday, but I have been past the mill a number of times when it was dark with smoke, and the smoke would fall instead of rise. That was not the occurrence yesterday.

Q. Did you see the effect in the planing mill, in the body of the mill, that the trains caused in passing it, of the darkness?

A. Yes, that is quite perceptible,

Q. So that you would judge from that as to the injury to the mill, from personal observation?

A. Yes, sir.

Q. Did you see anything of the cinders around upon the lumber?

A. I saw a large amount of dust—coal dust from the trains.

Q. Soot?

A. Yes, evidently from the trains passing.

2183 Q. Upon what?

A. Upon planed lumber.

Q. In and out of the mill?

A. Yes, on trucks that had been running outside, which must be run outside in order to be shipped.

Q. Then the testimony you have given has been from a personal observation, what you have seen of the workings of this railroad upon this mill, in reference to the planing mill?

A. Yes, sir.

Q. And to the damage in your judgment?

A. I have given it from my own observation and my own knowledge of the damage.

Cross-examination.

By Mr. ROBISON:

Q. You have known this mill for a good many years, haven't you?

A. Yes, sir.

Q. Been in it frequently?

A. Yes, sir, Mr. Backus used to do a large amount of planing for me at one time.

Q. When did that cease?

A. Well, about the time that I built one for myself several years ago.

Q. You have never been in the mill since this elevated railroad was up but once?

A. No, sir.

Q. And that was yesterday?

A. That was yesterday.

Q. You went there yesterday, I suppose, to see how it was affected?

A. I went there to be more familiar with the actual workings.

2184 Q. You went there to get facts to testify to today—in a proper way, I mean, of course?

A. I wanted to observe for myself.

Q. You did not observe any smoke yesterday to speak of?

A. No, sir.

Q. How long were you there?

A. Oh, I was there half or three-quarters of an hour; pretty well through the mill.

Q. How many trains passed while you were there?

A. Well, I should say six or eight trains and engines.

Q. What time of day?

A. About four o'clock in the afternoon.

Q. You say they made a great deal of noise?

A. Yes, sir.

Q. Interfered with your talking a great deal?

A. Yes, sir.

Q. Could you hear those big buzz planers running while the trains were going by?

A. The machines were not running when I was in there.

Q. Oh, the machinery was all stopped?

A. The machinery was not running.

Q. No machinery running at all?

A. No, sir.

Q. You could not talk distinctly with Mr. Backus or with whomever you were with when these trains were passing by?

A. That is a matter hardly necessary to testify to. Anybody standing down there, they make such a noise that as far as I am concerned, I have to stop talking.

Q. Do you think that with thirty or forty machines running, buzzers and planers, with all those running, it would matter much if a train of cars went by, with talking?

2185 A. It certainly would in front of the mill.

Q. In the main mill, I mean.

A. It might not in the main mill.

Q. You don't want to talk out of the mill, it is in the mill.

A. No, sir; there is a great deal of business transacted and a great part of the work done outside in front of the mill.

Q. You say that since that structure was erected, teams cannot go down on the street?

A. Not with safety.

Q. People cannot go there and buy lumber?

Mr. DICKINSON: He says they would not.

Q. They cannot, according to his testimony. Of course there is a good reason why they do not go.

A. I think I said they did not.

Q. You are acquainted with all the departments of this business?

A. I am acquainted as one possibly can be with another's business.

Q. Have you ever been in the warehouse?

A. Yes, sir.

Q. When was that put up?

A. I think in 1882.

Q. When were you there last?

A. Well, some time during the past winter and spring. I cannot say just when, but it has not been long.

Q. You have purchased lumber from there, have you?

A. Very little.

Q. Do you know about what their general business is?

A. In a general way.

Q. You say the cinders and dust, in your opinion, prevent the Backuses from doing any fine work in their institution?

A. I think I did not say that.

2186 Q. I understood you so. They could not do it profitably?

A. I think I said it would interfere. They may do a little fine work, but it would interfere very largely with the fine work they undertake to do.

Q. Do you think they can do any fine work there and do it in competition with other places more advantageously situated?

A. I think it is very doubtful if they can do fine work at a profit.

Q. Well, you don't think they do any fine work now, do you?

A. I don't know what else they can do with their fine machinery?

Q. Well, they cannot do it profitably and you don't think they are working any, do you, at fine work now?

A. I think perhaps they undertake to.

Q. You think they have some stuff up there in their warehouse, don't you?

A. Yes, they have some stuff there.

Q. Fine work, moldings, or brackets or whatever they manufacture?

A. I have not examined closely any time what they are keeping in their warehouse.

Q. You say the competition in this business is very close?

A. Yes, sir.

Q. And there is a small margin of profit at best, as I understood you?

A. I said there was a very small margin in the coarser grades now.

Q. Well, how about the business they do?

A. Well, there may be considerable profit, ought to make considerable profit out of their finer goods.

2187 Q. Are they the only institution in the city that makes fine goods?

A. I think they have better facilities for making good moldings and finer work than any other planing mill in Detroit.

Q. But there are other planing mills making that kind of work?

A. Other planing mills making at it.

Q. You are not running one, are you?

A. No, sir.
Q. Did you used to make good work when you were running?
A. I did in my own particular line.
Q. As good as they did?
A. I did in my particular line; I was merely in the planing-mill business.
Q. You had to have your lumber planed?
A. Yes, but it makes a great deal of difference whether I am merely planing lumber or making fine moldings.
Q. Have you had any conversation with them or either of them lately about their business?
A. Nothing more than in a general way, as I may have with any competitor in business.
Q. Have you any idea from what you have heard from them what business they intend to go into?
A. No, sir.
Q. You know they are going to give this up?
A. Well, I don't know it, but I know if I was there I would.
Q. Do you know that they are going to?
A. No, sir.
Q. They have not told you that they are going to quit?
A. No, sir, they have never indicated that fact to me.
Q. They are still planing down there and making moldings?
2188 A. I think they are on short time.
Q. Didn't you see some very fine work in there?
A. As far as the machine work is concerned I saw some very nice work.
Q. Didn't the Backuses in going through there, show you some very fine moldings and hardwood?
A. They showed me some patterns they were making.
Q. That is fine work, is it?
A. Yes, sir.
Q. They did manage to squeeze that out in spite of this track in front?
A. It would be very singular if they could not do a little; it would be very singular, indeed, if they could not do some little; it is certain almost that they can get out some pieces that are not defective, but there are so many pieces that will be defective, that it will take the profit entirely off.
Q. And they cannot compete with other institutions?
A. I think not.
Q. Then they are going to quit, or else fail?
A. I have not said that.
Q. Well, it follows, does it not, from what you say?
A. No, sir.
Q. They cannot compete?
A. A man may have means enough so that he will not fail.
Q. If he keeps it up long enough he will fail?
A. He will certainly fail as far as profits are concerned.
Q. You say that property is worth $450 a foot?

A. I think I made that valuation at one time.
Q. When was that?
A. Two or three or four years ago.
Q. What is it worth now?
2189 A. As I said in my testimony, I have paid very little attention to it.
Q. You say it is not worth anything?
A. No, sir.
Q. You say you would not take it as a gift? You think it has no value; it is not worth anything?
A. For that business it is not worth anything.
Q. In your judgment it is not worth anything?
A. It is not worth anything to me. I would not take it as a gift and run a planing-mill business there.
Q. Would you run a planing-mill business anywhere?
A. Well, I quit for good reasons.
Q. You had a mill somewhere in that vicinity?
A. No, sir, I had a yard.
Q. Where was that?
A. On Fort street, directly opposite their warehouse.
Q. You sold that?
A. Yes, sir.
Q. What did you get for that?
A. I got over $30,000 for it.
Q. How much was there of it?
A. One hundred feet.
Q. How much over $30,000?
A. Well, I got over $30,000.
Q. $75,000 is over $30,000—how much?
A. I got over $30,000.
Q. That is as near as you care to answer?
A. That is as near as I care to answer.
Q. Why? Are you afraid it will criminate you to tell how much you got for it, or is there some reason you do not want to tell?
A. That is as near as I care to answer.
Q. You got over $3,000 a foot?
A. No, sir.
Q. Oh, no, $300 a foot?
2190 Col. ATKINSON: Where was that?
A. Directly opposite their warehouse, on Fort street, running back to the River road.
Q. From Fort to the River road?
A. Yes, sir.
Q. How many feet was that?
A. 400 feet deep.
Q. 100 feet front and 100 feet on the River road?
A. Yes, sir.
Q. Running the entire depth, 400 feet?
A. Yes, sir.
Q. And you got over $30,000?
A. Yes, sir.

Q. Did you get $35,000?
A. That is as near as I care to answer.
Q. Why?
A. I have a reason for not answering it.
Q. Don't you know at all what that is?
A. I think it is not necessary.
Q. Well, it would be quite convenient if we knew. We are trying to find out what property is worth down there.

Col. ATKINSON: Why do you want to know?
Mr. ROBISON: To find out what property is worth down there.
Col. ATKINSON: You are funny fellows; been down there so long and haven't found that out yet.

Q. He says he knows what it used to be worth. It was not very much over $30,000, was it?
A. It was so much that it was an object to me.
Q. Do you think it was worth more than $30,000?
A. Yes, I certainly do.
Q. Do you think it was worth $40,000?
A. Well, we did not get just all we thought it was worth.
2191 Q. Then you didn't get $40,000?
A. We will leave that for you to judge.
Q. Where were you engaged in running a planing mill?
A. On Twenty-fourth street and the Michigan Central railroad.
Q. Anywhere else?
A. That is the only planing mill I ever owned. I was engaged with and helped to build the planing mill of D. A. Ross & Co. on Franklin street east and Rivard and managed it for a number of years.
Q. You say that on cloudy days, or I suppose wet days (it depends on the condition of the atmosphere) the smoke settles down?
A. Yes, sir.
Q. And you have gone by on what street when you saw this mill enveloped in smoke?
A. I don't know as I said I saw it enveloped in smoke.
Q. I understood you to say so, what did you say?
A. I said, and it must naturally do it, that it was darkened with smoke. I was not in it on these days, I was along the street.
Q. The smoke settled right down on the mill?
A. It settled down, it did not raise as it does on a clear day; I suppose we all understand that.
Q. What you wish to be understood is that in certain conditions of the atmosphere the smoke from this railroad settled right down on the mill and went into the mill?
A. It will darken the mill more than it will on a bright day.
Q. It goes into the mill?
A. Yes, certainly it will.
Q. What street were you on when you noticed that?
A. On the River road.
Q. This was when the smoke would fall down from this elevated road. Is that recently?

2192 A. I have driven along there quite recently.

Q. You have been up and down by this mill a great many times before this elevated road was up there at all?

A. Yes, sir.

Q. You know the location of it?

A. Yes, sir.

Q. How far is it from there to the Michigan Central railroad, the main line?

A. I think on the River road, from the corner of the mill proper, the brick building, I would say 100 to 125 feet.

Q. How many tracks are there over there?

A. I should think they number about nine. There are quite a number of tracks.

Mr. BAKER: Thirteen.

A. I am not positive about that. I know there are a number of tracks.

Q. There are ten times as many trains cross over there as there are on this elevated road, in your judgment?

A. Ten times as big.

Q. I know it is big, but that is a big railroad.

A. They can hardly be doing ten times the business of the other four or five roads.

Q. There are two of them pretty small roads. There are only three tracks on this elevated railroad?

A. Three.

Q. There are a great many more trains pass in and out of there every day on the Michigan Central?

A. Yes, I think there is more business.

Q. And on one of those damp, wet days, didn't you see the smoke from one of those engines kind of settle down?

A. Not to any extent.

Q. Does the Wabash and Union Depot Company burn a different kind of coal from these other roads?

2193 Col. ATKINSON: They are on the windward side.

A. I think the effect has a great deal to do with that, which way the wind is blowing.

Q. Here is the Wabash road right in front of the Backus mill?

A. Yes, sir.

Q. Then over there across the street are these other roads, a lot of tracks over there?

A. There are some tracks, but no trains—store tracks.

Q. Engines run up and down there?

A. Very seldom. They run past back of the mill; they will back in there with a large number of cars; a train will fill up those tracks.

Q. This smoke, then, only settles with a southwest wind?

A. It will settle more; that is, we have more winds from the south.

Q. Once in a great while we certainly have a north wind, and an east wind?

A. Yes, sir.

Q. How is it the smoke will not settle with that kind of a wind?
A. It will settle.
Q. Didn't it used to settle from the Michigan Central?
A. It was down near the ground then; it didn't settle.
Q. It would just fall down and bank up against the fence.
A. From an elevation of 20 feet I think it will darken more than when the tracks are below the grade, below the Backus mill on the Michigan Central, while they are away above on the elevated.
Q. Then it would rise when it was a clear day, the smoke would rise and darken Backus' mill, wouldn't it?

A. It would darken it, but the light that Backus has and
2194 has always had has been from the River Street front.

Q. How deep is the mill, do you think?
A. I have never measured it, but I should say 100 feet or perhaps more.
Q. He don't depend on his light from the back end of the mill, the north end of the mill?
A. The machinery was nearer to the River Street front.
Q. Did you notice that very fine emery-grinding machine that sharpens the saws?
A. Yes, sir.
Q. That is up to the north end, isn't it?
A. The one I noticed particularly was not at the north end, was at the west side over in the engine-room.
Q. Didn't you ever think it peculiar that no smoke ever darkens Backus' place except this from the Wabash road?
A. If there is only one side of a house or building to get light from, on the other three sides of the building the smoke will not darken very much. And there is no smoke from the Michigan Central worth speaking of on the River Street front. There occasionally may be a little from shunting cars on the Michigan Central tracks, just across the tracks.
Q. No cinders come from that?
A. I would not say that.
Q. No coal dust?
A. I won't say that.
Q. No soot?
A. I won't say that.
Q. This soot you saw on these trucks, that all come from the union depot company?
A. I did not watch to see it fall down, but I should judge so.

Q. You did not get covered when you went along there?
2195 A. It is impossible to travel along the River road there under the road or on the bridge without having yourself covered with soot and cinders to a certain extent.

Q. Did you ever have an office downtown here?
A. Yes, in the Moffat block.
Q. Did you ever get your desk covered with soot in there?
A. No, sir.
Q. Never noticed it at all?
A. No, sir, I didn't.

Q. I think I will get you an office.

A. You might get part of the Preston Bank building now, it is a very good office, part of their office.

Mr. DICKINSON: It could not have been very near the old Tribune building.

Q. How far from the railroad was your planing mill that you helped put up, Ross'?

A. That was very close to the railroad.

Q. Did you do any fine work there?

A. Nothing very fine, just the planing of lumber.

Q. You did nothing there but planing?

A. Nothing but planing.

Q. No molding machines?

A. No, sir.

Q. You kept lumber clean there, didn't you?

A. Yes, tried to make it the best we could.

Q. Didn't the smoke and cinders come in there from the running of trains by, and interfere with your work?

A. Not very much, from the fact that we had all our lumber on the side farthest from the railroad and the machines were situated on that side. It was only a one-story building, and we had light from that side.

Q. You had no openings toward the railroad?

A. Yes, we had openings; there were iron doors there and
2196 they were only open a part of the time. The lumber came in and the work was done on the other side of the mill.

Q. You put up a factory of your own?

A. Yes, on Twenty-fourth street and the Michigan Central.

Q. How near the railroad?

A. Very near to the railroad.

Q. Right on the railroad?

A. One corner came almost to the railroad.

Q. What became of it?

A. We took down the machinery and moved it to Tonawanda.

Q. Because the railroad interfered with the business?

A. No, sir.

Q. You could run one next to the Michigan Central all right?

A. Yes, sir.

Q. You could ran one next to the Grand Trunk or the Milwaukee?

A. Yes, sir.

Q. But as quick as one goes up on the union depot line it destroys the business; that is about the way it is?

A. No, sir, the railroad has nothing whatever to do with it, but the location of the mill; and the road has a great deal to do with it; but in my own case, on Twenty-fourth street, all the work was done away from the railroad on the side from the railroad, 100 feet or more from the track.

Q. The smoke and cinders, when the wind is right, will blow that way, won't they?

A. We happen to be on the side the wind was blowing——

Q. The wind don't blow from the west all the time. You used to shut down, I suppose, when the wind would blow from the north and east?

2197 A. If you are giving the testimony, all right.

Col. ATKINSON: You don't depend on the east for your light?

A. We depended on the west for our light in my own planing mill, and the work was done there. We might have a dark shed next to the railroad a great part of the time and only open when actually necessary. The location of the road has nothing whatever to do with the value of it.

Q. You say this machinery is of an extraordinary quality that is in there?

A. I say it is right good machinery.

Q. There is nothing peculiar about it, however, that makes it of great value?

A. Yes, there is. We may buy a cheap machine or a good machine, and I think every machine I have seen in the Backus property is a good machine. They are of the highest order of planing-mill property; the whole mill is.

Q. Worth more than they would be new?

A. A great many of them are worth more to a mill having them properly set up and properly adjusted than they were when they were put in there. I think I examined the machines quite carefully, and I think every machine is in proper condition as far as I could see.

Q. But you say if he would have to stop now the machinery would be worth nothing, that is, comparatively nothing?

A. Any planing-mill man knows that second-hand machinery, taken out of a planing mill and offered for sale, is not sold at a high price.

Col. ATKINSON: And I suppose any machinery taken out would be considered second-hand?

A. Yes, sir.

Q. Even though it was as good as new?

2198 A. And then, too, the demand for that is only limited and it may be a long, long time before we would find a customer.

Mr. BAKER: I thought the longer they are used the better they were?

Col. ATKINSON: They are if you leave them right there, as long as they are kept good.

Mr. BAKER: You got about $300 a foot, figuring both frontages, that is, you had 100 feet on River street and 100 feet on Fort street?

A. Yes, sir.

Q. That would make 200 feet of frontage altogether?

A. Yes, sir.

Col. ATKINSON: Was there an alley between?

A. No alley.

Q. You used it all the way through for a lumber yard, didn't you?

A. Yes, sir.

Q. 100 by 400 feet is not a very big lumber yard?

A. We had other property adjoining it, it was a very small lumber yard, we had a larger piece alongside of it.

Q. Was that planing mill you had on Twenty-fourth street near the Detroit, Lansing & Northern road?

A. The Detroit, Lansing & Northern came in over the Michigan Central tracks at that time.

Q. Your planing mill was right between those roads, was it not?

A. No, sir. The Detroit, Lansing & Northern road came in over the Michigan Central tracks.

Q. Were there not two railroads, one on each side of your planing mill?

A. No, sir.

Q. Wasn't there a side track on one side and a main road on the other?

A. No, sir.

2199 Q. Did you build that there?

A. Yes, sir.

Q. What did you build it on the Michigan Central for?

A. To have the advantages of the railroad.

Q. The advantages of the railroad?

A. Yes, sir.

Col. ATKINSON: Which side of the Michigan Central was that on?

A. On the south side.

Q. And you did your work on the opposite side?

A. No, sir, we did our work as well on the south side of the mill.

Mr. BAKER: I suppose you got rich there and went out of the business?

A. I would have liked to.

Adjourned until next day at 9.30 a. m.

THURSDAY, *October* 26, 1893—9.30 a. m.

FRED. A. BAKER, sworn on behalf of the respondents.

Examined by Mr. DICKINSON:

Q. I noticed in your cross-examination of Mr. Robinson yesterday, you asked him if he didn't know that this structure, the union depot Co. structure, and the trains passing the stove-works, that notwithstanding that they had increased their works recently; do you not know that before the union depot structure was contemplated the stove-works had bought the property for the increase, and bought the buildings?

A. I don't remember, Mr. Dickinson, whether they had purchased the property before the union depot enterprise was started or not, but about that time they purchased the property, and after the union depot was planned, and after it was well known, they proceeded to enlarge their plant, and have built a very large molding-room.

2200 Q. They extended their whole plant through to Fort street?

A. Yes, sir, all the way through to Fort street.

Q. Even with the lot, the same width on Fort street as on River street?

A. I am not entirely certain, Mr. Dickinson, whether they have got the corner or not on Fort street, but they got all the River Street front, and they bought it after the union depot plan was started.

Q. You asked him if he didn't know that their structure passed by their front; will you please tell the jury what the union depot Co. paid them for taking possession of their front, and passing by on this railroad?

A. As counsel in that case I desire to take the formal objection that unless all those awards are to go in evidence, I do not wish to answer the question.

Q. I never did think it competent to go into those cases, but I call this out because he makes the statement to the jury in his particular style of cross-examination, as, "Don't you know that the stove-works increased their plant recently," etc. That would give the impression with the jury that they passed by there with impunity, without paying for it. That is the only object I have in the question, to remove any such impression left with the jury, and I ask the question, if he knows—he does know, because I think he paid the money—how much the union depot Co. paid them for taking possession of their front?

Mr. ROBISON: Mr. Robinson testified yesterday that this property was absolutely of no use whatever for manufacturing purposes because of the railroad going by there, and all Mr. Baker asked him was if he didn't know that other property in that neighborhood, that the railroad went by just as it did this, that in spite of the railroad going by, they had increased their facilities and enlarged their plant.

2201 Mr. DICKINSON: When we come to the difference in plants we will discuss the difference in the damage, but so far as the point is concerned that the impression should rest upon the minds of the jury by this matter interjected by Mr. Baker, that we have passed by there without paying for the right to take possession of the street, I think I am entitled to show.

The COURT: There is a question in my mind as to whether this testimony is relevant or not, but I do not think the nature of this inquiry is such that any strict rule ought to be applied. I think there ought to be exceeding liberality in the introduction of this testimony under those circumstances. I will admit the question.

Mr. DICKINSON: Very well, what did you pay for it?

A. We paid the award of a jury——

Mr. ROBISON: Wait a minute. Was there a jury award in that case?

A. Yes, sir.

Mr. ROBISON: Then I object to it on that ground.

WITNESS: There is no need of making that objection, because a

jury rendered the award. In that case my recollection is $49,800, but it might have been $48,900. It was just under $50,000, and the company paid it and took an appeal to the supreme court, just as they did in the Backus case, and the appeal in the supreme court has never been disposed of.

Mr. ROBISON: Is it on the docket?

A. No, sir.

Mr. DICKINSON: You also asked the same kind of question, and I shall confine myself to that, as to the passing the property in front of the Diamond Match Company. Do you remember the width of the property of the Diamond Match Company on River street?

2202 A. I do not know. I don't remember the street, but it must be Tenth street—in the vicinity of Tenth street—that is the frontage of the old Richardson Match Company is on a street that runs north and south. They have a long frontage that runs to the Union mills, now occupied by F. L. Kidder.

Q. One long frontage?

A. Yes, sir, it is quite a long frontage; it is the length of a lot.

Q. And between it and the superstructure I think there is a side track from the Michigan Central there?

A. Either between it and the superstructure or right along the superstructure; right under the superstructure is a side track.

Q. What did you pay the Diamond Match Company for the privilege of passing?

A. Mr. Joy settled with the Diamond Match Company, and I don't know what they did pay.

Q. Didn't you hear that it was $25,000?

A. No, no. I probably knew at the time, but I don't recollect it now. I don't think it was as much as that. But Mr. Joy will know exactly.

Q. Very well. I have no further questions. I desired simply to counteract any impression by the peculiar way you put the questions yesterday.

A. All I called attention to, Mr. Dickinson, was the fact that they did go on and make these improvements. Now, I know nothing about the improvements of the Diamond Match Company, as——

Q. You know I was counsel for the Diamond Match Company?

A. Yes, you acted for the Diamond Match Company, and those improvements are there, and that is all I called attention to in the question.

2203 E. L. THOMPSON, after being duly sworn on behalf of the respondents, testified as follows:

Examined by Mr. DICKINSON:

Q. Where do you live?

A. In the city of Detroit.

Q. How long have you lived here?

A. Since 1881.

Q. What is your business?

A. Lumber.

Q. How long have you lived in the State of Michigan?
A. Since 1866.
Q. What branches of the lumber business have you been engaged in?
A. Manufacturing, logging and selling.
Q. Manufacturing?
A. Yes, sir.
Q. In how many branches of manufacturing? Give us some idea of the branches of the lumbering business in which you have been engaged?
A. We take the trees from the woods to the saw mill and manufacture the lumber, dry the lumber, dress it, make sash and doors, packing-boxes, molding, etc.
Q. Fine molding, and you have a planing mill and all that?
A. Yes, sir; in pine.
Q. You are familiar with the planing business?
A. Yes, sir.
Q. You have a planing mill?
A. Yes, sir.
Q. Whereabouts is that situated?
A. On the river Rouge in the suburbs of Detroit.
Q. Whereabouts on the river Rouge?
A. Just immediately beyond the village of Delray.
Q. And you make in that planing mill dressed lumber of all kinds?
2204 A. Yes, sir.
Q. Moldings?
A. Yes, sir.
Q. Where is it situated with reference to the railroad?
A. The railroad passes alongside of it, a spur of the Michigan Central.
Q. The spur you use for a side track for your business?
A. Yes, sir.
Q. How far is it from the main track of the Michigan Central?
A. Perhaps one-third of a mile.
Q. Do you know Mr. Backus' property?
A. Well, in a general way.
Q. You know where it is situated?
A. Yes, sir.
Q. You have seen it?
A. Yes, sir.
Q. You have been in it?
A. Yes, sir.
Q. You know his yard?
A. Yes, sir.
Q. You know his storehouse?
A. I know where it is situated.
Q. You know generally his business?
A. Inasmuch as a passing knowledge would be
Q. Besides you have been in the mill?
A. I have been in the mill twice, I think.

Q. What would you say as to the character of the mill, as to its being a fine mill or otherwise? Give the jury some impression of your knowledge of planing mills, and the business?

A. I should say it was well constructed, a substantial and well-equipped plant.

Q. In your business I suppose you do nothing in hard woods?

2205 A. No, sir.

Q. Yours is all soft wood?

A. Yes, sir.

Q. You know Backus works in all kinds of hard wood as well as soft?

A. I have so understood. I don't know of my own knowledge.

Q. You know the situation of the property with reference to the Michigan Central, do you not?

A. Yes, sir.

Q. The facilities there?

A. Yes, sir.

Q. You know its situation in the rear?

A. That is, the River Street side, do you mean?

Q. No, I mean the Fort Street side.

A. The factory proper does not reach Fort street.

Q. You know that practically it has two ground floors in the situation there?

A. Yes, sir.

Q. Now, in the planing mill, what have you to say as to the need of a steady light in fine work?

A. It is very essential.

Q. You say it is very essential?

A. Yes, sir.

Q. Not merely convenient, it is absolutely essential?

A. It is essential, and I would add also an ample light.

Q. Ample light?

A. Yes, sir.

Q. Why is this required?

A. From the nature of the work. The manufacture must be well done or it is not satisfactory.

Q. What have you to say as to its being necessary to have a steady light in this contant work on the machines?

A. Well, I don't know as I would say a steady light is so essential in prosecuting the work of dressing lumber, but

2206 in adjusting a machine or putting it in condition to perform its work satisfactorily, it is certainly essential that a steady light be had.

Q. The machine is adjusted to the work in hand from time to time all through the day?

A. It should be.

Q. Suppose there is a fault in the adjustment of the machine, even a delicate fault, upon fine molding, what effect would it have?

A. If there were nicks in the knives it would make the molding unmarketable. If the cylinder, for instance, was unbalanced, it

would make a sort of corrugated surface that would make it unmarketable.

Q. Worthless for the purpose for which it was manufactured?

A. It would be. It might be revoked, perhaps, and then made some use of, but of course that would involve extra expense.

Q. Suppose any impurity like a cinder or foreign substance gets on the wood where the knives or tools cut it in the machine, what effect would that have?

A. Well, anything that lies on the surface of the wood is not apt to get in the knife from the rotation, but on the end of a piece of wood where the cinder or gravel or anything of that sort is attached, it nicks the knives and thus renders them unfit for their work.

Q. Wherever a planing mill is, it is very necessary to keep everything clean?

A. It is to do good work.

Q. Suppose a piece has a flaw upon it, or mark upon it, does it detroy its market value at the full price?

A. It does.

Q. Even if it does not interfere with its utility?

A. Yes, sir.

Q. I suppose you could put up a molding around here with
2207 all the flaws in it, it would serve the purpose of a molding just as well, but it would impair its value?

A. Oh, yes, certainly; perhaps some person who was not so fastidious would buy it because it was cheap, but in the market it would be known as a cull.

Q. And there are a great many small knives and tools around one of these fine planing machines?

A. Yes, sir.

Q. I suppose one of these fine tools that is kept continuously working all the day, is liable to do a great deal of damage, if the smallest tools get out of order?

A. Yes, sir; if it is neglected.

Q. The edges of the tool is very fine?

A. They should be to do their work.

Q. To do proper work they have to be very fine?

A. Yes, sir. I would say I have very little experience in hard wood. I am speaking of the soft woods.

Q. Well, in hard woods, too, it would have to be much cleaner than in fine?

A. Yes, sir.

Q. Do you think there is a sharp competition in the markets of the United States in the planing-mill business?

A. There is.

Q. In what does success consist in the planing-mill business, in the present state of competition?

A. That is rather a difficult question to answer. The conditions are so various, and there are so many elements entering into it, that it would be hard to give a direct answer.

Q. It is necessary to save everything and exercise the utmost economy, and to do good work?

A. Yes, sir.

Q. The man that does not do perfect work falls behind?

A. That would help to put him in the rear.

2208 Q. I suppose it is more difficult to make what is known as first-class material than the coarser grades, is it not?

A. Well, in respect to their manufacture, the dressing and the finishing?

Q. The product.

A. The quality depends upon the character of the stock used largely.

Q. But the output, I suppose the highest profits are made upon the finest work, the fancy work, is it not?

A. Yes, sir, there is a larger allowance made for what it technically known as machine-work in that class——

Q. And upon the fancy goods that are made in such mills, what have you to say as to its being saleable as first class if there is a defect caused by a defective tool or discoloration?

A. It would be rejected and classed as culls.

Q. What is the difference then in first-class work in the market value of culls, and first-class materials?

A. In one case the first-class material would afford a good profit, and the other would mean a loss, not only on the labor, all the labor, but a considerable portion of the value of the material which entered into the article.

Q. Is it a part of the business, an art of the trade, to keep this product clean?

A. Yes, sir.

Q. Any flaw or dirt upon it, or discoloring or marking it throws it out as first-class material?

A. It renders it generally unsatisfactory.

Q. And it impairs not only the value of the product itself, but the good will of the concern?

A. Yes, sir, it would be injurious in its effect.

Q. Now, in these planing mills, I suppose there is ordinarily, after the lumber is dressed, there is no provision made inside of the mill itself for storing the product, is there?

2209 A. That depends upon the concern. You might in an adjoining building, immediately attached, or somewhat detached. There are various ways of doing that.

Q. There is no place in the mill itself?

A. Only for temporary storage.

Q. And where in the planing mill is the storage usually made of the finished product?

A. That would vary with the different plants.

Q. But it is not stored in the mill?

A. No, sir.

Q. There is some other arrangements made for storing outside of the mill?

A. Yes, sir, either in a building adjoining it, or remote, according to circumstances.

Q. I suppose you store this fine-dressed lumber outside of your mill where you are, don't you?

A. No, sir; we have a long shed adjoining immediately to the right that we store it in.

Q. Do you know anything of the character of the dust that is formed from a planing mill?

A. I know that it is very objectionable both in the mill and elsewhere, and it is dangerous.

Q. It is dangerous. Why is it dangerous?

A. From its combustibility and the danger of explosion.

Q. It is known to be as explosive as gunpowder?

A. I believe it is. I have never had an explosion. I have seen places where it did explode and did a very great deal of harm.

Q. Is it a part of the business to keep a storehouse away from where the dust flies?

A. Yes, sir.

Q. That is a well-settled rule of planing mills?

A. As far as my experience is concerned it is invariable.

2210 Q. Now, in working up the finer material in a mill, do you have it dry?

A. Yes, sir, it must be.

Q. It is to be not only seasoned, but dry?

A. It is essential to perfect finish that the lumber be thoroughly dry.

Q. And that makes the finest dust known?

A. Yes, sir, and on a day like this should it rain two or three hours continuously, the lumber will absorb the moisture so that it will not dress smooth.

Q. So it is absolutely essential to have everything dry?

A. Thoroughly dry.

Q. Do you know the Backus plant pretty well? Do you know the Backus plant relative to the superstructure and the elevated trains that go by there?

A. Yes, sir, I have recently visited it with a view of seeing it, and right after it was started I was there once. Before the building of the viaduct I was there once.

Q. And knowing the character of the business there, what have you to say as to the effect of that superstructure with the locomotives, say from 50 to 150 per day passing there with trains of various kinds upon this elevated superstructure, upon the business of that planing mill? Also include in your view of it the effect of the superstructure upon the property as well as the passing trains.

A. Well, the cinders and dust due to the passing of the trains is very objectionable. I don't know that the noise would have any special effect one way or the other, but as a general statement I would say it was a serious annoyance to the business and an injury.

Q. An injury to the business?

A. Yes, sir.

2211 Q. Have you been in there sufficiently so you can of your own observation say what the effect of passing trains is?

A. Well, I think there were two trains passed while I was in there. There was a jar, a vibration due to the passing of the trains, but I didn't see any black smoke. But I guess the engine was shut off as it went by.

Q. Did you see any effect upon the light?

A. At the time the trains passed I was not there—yes, I did too. I remember when the second train passed I was in the yards down on the River Street side and it did obscure the light. When the first train passed I was on the top floor and I did not observe any obstruction of the light.

Q. What effect do you think the steam exhaust as it pours out on an incoming train or an outgoing train would have upon the mill? The steam itself we will say, regardless of smoke?

A. If the windows were open on that side it would be an annoyance.

Q. You cannot possibly get along in a planing mill in the summer time without having the windows open?

A. No, I should think not.

Q. You would have to have the windows open to let the dust through?

A. I would hardly think it would be necessary to have the windows open for that purpose. There are conduits that carry the dust away, and the windows are not opened for that purpose.

Q. But the windows are made for air as well as light?

A. Yes, sir, for the convenience of the employés.

Q. And that is why all factories of this kind are made with a great many windows, is it not, for the air as well as for the light?

A. Yes, sir.

2212 Q. What do you say as to the effect upon fine work in a mill of flickering lights, as might come from the passing of trains, and from the consequent smoke and steam?

A. Having had no experience I could not say from practical knowledge. I should regard it as a general objection. It would interfere with close observation of the character of the work being performed.

Q. The machines move constantly; they go on forever during the day? Without cessation?

A. Well, that depends upon their condition. The man who operates a machine is supposed to carefully watch his production, every time, to see that there are no errors or faults in it.

Q. What do you say as to the passing of material underneath this structure where there are no fans or other arrangements made to catch the drift of the soot and the coal, and the oil, the grease that comes from the passing trains?

A. I really have no experience, no knowledge of that. I should think as a general proposition, if you simply want an opinion, that if the lumber was simply hauled tra-versely through, there would be a remote chance of injuring the lumber, but hauling it lengthwise it would get more or less grime on the top tier of the boards.

Q. Would that injure it?
A. It might.
Q. If it discolored it, it would injure it?
A. If the lumber was afterwards to be dressed, it would remove that soiling.
Q. Suppose it was dressed material?
A. It would certainly injure it.
Q. From your knowledge of the planing-mill business, and your opinion as a planing-mill man, knowing the situation there of these passing trains, and the superstructure there, would a planing-mill man take such a plant as an eligible planing-mill site?
2213 A. There would have to be other specially strong inducements to warrant him doing so. It might be a strategic location for trade that would warrant him in prosecuting his business even under the disadvantages of surroundings. On the other hand if a man was carrying on a retail trade, I would not think he would have that place under any conditions.
Q. Do you know anything about the extent of Mr. Backus' retail trade prior to the building of this elevated road?
A. I do not.
Q. If you wanted a planing-mill site, would you select such a site as this?
A. I would not.
Q. Would you have it at all for your investment?
A. No, sir, not at all for our investment.
Q. You have a large retail trade in your planing mill?
A. Yes, sir.
Q. You depend upon it largely?
A. It is quite a feature of the business.
Q. Retail trade with Detroit?
A. Yes, sir.
Q. What do you say, without the elevated railroad running by there, as to the eligibility of Mr. Backus' site for the Detroit trade—without the superstructure?
A. It would be very much more accessible.
Q. Is there any other site as valuable, to your knowledge, as that was prior to the building of the superstructure, with two ground floors, and its proximity to the center of the city and trade?
A. It had large advantages due to those conditions.
Q. And in the trade was reputed to be a very successful concern, was it not?
A. I believe so.
2214 Q. Did you know the plant was conveniently located with reference to its lumber yard and storehouse?
A. Yes, sir, I think it was.
Q. A very eligible situation?
A. Yes, sir.
Q. Now, as a planing-mill site, whatever the value of the property, whatever it is, without asking you the value, because I am not informed you are advised as to that—taking the plant as it was and as you know it, situated as it was with the railroad facilities

furnished by the Michigan Central, the proximity to the center of the city, its relation to its lumber yard and to its storehouse, the character of the mill, and the character of its products, and the situation generally as it was before the building of this superstructure and the passing of the union depot trains, what in your judgment is that impairment of the value of the plant in percentage? I do not ask the value of the plant, but what in your judgment is the impairment of the value of the property the plant, with this superstructure and these trains passing over there? You are quite aware, too, there is a grade in front of the Backus property, as there is none above there. It is level above there, but directly in front of the Backus property there is a grade of 20 feet to the mile, and down to Twelfth street there is a grade of 12 feet per mile. And in front of the Backus property there are three switches permanently there—there to stay.

A. I would like to qualify my answer to that question. I would say that the value for the business, as it is now situated, would be in my judgment from 30 to 40 per cent. less than it was before. That is due to the separation of the yard and shed. The impairment is not as great as it would be if those were adjacent to the planing mill. In other words, if their storehouse was imme-
2215 diately adjoining them on the west, for instance, I think it would be larger.

Q. Taking into consideration the very narrow margins in planing-mill work and the large volume of business to be done, and taking into consideration the fact that on the finest work the profit is larger, don't you think the impairment of 30 or 40 per cent. would make out of what was a successful business a losing one?

A. It would be very liable to.

Q. The impairment of 30 or 40 per cent. would be very liable to ruin it?

A. Yes, sir, it would.

Cross-examination.

By Mr. ROBISON:

Q. It is usually considered, is it not, that there is a very close competition in this kind of business?

A. Yes, sir.

Q. The margin of profit is not very great, is it?

A. Let me understand your question. Do you mean a jobbing shop, a shop that dresses lumber by the thousand for somebody?

Q. I mean in the business Mr. Backus is doing, and other people in the city doing in the same kind of business, the profit is not very great is it?

A. It is not on the dressing of lumber. However, with a retail trade, the dressing business is an incident, the same as the teaming is.

Q. There is a close competition generally in the lumber business of all kinds, is there not?

A. Yes, sir.

Q. Both in undressed and dressed lumber?
A. Yes, sir, there is.
Q. You do about the same kind of work in your mill that Mr. Backus does?
2216 A. I don't know as we do as fine work. I am not sufficiently familiar with the details——
Q. What fine work does he do that you do not do?
A. I understand they manufacture largely the hard woods.
Q. Don't you do just as good work as he does in the soft woods?
A. Yes, sir, I presume we do.
Q. You have a sale for your stuff in the city?
A. Yes, sir.
Q. And you do see in competition with Mr. Backus?
A. Undoubtedly.
Q. And you admit, don't you, that you make just as good moldings?
A. We make moldings that are satisfactory to the trade.
Q. You think just as good as his?
A. I have no reason to doubt it, although I have never made a comparison.
Q. You have as good machines?
A. We have as fine machines as can be bought.
Q. Have any of them got the Backus attachment on them?
A. I don't know what the Backus attachment is.
Q. Nobody else does, because they are secret; but has he given any of his attachments to you? Do you know any of his plans for running machines that are secret?
A. No, sir, I do not.
Q. This competition in the business has been close, has it not, for several years?
A. Yes, sir.
Q. According to your judgment then, with the value of this great plant down there depreciated from 30 to 40%, it is impossible for Mr. Backus to do business down there in competition with other places, is it not?
2217 A. I don't know as it has impaired the value to sell——
Q. No, but its value as a plant for the purpose of manufacturing? If it has knocked off 30 or 40% of his facilities for doing business down there, or the value of it as a plant, he can't compete with the rest of you any longer, he has got to move?
A. It is a disadvantage to him undoubtedly.
Q. Ain't you surprised that he continues business there?
A. I would not want to answer that question in the affirmative; if it was my case, I would have ceased doing business there years ago.
Q. You don't know how it does go, only from theory?
A. No, sir.
Q. You would have moved years ago?
A. I would, certainly.
Q. Why, this thing has only been up a few months.
A. I would want the yard adjacent to the mill.

Q. Has this running along of the railroad there, made the yard any more inconvenient to the mill?

A. It involves the hauling of the lumber under this viaduct. It increases the difficulty somewhat.

Q. How?

A. By the frightening of the teams——

Q. It does not appear that Backus ever had any teams run away.

A. I don't know that he has, but ordinarily it would. I took that in view in the consideration of my estimation of the depreciation of the property due the viaduct. That is, the teams were obliged to pass back and forth under the viaduct, and it is certainly as hazardous——

Q. You are aware there are about 13 tracks in front of the Backus property?

A. Yes, sir, but he don't have to cross them.

2218 Q. But the engines run along there frightening the horses. He don't have to cross this elevated road either, and you know there are thirty or forty tracks the other side of it, the main line of the Michigan Central?

A. Yes, sir, they are separated, however, by a high fence that removes the exposure of the teams to fright considerably.

Q. It is all theory that Backus' teams are frightened?

A. On my part it is. I never saw a load of lumber go under there that I recall now, but it is a general proposition.

Q. Then your idea of the value of this place is affected somewhat by the location with reference to the storehouse and the yard, is it not, the yard in particular?

A. The yard particularly.

Q. You don't thing a location of that kind is a good one, anyhow?

A. It would not suit me, I will say.

Q. You want a mill right in connection with your yard, immediately adjacent, to save hauling?

A. Yes, sir.

Q. And in your opinion taking the distance this mill is from the yard and the elevated road all put together makes it worth thirty to forty per cent. less than it would be if it were in the yard and no elevated road? That is what you mean?

A. Well, I took the separation into consideration, as I said before.

Q. In fixing the depreciation 30 to 40 per cent.?

A. Yes, sir.

Q. You don't think the cinders and stuff from the engines going along will hurt the lumber a great deal, do you?

A. I should think it would hurt it a good deal.

Q. Discolor it?

2219 A. Yes, and in addition to discoloring it, if the lumber were to remain out any length of time, it would get so mixed with the lumber as to impair the cutting, as I said before, it would dull the knives, and cause the lumber to be imperfectly manufactured.

Q. But you must remember this lumber is not sorted on those

premises. There is no storage capacity here. This lumber is up in the yard. Now, no great amount of cinders would get on the lumber drawing it down from Eighteenth street to this mill, would there?

A. Not ordinarily.

Q. You have a storehouse besides your yard, haven't you?

A. Well, they are in connection.

Q. Where is that?

A. On the Rouge. The warehouse is simply an extension of the mill.

Q. Yours is the Delta Lumber Company?

A. Yes, sir.

Q. Haven't you a big yard somewhere else?

A. Yes, sir, up Gratiot avenue, but that is exclusively a retail yard.

Q. What do you keep there?

A. Molding of all sorts.

Q. How do you get it from your yard there?

A. Altogether by rail.

Q. Do you have much difficulty with the cinders and soot and dust and one thing and another from the cars getting it from the Rouge?

A. We ship it in box cars altogether.

Q. But where you are loading and unloading it, do you have much difficulty in keeping it clean?

A. We are fortunately situated. We load our cars inside, in a building, which is entirely shut off from passing trains or anything of that kind.

2220 Q. Where is your yard located with reference to the railroad?

A. It is located directly back of the planing mill.

Q. I mean your retail yard.

A. Oh, the railroad runs 850 feet alongside of it.

Q. Is this lumber you have in there in an absolutely tight building?

A. As to the ra lroad, yes, sir; that is, the dressed lumber. The coarse lumber, as in all yards, is open.

Q. And the soot and cinders do not seem to affect that coarse lumber, does it?

A. We let it take it anyhow.

Q. And you manage to sell it?

A. Yes, sir.

Q. Your dressed lumber is in open sheds?

A. Yes, sir. There is a street there, we will say, (indicating) the sheds are open to the street here and closed on the back, and next to the railroad it is closed, and also next to Beaufait street on the west. It is thoroughly tight.

Q. There are doors there on the side towards the railroad?

A. No, sir, it is absolutely tight.

Q. You run your cars into the yard and unload from the car right into the shed?

A. Yes, sir, the cars do not come down in the yard as far as the shed. They come down within three or four hundred feet and then we take it up on the trucks.

Q. When you are unloading from the cars don't you find a great deal of trouble from the cinders from the engines passing?

A. There are a series of lumber piles intervening which shuts off the soot and cinders to a considerable extent.

Q. You manage to keep them there for that reason?

2221 A. We have so far.

Q. To keep the soot and cinders off?

A. No, sir, we put it there because there is a space there we could occupy, and of course we are glad to have the obstruction as a general preventative.

Q. You have a great many different machines up in your shop there?

A. Yes, sir, several.

Q. Do you know how many?

A. Well, I could not say offhand; probably 15, may be 20.

Q. Of all kinds?

A. I don't say all kinds. That is a very broad term.

Q. Working every day?

A. Yes, sir.

Q. You have to adjust them frequently during each day?

A. Yes, sir, some of them. Some of them are under adjustment all the time, some one or another.

Q. You have to change them to adjust them to different mouldings?

A. No, sir, ours is principally for wholesale. We run an adjustment as long as we can. We set a machine up and it is kept on one sort of work for two or three days, and from time to time the knives are sharpened. As they work back continually they get shorter and we have to set them up again, and that is where the finest adjustment comes in, so as to keep the first piece of lumber that is dressed and the last one exactly alike.

Q. How is your light there?

A. It is good.

Q. Don't you find it difficult to set these knives accurately, for instance, where there is a cloud passing over the sun? Don't it throw such a shade in there that you cannot set your knives accurately?

2222 A. No, we have all one side open to daylight.

Q. You don't have to have an absolute clear day in order to set the knives?

A. No, sir.

Mr. DICKINSON: Suppose the cloud, instead of passing miles and miles away up in the sky, passed within forty feet of your place?

A. It would doubtless make it dark. Ours is a one-story building, about 16 feet high at the eaves, a little higher than this room, and the whole of one side of the westerly side is glass eight feet wide, the whole of the easterly side is doors about eight feet high opening from the ground up, and above these doors are numerous

windows all along, and in the center are transoms of glass, and that is five feet high.

Q. A gentleman yesterday who had been down there watching this institution for two or three months and observing the effect of the passing of trains over that viaduct stated that when a train went by it had the same effect as a cloud passing over the sun. A shadow was cast through the building the same as we have all observed, the shadow of a cloud passing over the sun. Now that you say don't have any serious effect down at Delray?

A. It would not at our mill, but I would not like to say what the effect would be there. The conditions are not at all similar between Mr. Backus' and ours because he has light only on the south side, while on the west he is in the dark, and on the east he is in the dark, because he has awnings on the sheds there over the tracks on which he unloads his cars.

Q. Do you think Mr. Backus could run his mill down there without any great difficulty on days when there were clouds passing over the sun, say a hundred or so a day? Say the viaduct was not there, do you think it would interfere with his business?

2223 A. No, not seriously.

Q. Then, if it is a fact that the passing of a train over that viaduct has the same effect on the light in Mr. Backus' mill as the passing of a cloud over the sun, then that would not affect it seriously, would it?

A. It being closer to the building it would impede the light more than a cloud way up in the air.

Q. That is your opinion?

A. Yes, sir.

Q. But suppose you had been in the mill and stayed there for months and found it had the same effect, then you would not say that the passing of a train over the viaduct would not affect the light in Mr. Backus'.

A. On that supposition I suppose I would not. If that was the experience of this gentleman you speak of. I don't know anything about that myself. The train would certainly darken the building more than a cloud would.

Cross-examination.

By Mr. BAKER:

Q. Mr. Thompson, one or two questions: How many acres have you in your lumber yard down at Delray?

A. About fourteen acres.

Q. Is your mill on the same fourteen acres?

A. Yes, sir.

Q. That is, your entire plant is about fourteen acres?

A. Yes, sir; the mill is located in one corner. It is not a rectangular piece, it is triangular.

Q. You have the River Rouge on one side?

A. Yes, sir.

Q. And what railroad?

A. A spur of the Michigan Central on the westerly side.
Q. And the Lake Shore?
A. No, just the Michigan Central.
2224 Q. It goes on one side of it?
A. This it the northwest corner, (indicating) the Michigan Central goes in there about 100 feet and turns off. We have our own private track, 1,100 feet, running straight to the River Rouge. Along this side is the River road, so called, and the plant is 800 feet this direction, 1,300 feet on the River Rouge, and 1,100 feet along on the railroad, and only about 100 feet of that is used by the railroad company, the rest is our private track.
Q. There is 100 feet of the main track of the Michigan Central runs along your plant?
A. Yes, sir——
Q. When did you locate there?
A. About eight years ago.
Q. About eight years ago?
A. Yes, sir.
Q. Do you remember what you paid for the land?
A. Yes, sir.
Q. Have you any objection to telling us?
A. I don't know as I have. I paid $600 an acre for it. That was in an entirely crude state, without any docks or any improvements of any kind.
Q. Was it necessary to locate where you would have railroad facilities?
A. There were no railroad facilities there then, but we brought them there.
Q. It was near the railroad?
A. Yes, sir.
Q. And you also have navigation on the Rouge?
A. Yes, sir.
Q. So that vessels can come to your property?
A. Yes, sir; there is 16 feet of water there.
Q. You receive by water and by rail?
A. Our receipts are almost wholly by water.
Q. Where from?
2225 A. From Lake Michigan largely.
Q. And your planing mill and storage-room is close to the railroad on this same property?
A. They are immediately adjoining.
Q. Your lumber yard is right close to your mill?
A. Yes, sir, there is 100 feet of clear space maintained from the mill to the lumber; the lumber is around there.
Q. How do you handle your lumber when you feed it to the mill?
A. On two-wheeled trucks.
Q. You don't have to have any team?
A. The trucks are drawn by a horse.
Q. A single horse?
A. Yes, sir.

Q. Low trucks?

A. The wheels are about three feet high.

Q. How many thousand feet can you put on a truck?

A. Oh, I think our loads are from ten to twelve feet high; probably 1,200 feet.

Q. Are the trucks level?

A. They are simply two wheels with a little frame about three feet wide and four feet long; and then we have what the boys call a Morman hitched to the horse with a tongue. They go and hitch that to a single pair of wheels and tip the load down on the forward track, and he draws it in that way.

Q. You have a large number of these trucks, because your lumber is fed right from the trucks?

A. Yes, sir.

Q. You don't dump the truck?

A. No, sir.

Q. You bring this truck up there and they feed right from that truck?

A. Yes, sir. We load cars or anything else in that way; we use no wagons whatever.

2226 Q. How far do you have to haul? How far away is your farthest pile?

A. We will say 1,400 feet. I would say more than that, perhaps 1,600 feet would be the very remotest.

Q. Do these trucks run on a track?

A. No, sir, on a roadway planked.

Q. You plank the alleys?

A. Yes, sir.

Q. Yours and Mr. Backus' is among the largest in the city, I suppose?

A. Yes, I guess that would be true.

Q. Where is your principal competitors outside of Detroit?

A. Do you mean as to the disposal of our product?

Q. Yes, sir.

A. The Saginaw Valley, Bay City——

Q. Do you make what is known in the trade as box shooks?

A. We do not.

Q. Mr. Backus does?

A. Yes, sir, I think he does.

Q. A box shook, as I understand it, are simply the boards for a box already to nail together, am I correct?

A. Well, I don't know how Mr. Backus puts them up, but they are generally put in crates or tacks?

Q. Put together as you would sash?

A. Yes, sir, all the ends, for instance, are crated together——

Q. It is customary, is it not, in these factories to make these boards and saw them, and have them so that all the carpenter has to do is to nail them together?

A. Yes, sir.

Q. And you can ship them all over the United States, and do?

A. Yes, sir.

2227 Q. Simply to save space in shipping?
A. Yes, sir.
Q. Will you state whether or not they have large institutions of the kind in Bay City and Saginaw?
A. I believe they have.
Q. You are familiar with Saginaw Valley?
A. Yes, sir, somewhat.
Q. You buy lumber there?
A. Very little.
Q. You get your lumber where?
A. From Lake Michigan largely, our own production.
Q. Have they large institutions of this kind in Chicago?
A. Yes, sir.
Q. Where they bring their lumber there and manufacture it up in substantially the same way?
A. Yes, sir. I would say, however, that Chicago does not export so many box shooks as the cities of the Saginaw valley or those cities situated closer to the forests do
Q. Bay City is remarkably well situated for that business?
A. Yes, sir, and Saginaw also.
Q. They are really your warmest competitors, are they not?
A. Yes, sir; I think they are, so far as we know.

Redirect examination.

By Mr. ATKINSON:

Q. Mr. Thompson, I suppose the supply for Bay City comes largely by boats, does it not?
A. Quite a proportion, I believe, does.
Q. And it comes from substantially the same region as the lumber that comes to Detroit?
A. Yes, sir.
Q. Now, this railroad you speak of running alongside of
2228 your plant, is a mere spur for your own convenience, is it not?
A. Yes, sir, it was built originally for us, and afterwards extended to accommodate the Sulphite Fiber Company, the Sutton Manufacturing Company, and the Parker Rendering works.
Q. It is not a road for general travel?
A. No, sir. They visit us twice a day. They come in there in the morning and in the afternoon.
Q. It is practically your own property and subject to your own control?
A. Yes, sir.
Mr. BAKER: The Michigan Central comes within 100 feet of you?
Col. ATKINSON: This 100 feet of the main track, does that run by your windows?
A. It runs by the entrance of our grounds; by our windows on the storage end of the planing mill.
Q. But not where your machines are and where you are at work?
A. No, sir.
Q. It is on a grade?

A. No, sir, it is level.

Q. It is not an elevated track?

A. No, sir.

Q. And doesn't come up in front of your windows and above them, the same as Mr. Backus'?

A. No, sir, the top of the cars is just about level with the bottom of the windows; perhaps there might be a foot onto the windows.

Q. And in your store-room I suppose the necessity for light is not so great as in your work-room?

A. No, sir.

Q. You consider it would be a decidedly different thing to
2229 have an elevated track built up so as to run close to the windows on the sides where you are working, and with a tremendous number of trains passing constantly by you?

A. I would certainly.

Q. You would consider it as a very much more serious injury, would you not?

A. Yes, sir, I would like to say that if the trains passed on a level with the bottom part of our windows we would have to put in skylights—we have but one story—because we depend on the light coming from these high windows, and the light comes in on the top of the cars where we are loading our lumber inside of the mill.

Q. If an elevated track of that kind was put immediately in front of your windows, with a large number of trains passing, would you stay there at all and attempt to do a planing-mill business?

A. That would depend again. If I could get a better site I should not.

Q. You would consider it a bad site?

A. I certainly would consider it a very unfortunate occurrence.

Q. And very injurious?

A. Yes, sir.

Q. Your usual experience teaches you to believe that railroad trains will frighten ordinary horses?

A. Yes, sir, very often.

Q. And would you regard such a place as Backus' with this elevated railroad immediately in front of his River Street front as fit at all for a retail trade of the city where teams of different persons would come down and buy the lumber they wanted?

A. I should not. In fact, I don't believe, sir, there would be a great many customers that would go down there.

2230 Q. Customers, at least, would be timid about driving their teams in there?

A. They would be.

Q. In prosecuting the business in the retail trade there, would not the noise and other annoyance of the railroad on that side be very great?

A. Well, I think the principal damage would be in frightening and disquieting teams of the people that came there.

Q. Making it an undesirable place for any one to come to?

A. Yes, sir.

Q. I suppose if a man's team should run away he would go to another place the next time?

A. Undoubtedly.

Q. Now, how do you supply your retail trade in the city from Delray?

A. We haul it.

Q. By wagons?

A. Yes, sir.

Q. And about how many loads could be drawn from your place to the center of the city, say in a day?

A. About two.

Q. Now, in that respect, Mr. Backus would have great advantage in length of hauling, would he not?

A. Yes, sir, and I would say that is the reason we started this yard on Gratiot avenue, so as to get in town. We did a comparatively small trade from Delray. We do not desire to do a retail trade there.

Q. This cartage, when it is of any great length rapidly swallows up the profits, does it not?

A. Yes, sir, it does.

Q. So it is an advantage to be near the customers or those who consume your goods in the retail trade?

A. It is.

2231 Q. Now, with reference to your lumber yard, you say you pile your lumber right alongside of the railroad track?

A. Yes, sir.

Q. Where is that done?

A. That is done inside of the planing mill on the extension that reaches to the River Rouge.

Q. That is alongside of the spur track?

A. Yes, sir.

Q. Do you mean your lumber piles are piled alongside of the main track of the railway?

A. No, sir; there is no main track of the railway except this 300 feet I spoke of which crosses the corner of our property, the other is a private switch of our own.

Q. That is this place where the cars come down twice a day?

A. Yes, sir.

Q. It is not like the main track where trains are passing constantly or anything of that kind?

A. No, sir.

Q. Would you consider it decidedly different if your lumber was placed alongside of the track that four main lines of railway — and liable to be operated upon by dozens and hundreds possibly of railroads in the future as affecting the use of the property?

A. I should use it if I had to.

Q. But you would consider the danger greater and the injury greater?

A. It would be greater and the injury would be more serious.

Q. When you get lumber by rail it is brought in open cars, I suppose; and you find it sometimes covered with dust and cinders?

A. Always in fact.

Q. That is to be swept off?

2232 A. It should be removed with a great deal of care else it will dull the knives.

Q. If it was dressed lumber it would almost spoil it?

A. Yes, sir, if it was fine lumber; if it was sheeting boards it would not make much difference.

Q. Your retail yard in the city, is that located on the railroad?

A. On the belt line.

Q. Not any main line?

A. No, sir.

Q. Located where how many trains pass during the day?

A. About 8 or 10 perhaps,

Q. Not anything like the Michigan Central or the union depot?

A. No, sir.

Q. Those main tracks that Mr. Robison asked you about of the Michigan Central that were near Mr. Backus' place before that time, do you know how his property is situated as to the dust or cinders coming in from the Michigan Central?

A. Only as I have seen it there, he having two tracks between the Michigan Central and his building on which he places the cars into — he puts lumber and having the shed projecting over it, it pretty nearly excludes the cinders and dust.

Q. He is pretty well protected, then?

A. Yes, sir.

Q. What is your experience with prevailing winds—whether they are from the southwest?

A. I should think they would be in the summer season generally southerly; the winter, generally northerly.

Q. He does not depend for light on the side of the Michigan Central to any extent?

A. Yes, sir, they load their cars there.

2233 Q. I mean in the mill?

A. No, the light is from the south side, the River Street side.

Q. Then there are skylights in the shed on the Michigan Central side?

A. Yes, sir.

Q. You consider when you say 30 or 40 per cent. damage to this plant, you consider the damage less from the fact that the yards or warehouse are all remote from the mill so as not to be affected by this superstructure?

A. Yes, sir.

Q. But considering Backus' situation, that his lumber yard being so remote is where he is compelled to lay the lumber along under this superstructure. Does it not affect that property of its usefulness?

A. Which property do you allude to?

Q. The two down on the river, it being so situated that he is compelled to bring the lumber to the mill and go along under this

superstructure, is not the value of the lumber affected as well as the mill?

A. It would be for his use; not as a lumber yard.

Q. If it was used separately?

A. Yes, sir.

Q. It would those three properties in combination, they are all affected by this superstructure?

A. They are to a very large extent.

Q. Because you have got to bring the lumber from the yard to the mill along under this superstructure, and then to haul it around by Twelfth street?

A. Yes, but I was not informed as to that.

Q. That is, their mill was so arranged to do that, and that would affect the use of the warehouse, the lumber yard and the use of the mill?

A. Yes, sir, as far as the feature of teaming is concerned.

2234 Q. Now, how long have you known the Backuses?

A. Oh, I guess I have known Mr. Absalom Backus 15 years or more.

Q. They have all been at work in this business ever since you knew them?

A. Yes, sir.

Q. And devoting themselves to it?

A. Yes, sir.

Q. And having used these three properties so far as you know together, have they not?

A. Yes, sir.

Q. Is a warehouse for overstock a very essential thing in connection with a planing mill?

A. Yes, sir, it is a necessity.

Q. A large concern of that kind could not get along without some such convenience, could they, without a great loss?

A. It would be a great loss to them to be deprived of such facilities.

Q. Now, to come to Mr. Robison's astronomy, I suppose clouds differ in density and heavy fogs would almost stop business in a planing mill, would it not?

A. That would depend. If they had a good electric light I guess they could get along.

Q. I mean stop it, unless there was artificial light?

A. Yes, sir.

Q. Are planing mills often run with electric lights?

A. Yes, sir.

Q. They are fitted up specially with these lights for the purpose of running in dark weather or at night?

A. Yes, sir.

Q. I suppose that is expensive?

A. Certainly.

Q. Have you any idea what it would cost to furnish the Backus establishment with electric lights?

2235 A. No, sir, I have not.

Q. You haven't investigated it?

A. No, sir. We have our mill equipped with electric lights with a cost of about $600, including the dynamo.

Q. You furnish your own electric light?

A. Yes, sir.

Q. That is, the insulation cost about $600?

A. Yes, sir, cost that to put it in, and I presume it costs us $50 a year for lamps.

Q. You supply the power?

A. Yes, sir, our own power.

Q. Is it an independent engine?

A. It is an engine that drives the fan that circulates the fan in the dry kiln.

Q. Then you utilize some excessive power to furnish the light?

A. Yes, sir.

Q. Which is the best, electric light or natural light for a planing mill?

A. I should prefer the daylight always.

Q. You use the electric light on dark days?

A. Yes, sir.

Q. How many lights do you use?

A. I think we have 80 in the whole plant.

Q. Have you any means of estimating the relative number that would be required in the Backus mill?

A. I have not; no sir.

Recross-examination.

By Mr. BAKER:

Q. Mr. Thompson, you were down there on the Rouge and were down there before you put in the electric light?

A. Yes, sir.

Q. Did you ever have a fog down there that stopped the mill?

2236 A. I don't recall that we ever did.

Q. I suppose in some parts of the ordinary buildings for that purpose it would be necessary at times, late in the day or very early in the morning, to have artificial lights?

A. Yes, sir.

Q. Especially in the winter time when the days are short?

A. I think it is generally the fact that mills of that character operate only about eight hours in the winter unless they are well equipped with artificial lighting.

Q. Unless they are equipped with artificial lighting they have to cut down to eight-hour time?

A. Yes, sir.

Q. And cost you about $600 to equip your mill so as to run all night if necessary?

A. Yes, sir.

Q. And you have excess of power enough so the running expense is a very nominal matter?

A. Yes, sir.

Q. Now, about this retail trade we have heard so much about. Do you know of any reason why people who go there to purchase—these retail buyers—why they could not use the court, the entrance to which is on Fort street, to the Backus property?

A. I suppose it would involve the elevation of the lumber to that level.

Q. It would require them to deliver the lumber at that side of the mill instead of the River Street side?

A. Yes, sir.

Q. Do you know to what extent the Michigan Central crossing interferes with his retail trade?

A. I don't. It would be a menace, undoubtedly.

Q. And that is a crossing of thirteen tracks, and the entire traffic of the Michigan Central passes over it?

2237 A. Yes, sir.

Q. That would cut off a retail trade that would come from the East on the River road largely, would it not?

A. It would interfere with it, undoubtedly.

Q. And the only conceivable effect upon this retail trade would be that of changing the point of delivery to it?

A. The suggestion of delivering it in the court would obviate the necessity of going around this viaduct.

Q. What is the capacity of your planing mill per day; how many thousand feet of lumber can you cut up?

A. Well, we could not cut up any hundreds of thousands. We probably would dress 100,000 feet, as far as matching and surfacing, and so forth, is concerned, but in box shooks we probably could cut up six or seven thousand feet at the outside.

Q. But on the average, take the year through, how many feet of lumber do you consume a day?

A. Well the word consume don't quite fit. Permit me to say that we don't consume over a million and a half feet of boxes and moldings, to which I take it you allude, in a year.

Q. I want to know about what your annual consumption of lumber is in a year?

A. We handle about 30,000,000. Probably 60 or 70 per cent. passes through the planing mill in some form.

Q. Then you depend largely upon the wholesale trade, don't you?

A. Yes, sir.

Q. How many mills like Backus' would it take in this city to supply the retail trade of the city?

A. I could not answer that question.

Q. Can you give us an idea about it?

A. No, I could not. I think there are about one hundred

2238 million feet of lumber used in Detroit. I presume four such mills as Backus' could easily do it.

Q. All the trade in Detroit?

A. Yes, sir, supposing they had the opportunity, but the fact is the largest amount of dressed lumber used by builders and con-

tractors comes here in a manufactured form. For instance Saginaw dealers send their lumber finished.

Q. The retail trade is not a very valuable part of your business?

A. It is an incident to it.

Q. Is not that substantially the case with the Backus plant?

A. I am unable to answer that.

Recross.

By Mr. ROBISON:

Q. Do you have a dust-arrester?

A. Yes, sir.

Q. What kind?

A. Allington, so called.

Q. The Saginaw concern?

A. Yes, sir.

Q. Does it work all right?

A. Yes, sir.

Q. Why don't you get one of Backus'?

A. I don't know of any occasion to make a change.

Q. But it is the best there is. Do you know anything about how they are operated?

A. I have seen his and I have seen the models of the sort he sold.

Q. Do you think that this elevated structure down there would have any effect on his manufacturing dust-arresters and patent crates? Do you think he could do that down there just as well with the elevated road?

2239 A. I presume so, if he makes them; I don't know that he does.

Q. And of course, now that he is going out of his lumber business he will undoubtedly go to manufacturing dust-arresters?

A. That I don't know.

A JUROR: You spoke about the impairment of the business, it being 30 or 40% less, and then stated that in that calculation you reckoned the fact of the lumber yard being down where it was, so that the lumber had to be brought up to the mill, was the principal cause of that impairment.

A. Yes, sir.

Q. Supposing that lumber yard were located opposite the mill, or as near the mill as your lumber yard is, what would the impairment be then?

A. It would be perhaps 20%. I would make easily that difference.

Q. The other being because of their being obliged to draw the lumber up under this elevated railway?

A. Yes, sir.

Q. You would not make any difference in the distance of the yard, whether the elevated railway were there or not, if the elevated railway were not there and the lumber was not drawn up there?

A. Yes, sir, I would make a difference. I would say this, Mr. Juror, I don't know how many teams it takes to supply Mr. Backus'

mill, but two horses and one driver supply ours. They will handle from 100,000 to 150,000 feet a day, and they have special facilities for doing it because they use what is known as dump wagons that unload themselves.

Q. Before this elevated railroad was built and while Mr. Backus was carrying on his business there, the lumber yard was right
2240 where it is now, so that the difference in this impairment would be because of his teams having to draw this lumber up under this elevated road? That you think would be the disadvantage?

A. Yes, sir.

Mr. DICKINSON: I don't understand you that the impairment you speak of, the percentage, would be ascribed merely to the drawing up under that superstructure, but to the darkening of the light, and the impairment of all the facilities of the planing mill?

A. Yes, sir, but I say perhaps 20% of this impairment would be owing to the drawing of the lumber under this superstructure.

Q. But you have no doubt that the impairment of the facilities of the mill would take off the profits and success of the business to such a degree as to make it a losing instead of a successful venture? Am I right?

A. It would amount to that.

Col. ATKINSON: I suppose a lumber yard or source of supply to a mill of this kind is absolutely essential?

A. Yes, sir.

Q. You have got to have it somewhere?

A. Yes, sir.

Q. The only point is to get it as convenient to the mill as possible?

A. Yes, sir. It might be 100 miles away, but under great inconvenience.

Mr. ROBISON: You don't mean to be understood that that mill is worth 20% less because this lumber has to be hauled under this viaduct?

A. I say the impairment to the eligibility, to the site——

Q. That is because of its distance away?

A. No, sir, because of the necessity of hauling this lumber under the viaduct.

Q. You think it would be worth 20% less because the lumber has to be drawn under the viaduct?

2241 A. Yes sir, that is, if it was open.

Q. How far does it have to be drawn under the viaduct?

A. Probably 1,500 or 1,200 feet. It is equally dangerous to drive alongside of that embankment where trains pass. I know my horses are always frightened along there.

GEORGE L. D. SUTHERLAND, sworn on behalf of the respondents.

Examined by Mr. DICKINSON:

Q. I hardly need ask you whether you are one who frequently visits the Michigan Central Railroad yards, or whether you are in

the employ of the Michigan Central railroad. You are, are you not?

A. Yes, sir.

Q. For how many years have you been connected with the Michigan Central?

A. Forty-four years.

Q. In what capacity are you engaged?

A. I have charge of the repairs and cleaning.

Q. Cleaning cars that come in?

A. Yes, sir.

Q. You are the foreman of that department?

A. Yes, sir.

Q. How long have you been engaged there in that capacity for the Michigan Central?

A. I have been about thirty-five years at that.

Q. And what are your duties? Tell the jury so they can form some idea of it.

A. Examine the trains that come in, do all the repairs necessary, clean them, get them ready to leave..

Q. I suppose prior to the construction of the union depot, the F. & P. M. cars and the D., L. & N. cars came in there, did they not?

2242 A. Yes, sir, they used to, but not now.

Q. In your observation of the cars for so many years, you have had to do with closed passenger cars, have you not?

A. Yes, sir.

Q. And the Pullman and Wagner cars that come in?

A. Yes, sir.

Q. Will you please tell the jury what you find upon the cars—closed passenger cars—that come into your station there daily in the way of cinders?

A. Well, you generally find the hurricane decks and the platforms pretty well covered with cinders.

Q. Is that invariably the case whenever they come in there, and are they always cleaned again before they go out?

A. Yes, sir.

Q. How about the inside of the cars that are closed, as to cinders?

A. Anywhere there is an opening the cinders get through.

Q. Do you find them usually in the cars, on the cushions?

A. Yes, sir.

Q. They are cleaned as to cinders inside each time?

A. Yes, sir.

Q. And what is about the average of cinders upon each car as you take them off and clean them from day to day? What would you get off from the floor and the platform each day?

A. It would probably be half a pint; maybe a little more on each car.

Q. Each car, however near or remote from the engine?

A. They are a little heavier up to the front end.

Q. How long are these cars?

A. They are 45 and 50 and 60 and 65 and 70 feet.

2243 Q. What is the average number of cars in an ordinary passenger train?

A. From eight to ten; as high as sixteen.

Q. You find the cinders at the extreme end of the train as well as near the engine?

A. Yes, sir.

Q. And you find from a half a pint or more on a car?

A. Yes, sir.

Q. I suppose in the running of the train very many of the cinders blow off?

A. Yes, sir.

Q. Do you not find cinders inside of the cars where the windows have been closed, even?

A. Yes, sir, they will work through the ventilators, and so on.

Q. Now, the class of cinders you take off the cars that come in there, can you tell the jury if these are fair samples of the size? Look on them both (showing envelope filled with cinders).

A. Yes, sir, that is about the average size that we take off the trains.

Q. In the yellow envelope, Exhibit "Griswold 6," is about the average size?

A. Yes, sir.

Q. Do you see anything of the cinders of the size I show you in Exhibit "Griswold 7"?

A. Yes, sir, we occasionally get them in the freight yard where they are switching heavy trains; but this other is the style of the ordinary cinders.

Q. They will run about that average, will they, in size?

A. Yes, sir.

Q. Now, you have been engaged in that yard for forty-five years, more or less?

A. Yes, sir.

2244 Q. Will you please state whether you have ever seen a locomotive drawing a load that did not throw these cinders?

A. They all throw more or less cinders.

Q. Do they have devices attached to locomotives for arresting the cinders?

A. They have.

Q. But have these devices been successful enough to prevent their blowing these cinders?

A. I suppose if they are kept in proper order they would be.

Q. Have they ever done it as a matter of fact?

A. No, sir, not on soft coal.

Q. They all burn soft coal, do they not?

A. I don't know what they burn on the union trains.

Q. In the cars such as you have seen of the D., L. & N., the Canadian Pacific or the F. & P. M., have they burned anything but soft coal?

A. I have never seen them burn anything but soft coal.

Q. And you have often seen the F. & P. M. and the D., L. & N. trains?

A. Yes, sir.

Q. Do you know of any that burn hard coal?

A. No, sir.

Q. What is the effect of the throwing of the cinders by locomotives as to the difference to the number of cinders it throws when it is going up a grade, and when it is running on a level?

A. She is working harder going up a grade and usually throws more.

Q. Considerably more?

A. Oh, yes, I should judge so.

Q. Have you ever known in your experience, and in your examination of cars, with reference to cinders upon them, and in your experience in the yard, have you ever known of any devices
2245 that have been put upon locomotives that have prevented this throwing of cinders, as you have related, as yet?

A. They have a netting.

Q. Has it been successful in the preventing of the throwing of cinders?

A. No, I think not.

Q. Now, from your experience and knowledge and operation where do the cinders come from that you find upon the cars?

A. They all come from the locomotive.

Q. I suppose the heavier the load, the more it exhausts and the more it throws cinders?

A. Yes, sir.

Q. Have you ever seen a locomotive going in or out that did not throw fire from its smokestack?

A. I never seen one but what would throw fire.

Q. And about how far in your observation would the average spark, of course some will go further and some a less distance, but about how far is the fire thrown before dying?

A. It would go back to the second or third car before it goes out.

Q. And that is how many feet?

A. One hundred and fifty feet or more.

Q. And if the wind is blowing at the side, or if the wind is heavy, I suppose those sparks go to one side?

A. Yes, sir.

Q. And I suppose the heavier the load the more fire they throw?

A. Yes, sir.

Cross-examination.

By Mr. ROBISON:

Q. The locomotives that are in use now don't throw as many cinders as they used to?

2246 A. I think they are kept in better order than they used to keep them.

Q. They have an apparatus that is supposed to arrest these sparks?

A. Some of them, not all.

Q. But it don't compare—this throwing of the sparks from engines now—with the engines that used to burn wood, as far as throwing cinders is concerned, does it?

A. No, sir.

Q. No comparison?

A. No, sir.

Q. There isn't any engines around these yards burn wood now?

A. No, sir.

Mr. DICKINSON: And haven't for forty years?

A. We have two at Jackson yet, but they are not running. They have not run on the road for the last twenty-five years.

Mr. ROBISON: Don't any of them come up here?

A. No, sir.

Q. And these cinders are heavy—they are not light—they are like charcoal?

A. Some you will find pretty heavy. The cinders on the cars are just as they are in that yellow envelope.

Q. They don't blow off sideways very far?

A. Not unless the wind is blowing that way.

Q. It has to blow pretty hard, don't it, to blow it sideways? If you take shot and throw it up in the air it will come straight down, no matter how the wind is blowing?

A. Well, the cinders will go two or three cars behind.

Q. That is by the motion of the wind and the motion of the car?

A. Yes, sir.

Q. You take this paper of cinders and go out when the
2247 wind is blowing and throw them up, and they won't float off 50 or 60 feet, will they?

A. No, sir, I should say not.

Mr. DICKINSON: The wind will carry them off to the side by the force of the wind and the engine together?

A. Yes, sir.

Q. About how far will they carry them to one side, alive?

A. I have noticed them go over the fences, and that is 200 feet and more.

Q. Now, this device in use to catch sparks, is this a sample (producing two wire screens)?

A. Yes, sir.

Q. In use on the Michigan Central?

A. Yes, sir.

Q. They have the finest devices known to the art on the Michigan Central?

A. Yes, sir, on some engines they have.

Q. And these are the devices in use?

A. Yes, sir.

Q. What have you to say as to their burning out, getting ragged and being useless; how long does it take about?

A. Well, they get choked up; they get on fire, too, and it burns them out, and they don't renew them.

Q. They don't renew them whenever there is a hole in them like that, they continue to use them?

A. Yes, sir. It is the duty of the engineer to report that at once.

Q. But practically they don't do it?

A. No, sir.

Q. So that practically they get burned through with holes so as to allow cinders to go through?

A. Yes, sir.

2248 Q. And practically they throw sparks and cinders, as you have stated, notwithstanding these devices?

A. Yes, sir.

Q. How about the majority of engines, do they have these on or not?

A. Our last new engines we are getting are a different style. They are constructed with a spark-arrester.

Q. Like this?

A. No, sir, not like that. That is from our old engines that we are running on a lot of passenger trains.

Q. Is there anything new in spark-arresters?

A. They claim so.

Q. Do they work so as to stop the throwing of sparks and cinders?

A. No, sir.

Q. Practically they do not work?

A. No, sir.

Recross-examination.

By Mr. BAKER:

Q. Where did these things come from (indicating screens used on locomotives for spark-arresters)?

A. I don't know.

Q. Did you ever see them before?

A. No, sir.

Q. You don't know what junk shop they did come from.

A. No, sir.

Q. And you are not an expert in building spark-arresters or dust-arresters and engines?

A. No, sir.

Q. You simply know that they have not yet got a device that is perfect, that can arrest them all?

A. Yes, sir.

Q. But it has gradually improved, has it not?

2249 A. Yes, sir.

Q. And they use a variety of apparatus connected with the engine for the purpose of reducing it to a minimum?

A. Yes, sir.

Q. Do you know what the size of that mesh is?

A. I do not.

Q. You say it is the duty of an engineer as soon as there is any defect in his engine to report it and have it repaired?

A. Yes, sir.

Q. They don't always do it; railroad men make mistakes sometimes?

A. They have made some lately.

Q. You are at the head of the department that cleans cars down there?

A. Yes, sir, cleaning and repairing them. We have full charge of all passenger trains coming in and going out.

CHARLES KRONBACH, sworn on behalf of the respondent.

Examined by Mr. DICKINSON:

Q. Where do you live?

A. I live in the city of Detroit here.

Q. How many years have you lived here?

A. I have lived here twenty-one years.

Q. What is your business?

A. I am foreman in the Backus planing mill.

Q. And how long have you been engaged there?

A. It is going on eighteen years now.

Q. You have charge of the machines?

A. Yes, sir.

Q. Upon all the floors?

A. No, just the lower floor.

2250 Q. You are familiar with the class of work that is done there?

A. Yes, sir.

Q. Familiar with the machines?

A. Yes, sir.

Q. Is it a part of your duty to see that the men keep to their duty in adjusting the machines and keeping them clean and in perfect order?

A. Yes, sir.

Q. From day to day, how is it as to your being in the shop, as to the time you are in the shop from day to day?

A. I don't understand you.

Q. You are in the shop what hours every day?

A. From seven in the morning until half past five in the evening.

Q. Your watch, then, is from seven in the morning until half past five in the afternoon as foreman in charge of the machinery?

A. Yes, sir.

Q. And have to see that the work is got out right?

A. Yes, sir, I have to see that the work is got out right, and I get the orders from Mr. Backus, and I see that the orders are filled and that everything is done right.

Q. You were there before the building of this superstructure, were you not? The building of the elevated road, the union depot, the railroad company's structure down there?

A. Yes, sir.

Q. You know how the mill was before the building of this superstructure?

A. Yes, sir.

Q. Will you please look at this picture I show you and see
2251 if that is a correct representation of the River Street front of that mill as it was before the building of that superstructure?

A. Yes, sir; that is right.

Q. That is as it was, is it?

A. Yes, sir.

The photograph referred to is marked Kronbach Exhibit "1."

Q. What have you to say as to the requirement of light in your business?

A. We have to have all the light we can possibly get.

Q. And your light there on your floor came in from the River Street windows before the union depot structure was erected?

A. Yes, sir.

Q. On the south side of the mill?

A. Yes, sir.

Q. Now, will you please tell the jury whether the building of this superstructure and the passing of trains has affected the light materially for the purposes of running the machines there, or has it impaired the effectiveness of the machines and the work of the men?

A. Well, it does a lot of harm.

Q. In what way? Try to tell the jury in your own way.

A. It requires a lot of light around the machines to set up the machines in the first place. That is for fine work. We have to have machines that require from 14 to 20 knives and some of them are little bits of knives, and some of them larger, and every knife has got to be in its place. It can't vary the thirty-second of an inch or it would throw the molding out of shape, and the next knife would catch the same spot perhaps and the molding would be spoilt. And if the knives are not in good shape, and in the
2252 right place the molding is spoilt. We can see a little bit better by the gaslight, but it ain't very good light.

Q. Suppose one of the smallest knives of the machine which is working is out of gear or out of position the thirty-second of an inch, and is not observed by the workmen at the machine, how many pieces will be spoiled inside of a minute, when the machine is running its capacity?

A. In a minute will be about 40 feet.

Q. About 40 feet of lumber in a minute will be destroyed?

A. Yes, sir.

Q. And that may have been if there is a moment's carelessness on the part of a workman, or a moment's oversight?

A. Yes, sir, they have to have good light then to see that right off. If they don't see it right off the stuff is spoilt.

Q. Have those things occurred in the mill since the building of this superstructure?

A. Oh, yes, sir.

Q. Frequently?
A. Pretty often. We have had lots of trouble.
Q. More than you had before the building of the superstructure?
A. Yes, sir.
Q. Have you observed in the machines there under your charge in the hands of the men the interposition in the work of impurities like cinders?
A. Yes, sir.
Q. Tell the jury about that, if there is anything about that.
A. We find these cinders pretty regular. We find them all over the floor; not inside the mill but outside. We have the rip-saws on the outside, two rip-saws, and they rip the lumber up in
2253 small strips, say two or three or four or five inches wide, and we lay that on the truck, and after we get a truck-load, about 1,000 feet, we run it inside the mill through the planer, and by these cinders falling all over the place they naturally drop onto that lumber, and when it is taken inside and run through the planers, the heavy rollers generally press these cinders inside the lumber, and after it gets up to the knives it dulls them, and also makes a mark in the lumber.
Q. It marks the goods?
A. Yes, sir.
Q. Is this matter of frequent occurrence?
A. Yes, sir.
Q. Will you please state whether the soot, the dark soot, gets upon the lumber so that the ordinary observer won't observe it without rubbing upon it?
A. Well, if you rub on it you will generally see it.
Q. But will the ordinary observer see the soot without making a rub on it?
A. Well, you have to look pretty close, but the cinders you can see.
Q. And they do get into the knives the best you can do?
A. Yes, sir, they get pressed into the boards and the knives will work against them.
Q. And all care is exercised to prevent it in the mill, is it?
A. Yes, sir.
Q. Caution is enjoined upon the men about getting any impurity in?
A. The man who runs the machine, he generally shakes the cinders off, he turns the board over, but at the same time the cinders get in there anyhow.
Q. Have you ever discovered, arising from this cause, that there were nicks in fine knives?
A. Yes, sir.
2254 Q. The edges turned?
A. Yes, sir.
Q. What effect does it have upon the product if the edge, or the point of the edge, or we will say, to use your own expression, the thirty-second part of an inch of an edge is turned; what effect does that have upon the product?

A. If it is a molding, it is spoilt.

Q. Why?

A. Because then it is a cull.

Q. It is spoiled because it will not fit with the balance?

A. Yes, sir, and you might say it is worse than a cull; nobody can use it for anything.

Q. Has this occurred since the building of this superstructure?

A. Yes, sir.

Q. Now, Mr. Kronbach, did these imperfections occur prior to the building of this union depot structure and the running of the union depot cars?

A. No. It is the light. We cannot see inside there now.

Q. The light has been changed?

A. Yes, sir.

Q. But did you have these troubles from cinders before upon the knives?

A. Not that I recollect.

Q. You had no such trouble before?

A. No, sir.

Q. Is it a matter of frequent occurrence, or only rare occurrence that you have this trouble now?

A. Yes, sir, it happens every day, more or less.

Q. And such a state of things did not exist prior to the building of the union depot structure?

2255 A. No, sir, we used to have a light where we could see the defect. If you have a bad light you can't see it and they let it go, and it runs along fifteen or twenty minutes before they get on to it, and all that lumber is spoilt.

Q. Is it a part of the duty of the men to see that this raw material is kept clean and free from impurities?

A. Yes, sir, that is the rule, to keep it clean.

Q. Now, will you please tell us what you find upon the dressed product of the molding, and so on, the fine lumber, that has resulted since the building of the superstructure, when it has been stored outside of the mill or deposited for shipment or taken for shipment?

A. It has happened sometimes when we have filled an order, and piled the lumber on the outside that if we don't get the car just at the minute we want it we find that the lumber will be all black afterwards.

Q. You have to take it outdoors to ship it anyway?

A. Yes, sir.

Q. What is the practice in the mill as to the loading of a car, where is the lumber piled before loading?

A. We have to pile it on the outside.

Q. Was that the practice formerly?

A. Yes, sir. Every car is inspected and we can't see well enough inside to inspect the lumber.

Q. Do the men get through as much work as they used to, even on the class of work they are doing now?

A. No, sir, because they are troubled more or less with the knives.

They have got to shut down oftener and fix the knives, and it all takes time.

Q. What have you observed in the passing of locomotives as to the throwing of smoke and steam?

A. They all throw it. Sometimes it ain't so bad as others. Sometimes they throw an awful volume of smoke, and it darkens the place inside.

Q. Does it come inside in the summer when the windows are open?

2256 A. Yes, sir.

Q. Come right through in the mill so that the cloud is perceptible in the mill?

A. Yes, sir; we notice the smoke inside.

Q. You are the foreman on that floor?

A. Yes, sir.

Q. Did you have charge of the retail trade for the mill?

A. Yes, sir; I sell lumber there too.

Q. What have you to say as to the customers of the mill, before the building of the superstructure, as to what sort of trade you had?

A. The trade is decreasing.

Q. But before, did you have a good trade in the city of Detroit?

A. Yes, sir; I had a good trade.

Q. How was the trade carried on, where were the customers found?

A. They generally came down there with their teams, and I had to work up stuff that was not ready, and rip it for them, and they waited for it until it was finished and put it on their wagons.

Q. Was that a considerable trade?

A. Some days I sold over $400 worth, and some days probably not over $25 or $50. I can't tell what was the average.

Q. It ran a fair daily trade in that class of business, did it?

A. Yes, sir.

Q. How has it been since the building of the superstructure and the operation of the railroads there? What has been the effect upon that retail trade?

A. I have been losing all the old customers I used to have. They are afraid to go around there because their horses get frightened. The horses generally don't like to stay there.

2257 Q. Whatever the reason, the trade has gone?

A. Yes, sir.

Q. Has there been any runaways down there?

A. Yes, sir, quite a number of runaways down there. Sometimes the horses would not get away. One time a man was down there with his lady. He stepped inside and the lady was sitting in the buggy and the horse jumped off over the sidewalk, into the next man's yard; and one time there was a lady down there and the gentleman went in to see the engineer; I guess he was an insurance agent. I saw the lady and told her that it was dangerous to stop there on account of that viaduct, and she said she thought her horse would not get scared at anything, but I told her it was a different

thing than being alongside the railroad. If the railroad is right over the horses where they can't see it they will get scared sooner; they hear the noise and it kind of sets them wild. So I went off in the engine-room, where that man was and told him it was dangerous to leave the buggy out there, and he says, "Well, I don't think my horse will run away." When I came out I saw two of my men had left the rip-saw they were working at, and each one had ahold of the horse, and the horse was rearing up, and the lady happened to get out in time without being hurt any.

Q. Are you the foreman in charge of the sawdust and shavings?

A. Yes, sir.

Q. Was that sold also to retail customers that came there?

A. Yes, sir.

Q. What has become of that trade?

A. They don't come so regular now. It is decreasing.

Q. Has there been any recent cases of runaways there? How about last Saturday, during the trial of this case?

A. Yes, sir, Mr. Backus told me——

2258 Q. You didn't see it yourself?

A. I didn't see it. I was not there.

Q. Never mind, then, if you didn't see it. One of your customers, was it, that was run away with twice and finally backed out?

A. There was one customer down there—that was the time they built this viaduct. They were driving piles in there and had machines running, and they had a big hole dug there about 8 feet square and about 6 feet deep.

Q. That was when they were building it?

A. Yes, sir.

Q. Did he afterwards come down since the road was running?

A. Yes, sir.

Q. And did his horse run away?

A. Yes, sir; he tried to run away.

Q. Has that man been down there since?

A. No, sir.

Q. What was his name?

A. That fellow's name is Deitlow.

Q. A carpenter?

A. Yes, sir.

Q. What about the other customer you were telling about?

A. I had a customer down there not long ago, he asked me if I could get him out a lot of molding for a double store that required lots of molding, and I told him Yes and he came down, and I told him right away that he should be careful about his horse and he told me his horse was all right, it was used to railroads. He got along twice that way, and the third time he tied his horse outside of these posts, these columns, whatever you call them, under the viaduct, and he came inside, and I was getting out some stuff, and I seen him running outside, and I looked out and he could

2259 not get anywhere near his horse because his horse was frightened so it was rearing up and kicking around so he could not get anywhere near it. He has been down there since, but he

always stops now on Twelfth street, right in front of the Scotten building, and I have to carry the lumber down there.

Q. How do you carry the lumber down there, by hand?

A. Yes, sir.

Q. You load his wagon by hand from the mill to Twelfth street?

A. Yes, sir.

Q. How far is it down there where you have to tote the lumber?

A. Well, he don't take so much now.

Q. Why couldn't he come in down by Fort street?

A. Well, I don't see him. I don't want to tell him where to go. I carry the lumber where he stops and that is the end of it.

Q. Have you any facilities for delivering lumber on the north side of your shop?

A. We can run it from the elevator and out through the yard.

Q. And that would necessitate the employment of labor and changes in the elevator and the removal of the lumber?

A. Yes, sir.

Q. You would have to attend to it?

A. Yes, sir.

Q. Would that take you away from your other duties as foreman in the shop?

A. Yes, sir.

Q. At all events customers don't come down that way; they don't come down Fort street?

A. No, sir, we had one down there once and I have not seen him since.

2260 Q. During the building of this structure down there, how long were they at it; how long was the street out of condition there?

A. I don't recollect. It was quite a while. It was months.

Q. Was it about a year they were at it down there, tearing up the street and putting in their stone foundations for their columns along the street?

A. It was a long while, but I can't tell exactly how long it was.

Q. What effect did that have upon your business during the construction of that structure and the tearing up of that street?

A. It hurt the business. We could not get through with our own teams and outsiders would not think of trying to get there.

Q. How long is it since they got the pavement down there and the sewer filled in?

A. It is repaved this summer. I don't know exactly how long ago. I can't tell.

Q. During that period of the situation of the street, did that result in great damage to Backus, and inconvenience them in sending out their lumber?

A. Yes, sir, it was a great damage. We could not get through the way we ought to.

Q. Can you give us anything of the distance which the sparks will go into that place?

A. Well, I don't know. I find them all around the factory on the first floor. I find some upon the roof and all over.

Q. Do you know of an instance of your finding them upon yourself, even this morning?

A. Yes, sir, this morning I found one or two of them on the rim of my hat. One of them dropped off my hat as I was standing talking with the engineer, and he seen it and he asked me what it was, and I took off my hat and I found another there.

2261

Q. Where were you talking with the engineer at that time?

A. I was in the engine-room.

Q. In this alleyway?

A. Yes, sir.

Q. In the door of the engine-room?

A. Yes, sir.

Q. Do you know anything about a cinder going into the alleyway up there in the engine-room and burning the engineer on the neck?

A. The engineer showed it to me.

Q. You didn't see that?

A. I didn't see it drop, but he showed me the spot where it burned him, and I had seen cinders all along in the alley there.

Q. Past the shaving-room?

A. Yes, sir; right there in the engine door.

Cross-examination.

By Mr. ROBISON:

Q. Have you got the cinder here, that one you found this morning?

A. No, sir.

Q. What did you do with it?

A. I dropped it.

Q. Hard coal was it?

A. That is more than I can tell you. I am not posted in that kind of business. I could not tell whether it was hard coal or soft coal.

Q. How wide is the street in front of the Backuses mill?

A. I should say about 60 or 70 feet wide.

Q. You don't know how wide it is?

A. No, sir, not exactly.

2262

Q. This picture, Kronbach Exhibit "1," that is the picture of the mill before the superstructure was erected, is it?

A. Yes, sir.

Q. It looks just like that now, does it not, with the exception there is an elevated road in front of it?

A. Yes, sir.

Q. There seems to be a lot of railroad tracks over in front of the mill, what tracks are those?

A. I suppose they are the Michigan Central.

Q. Do you know what they are?

A. The Michigan Central, yes.

Q. How many tracks are there over there?

A. I have never counted them, there are quite a number of them.

Q. And engines running up and down, back and forth there?

A. Not during the day.

Q. There are thirteen tracks over there?

A. I don't see them in the yard very often during the day.

Q. They are not vacant tracks? They are in use?

A. Yes, sir, they fill them up with cars.

Q. Where they make up trains?

A. No, they back their cars in there.

Q. Engines go in there and pull them out, don't they?

A. They don't do much switching in around there in the daytime. They must do it in the night-time, because in the daytime there are teams around there all the time.

Q. There are some engines going back and forth there, aren't there?

A. There might be some.

Q. Don't you remember you ever saw an engine in front of the Backus yard before this elevated road was built?

2263 A. Oh, yes, I have seen them, but they don't switch there in the daytime much; they back their cars on there.

Q. The engines go in there after the cars, don't they?

A. Yes, sir.

Q. Do they throw any sparks?

A. Not over the mill, as I can see. They are only in there nights as far as I know.

Q. Then if they do throw sparks, you don't know? You don't see them?

A. No, I ain't there nights.

Q. You don't know of any reason why the engines of the Michigan Central don't throw sparks as well as the elevated-road engines? They throw them wherever they go?

A. I suppose they are liable to.

Q. And if the wind blows from the south, it has been testified here, they will go 150 or 200 feet. When those sparks are thrown out of the engine they go up in the air a good ways, don't they?

A. Yes, sir.

Q. And the wind blowing from the south, they would blow clear over the Backus mill from the elevated road?

A. Yes, sir; we find them there.

Q. They go over the mill, and then in front of the mill; they come from the Michigan Central, don't they?

A. I say I don't see them switching there much during the day.

Q. It is very dark in your mill, you say?

A. Yes, sir.

Q. Your light comes from the south?

A. Yes, sir.

Q. And the elevated road shuts it off?

A. Yes, sir.

Q. There are some windows on the east side of the mill?

2264 I can count 21 windows there on this picture. Those windows are still there on the east side of the mill?

A. I ain't upstairs; I am in the basement.

Q. There is light enough, then, in every story except the lower one?

A. I don't know anything about the upper floors. I don't have anything to do with them.

Q. The upper floors of this mill you don't know anything about?

A. No, sir, I don't have anything to do with them; only the first floor.

Q. How many teams have you seen run away down there since you have been working for Backus?

A. Four.

Q. Did you ever see teams run away there before this elevated road was built?

A. I won't say they all got away.

Q. You spoke of one or two rearing up?

A. Yes, sir.

Q. They succeeded in holding them?

A. Yes, sir.

Q. You haven't seen any of the teams actually get away down there?

A. No, not that they got away, but they are wild and nobody can hold them. They tie the horses up and they can't get away.

Q. A good many teams go by there yet?

A. I ain't out there all the time.

Q. Did you ever see any teams get scared out there except your customers'?

A. Oh, yes, I have seen horses get scared out there often.

Q. Did you ever see them run?

A. Try to run.

Q. But didn't get away?

A. No, sir.

2265 Q. Did you ever see them frightened by the engines on the track over in front of the Michigan Central track?

A. No, not that I recollect.

Q. You never saw horses frightened near the Michigan Central track?

A. No, not that I know of.

Q. You say that your trade has decreased down there?

A. Yes, sir.

Q. About how much, in your judgment, to be fair about it?

A. Well, it seems to me that all the old customers went back on me. They are all gone.

Q. Then you are not doing anything?

A. No, not a great deal. We pick up some new ones once in a while.

Q. You are doing a pretty good busines up in the warehouse?

A. Well, I don't know anything about the warehouse.

Q. But a few years ago you didn't have the warehouse there?

A. Yes, about seven or eight years ago.

Q. Haven't you an idea that has something to do with the loss of your customers down there——

A. No, sir.
Q. Backus is still making stuff down there?
A. Yes, sir.
Q. And selling it around town here?
A. Yes, sir, he manufactures stuff there?
Q. And they sell it, don't they?
A. Yes, sir.
Q. There is a way of taking this stuff out on Fort street, isn't there?
A. Yes, sir.
Q. You can drive right in the mill from Fort street?
2266 A. You can drive to the second, but not to the lower floor.
Q. You mean the first one above the ground?
A. Yes, sir.
Q. They do drive right in there with the wagon?
A. Yes, sir, they can drive in there on the second floor. The second floor is level with the ground on Fort street.
Q. They do drive in there and get lumber?
A. No, not that I know of.
Q. Don't they draw lumber in there upon Fort street?
A. We draw lumber into the mill to the machines for the planer, not draw it in to back it in from the door.
Q. What portion of the lumber comes in that way?
A. Well, as near as I can get at it there are two planers there and all the stuff they dress on there would be brought in from that side.
Q. How many are there below?
A. Ten, I believe.
Q. And that all goes in from River street?
A. Yes, sir, from the River Street side.
Q. This lumber that is manufactured up above, that is drawn out on Fort street?
A. That is for the box trade.
Q. You load that onto cars?
A. They tie it up in bundles and shooks and run it down the elevator and shove it on the cars.

Redirect examination.

By Mr. DICKINSON:

Q. You have been asked about the Michigan Central grounds opposite the Backus mill as it was before the building of the superstructure of the union depot company; this yard of the Michigan Central opposite the Backus mill is all below the Michigan Central crossing, is it not, the main tracks?
2267 A. Yes, sir, it is.
Q. Is not that place, and has it not always been used for the storage of freight cars?
A. As long as I remember.
Q. The end of the Michigan Central yard is on Twelfth street, is it not?
A. Yes, sir.

Q. And then from Twelfth to Third street is all Michigan Central property, is it not?

A. As far as I understand.

Q. Then from Twelfth street down to the Backus property is all union depot property south of River street?

A. Yes, sir.

Q. All union depot property?

A. Yes, sir.

Q. Now, is there in the yard opposite the Backus property any main trunk line of railroad at all running out of the city?

A. No, sir.

Q. No place over which a Michigan Central train runs, is there, below the crossing and in this yard?

A. Well, I won't say for sure.

Q. There is no trunk line of railroad track down there below the crossing of the Michigan Central and in that yard?

A. No, sir.

Q. Is there any Michigan Central track across Twelfth street?

A. Yes, sir, there is one.

Q. Only to make a connection with the Wabash, a single track?

A. That is all.

Mr. BAKER: All the exposition trains went over there?

Mr. DICKINSON: But there is no Michigan Central track,
2268 as such, leading out of the city, no trunk-line track running down that yard at all?

A. No, sir.

Q. And no main-line track nearer the river front running across Twelfth street?

A. No, sir.

Q. On the opposite side, before the building of the structure, there was a high fence opposite the Backus property shutting in the Michigan Central?

A. Yes, sir.

Q. (Showing photograph.) See if this is a good representation of the tracks of the Michigan Central and of the yard opposite the Backus property?

A. That is, as near as I can tell.

Q. That is the general situation, is it not?

A. Yes, sir.

Photograph marked "Kronbach Exhibit No. 2."

Mr. BAKER: There is an elevator over in front of the Backus property, isn't there?

A. Yes, sir.

Q. Between the Backus property and the river?

A. Yes, sir.

Q. At the river?

A. Yes, sir.

Q. Now, there is a big railroad yard there and engines are working back and forth in that yard continuously, are they not?

A. No, I don't see the engines working very much in that yard, because they back the cars in from the east end into that yard.

Q. They are handling cars in that yard every day and every night, are they not?

A. Yes, sir, to a certain extent.

Q. And their connection with the Wabash is through
2269 that yard, is it not; and don't they transfer their cars below where the Michigan Central crosses Twelfth street?

A. Yes, they run their cars across there.

Q. As a matter of fact, from Eighteenth-and-one-half street to Third street is all railroad yard is it not, and Mr. Backus' property below there to Third street is all railroad yard, is it not?

A. Yes, sir.

Court then adjourned to 2 o'clock p. m. same day.

2 P. M., OCTOBER 26, 1893.

CHRIS. KRAUSE, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?

A. In Detroit.

Q. How long have you lived in the city?

A. Thirty years.

Q. And what has been your business?

A. Machinist.

Q. Have you been engaged in the employ of Backus & Sons at the planing mill on River street?

A. Yes, sir.

Q. How long have you been in their employ?

A. Twenty-five years I worked for Mr. Backus there.

Q. And you are still there at the planing mill?

A. Yes, sir.

Q. What did you do there in that mill?

A. I fix the machinery and run the molding machines. We got a sticker and a big molding machine and when I get through with my machinery I run the molding machines right along.

Q. It is your business there to oversee the repairs of the machines, and keeping them in order and keeping the knives sharp, and so on, and looking after them?

A. That is all I got to do.

2270 Q. What hours of the day are you there; what is the time you spend there in the shop?

A. Sometimes it takes four or five hours when a machine breaks down, or something like that, to fix it up again.

Q. Where do you stay ordinarily during the day? What time do you go in the morning?

A. I get down at six o'clock and they start to work at seven o'clock.

Q. And you see that everything starts in order in the morning at seven?

A. Yes, sir.

Q. When do you leave the shop?

A. In the night-time at half past five.

Q. You are familiar, then, with the machines that are used in this fine work of all kinds?

A. All kinds.

Q. Now, you were employed there before the building of this railroad in front of the mill?

A. Yes, sir.

Q. You have been constantly there since?

A. Yes, sir.

Q. Will you state whether in your business there, in the performance of your duties, you have observed the cinders getting into the knives in the mill?

A. That is the way when cinders come in there; we got two ripsaws outside in the shed there, and then they rip that lumber and we get the trucks and put it right on the trucks.

Q. It is ripped before it goes into the planing mill?

A. It is ripped before it goes into the planers, it drops right in there and goes by the machine and we run it through.

Q. I suppose care is taken to keep it clean as possible. You do take care to keep it as clean as you can?

2271 A. Well, that is pretty hard sometimes.

Q. Will you please tell the jury whether you find that cinders do get into the knives and onto the lumber in the mill?

A. Yes, when the trains pass there then the dust and cinders comes right down and drops on the lumber there.

Q. But in the practical working of the machines, have you been troubled with the cinders getting into the knives and dulling the knives?

A. When cinders comes in and lays on the board there and they go through there, they press it right in and then the knives touch it.

Q. Press the cinders into the wood?

A. Yes, and then the knife touches it and it is all fine grinding or something like that and that makes a nick in the knife and you got to take the knife out and file it over or grind it over and set it up again.

Q. That stops the work so far?

A. Yes, sir.

Q. Suppose the knife is not taken out and you go on with it with that nick and impurity, what effect does it have? Why don't you let it go on?

A. We could not use those mouldings. As quick as we get nicks in the mouldings the fellows would not take it.

Q. Does it ever occur before you see the nick in the knife or discover it that mouldings are damaged?

A. So quick as the nicks are in the moulding we got to put it in the cull mouldings or sell it cheaper.

Q. Do you find that in that mill that sometimes the nick is not found out, so that damage is done to the lumber?

A. So quick as the knife runs over the cinders it gets a nick in it.

2272 Q. Isn't it discovered sometimes until damage is done to the lumber?

A. I don't know.

Q. Do you always find it out as quick as the knife gets dull or nicked, do you always find it out quickly or does it do some damage first?

A. I got a boy on the front there, and I tell him before I start the machine, and he takes that off and lays it on the side, and I got to tell that boy just like that, if the — nicks, when you see anything just let me know and tell me right off.

Q. You do not discover a nick, then, until it actually shows on the lumber?

A. No, sir.

Q. Until the board comes out so that the board is damaged before you discover the nick?

A. Yes, sir.

Q. Now, did you have any trouble of this kind in that mill before the union depot company's track was laid by there?

A. No, sir.

Q. You were there just as constantly before the union depot was built, were you not?

A. Yes, sir.

Q. And you were in there every day before?

A. Yes, sir.

Q. You never had that trouble before?

A. No, sir.

Q. Will you tell us whether the passing of the locomotives throws smoke into the shop; is there any trouble from the smoke or steam?

A. When the locomotive passes there and the air or wind drives the smoke down, and it comes in the doors and so on and a fellow could not see hardly nothing.

2273 Q. You have seen it there so that there was a pretty thick smoke sometimes?

A. Yes, sir.

Q. Will you please tell the jury whether, in working there in the mill with these fine knives and fine machines, what the need is for light?

A. The man who runs the moulding machines, he wants a good daylight.

Q. Can he not get along with gaslight?

A. It is not so good as a good daylight.

Q. Just tell the jury why he cannot get along without bright daylight.

A. Sometimes I got a moulding to make, I use 14 or 16 knives in there, and each knife got to cut, and that is very particular to set the knives right in the machine so that they cut their distance there, and when they cut one wrong then the whole moulding is good for nothing, and that wants a good light.

Q. What do you think the effect is, are you troubled with want of light there since the erection of the structure?

A. Yes; Mr. Backus said first, We want the electric light, and now we do not have it; we burn gas; I got two gaslights.

Q. Two gaslights to a machine?

A. Yes, but I like to get the daylight better than the gaslight.

Q. And this has been a trouble since the erection of the structure, since the railroad was built?

A. Yes, since that we get no such light as we did before.

Q. Now, do the trains make it dark when they pass?

A. Yes, sir.

Q. How about its being necessary to have a steady light about these machines?

2274 A. Sometimes when they set the moulding machines up and so on, and the train passes there, that stops my whole light off and you got to wait until the train passes; besides, I got the gas burning.

Q. Well, what do you think of the work done and the way the mill runs now, since the railroad was built along there, as compared with the way the mill run before the railroad was built along there?

A. Well, sometimes I got lots of bother from grinding knives, it thaks me so much longer to set a machine up, and then the light is gone.

Q. Then you have constant trouble with the cinders?

A. Yes, sir.

Q. Where did you learn your trade?

A. I learnt something in the old country. I was for a couple of years in Berlin; I learned something there and then I come over here.

Q. What did you go into here first?

A. I run a common machine first, and then after that Mr. Backus got a union machine.

Q. A common planing machine?

A. Yes, and then we got the big siding machine, what they call the union machine, and I run that for eight or ten years, and then I make mouldings besides already.

Q. What do you think, from your knowledge of the machinery, as to the kind of machinery and whether it is in good order and fine condition in the Backus mill, is it good machinery?

A. Good machinery, all good machinery.

Q. Is it kept in bad order or perfect order?

A. All in perfect order.

Q. Will you tell the jury whether, when you get a new machine into the mill, it takes some time to get it in good order?

2275 A. When we get a new machine in the shop for the first couple of weeks it don't run so good as when we get it in good order so that everything is tight and solid.

Q. Now, up to the shop, which machine is worth the most, the machine that comes in new, when it comes in new, or the machine that has been in there and is adjusted and running for some years?

A. Well, I think the new machine is better when the machine is run for eight or nine years; there is lots of things which we fix over on the machine.

Q. Which machine now is worth most to the shop, the new machine or the machine adjusted and equipped in good order and running smoothly?

A. When the new machine is in for a couple of weeks I think the new machine is better.

Q. Is there any machine in the shop that is worn out at all?

A. Not one.

Q. Everything is in first-class condition?

A. Yes, sir.

Q. Is there any part of the equipment missing in any place?

A. No, sir, we use it all in journals; we don't use no brass boxes.

Q. Everything is first class?

A. First-class machines.

Q. Now, of those machines in there—I don't know that I made myself understood; possibly I did, but we will find out—in those machines in there, are they added to and improved by the Backus method?

A. Yes, sir.

Q. Do they add improvements upon them?

A. Yes, sir.

Q. To do this work. Now, of the different machines, as they run in the shop, doing the work they do, is there any one of them
2276 that you would take out and put in a new machine of the same kind?

A. I don't know; I guess not. The machines we had are all just as good when we get new in the shop, and better, too.

Q. In perfect order?

A. Yes, sir.

Q. Would you value a new machine more than any single machine of the same kind in the shop? Take the machines as they are in the shop, would you value a new machine, bought today and put in the place of a machine of the same kind—would you take the old machine or a new one?

A. No, take the new one.

Q. Rather than have the old one?

A. Yes, sir.

Q. Is there any machine in the shop that you would now take out and put in a new one of the same kind?

A. Besides, the machine is run down so that we could do nothing more with it.

Q. I say, take the machines as they are now, would you take one of those machines out now and put in a new one of the same kind?

A. Yes, when we could take and put a new one in.

Q. You mean you could do it? Do you need to do it, would it be any better?

A. When the old machine runs out we got to put a new one in place of it.

Q. Is there one of them that is worn out?

A. No, sir.

Q. Now, then, would you take out any machine that is running

there in good condition, as it is, take it out and put in a new machine if you could, if it is not worn out, and just as it is today?

A. No, sir, we would not take nothing out from those machines.

2277 Cross-examination.

By Mr. ROBISON:

Q. What is your regular business?

A. Machinist.

Q. All kinds of machinery?

A. Yes, sir.

Q. Manufacturing machines?

A. Yes, sir.

Q. Where did you ever work making machines?

A. I don't make any machines; I am just in the lumber business, running these kind of machines.

Q. You don't make machines?

A. No, sir.

Q. You work with machines?

A. That is all.

Q. What kind of machines?

A. Matchers and stickers, four-sided sticker.

Q. What is a four-sided sticker?

A. To make molding out of.

Q. A molding machine?

A. Yes, sir.

Q. Matchers and stickers, and what else?

A. Then we got in there a four-headed big molding machine, a Boston machine.

Q. Those are the machines that you work?

A. That is the big molding machine, that is the most we do work.

Q. You don't know anything about engines, do you?

A. No, sir, not very much.

Q. Are you a machinist or are you a wood-worker?

A. A wood-worker.

Q. You don't know anything about machines yourself, except those you work upon there?

A. I got to fix the whole machinery up there.

Q. The machinery in the whole institution?

2278 A. Yes, sir.

Q. Do you fix that machine that grinds saws?

A. If a machine is broke down or something, the babbitt runs out, we got to take it apart.

Q. You can put the babbitt in, that is, all right?

A. I got my tools all there.

Q. You are the man that has charge of the machinery in the whole institution?

A. Yes, sir.

Q. Besides doing that, you also run these wood-working machines?

A. Yes, sir.
Q. Did you ever get any nicks in any of these molding machines before that railroad was put up?
A. Not so much as now.
Q. There used to be some nicks once in a while?
A. We got lots more in now.
Q. There used to be some?
A. Oh, sometimes one comes in or something like that.
Q. Did you ever work at any other place except at Backus'?
A. I worked a year with Mr. Robison down on Woodbridge street there, on that side of the Milwaukee depot.
Q. Ross's place?
A. Ross's place, and then after that I worked 25 years now at Backus's place.
Q. You say that these machines that are in there are all in good condition?
A. All in good condition, first-class machines, too.
Q. Well, you are not working them at all, are you, they are standing still, aren't they?
A. No, sir.
Q. You are not working much now, are you?
A. Oh, there is ten goes most every day downstairs.
Q. You have charge of the machinery upstairs?
2279 A. No, sir, I got two machines up there. We got just two big machines upstairs. I got charge over them, too.
Q. What are they?
A. They run that box lumber, to make box business.
Q. Planed?
A. Planing both sides.
Q. You have charge of those two machines?
A. Yes.
Q. They are running all the while, are they?
A. They are running every day, both.
Q. You never used to get any cinders in there before the railroad went along?
A. No, sir.
Q. Didn't the lumber come in there sometimes with cinders on?
A. Now?
Q. Didn't it used to before this?
A. No, sir.
Q. Didn't you ever have any lumber come in there on the railroad?
A. We got some on flat cars and so on, I didn't see no cinders in there when it comes in the mill, I got nothing to do outside and I don't know.
Q. You have something to do with planing this lumber?
A. I got my business right in the shop inside.
Q. Are there cinders on the wood that comes to you in the inside?
A. Yes, sir.
Q. Are there not some on the lumber that comes on the flat cars?
A. I cannot tell that, that is more than I can say.

Q. You never saw any on the lumber that came on the flat cars?

2280 A. Well, I got nothing to do with that. I have not been outside.

Q. All you know about it is that there are some cinders on the lumber?

A. Yes, that comes inside the mill, I see it then.

Q. But where it comes from you don't know?

A. No, sir.

Q. That has always been so, hasn't it?

A. I don't know, I can't tell; that business on the lumber, when they rip it, whether it comes on then or when it comes.

Q. You say you have to stop your machines sometimes, do you, when the trains go by?

A. When I get my machine in good order and running I would not stop it. I would sometimes when I set up a molding machine and the train passes there, I got to stop then, I cannot see to put the knives in.

Q. How long does it take a train to go by there?

A. Pretty near four minutes, or three minutes, or something like that.

Q. Three minutes for a train to go by there?

A. Yes, sir.

Q. Does it take as long as that for a train to go by that institution?

A. Yes, sir.

Q. An ordinary train?

A. I don't know, I cannot count it all the time. The doors are open and I cannot look up.

Q. That is a kind of dark hole where you work, anyway, isn't it?

A. I cannot see nothing, I set my machines before all right enough.

Q. Are not all these machines back in the back end of the cellar?

A. We don't got nothing there.

2281 Q. What is there back under ground?

A. One band saw, that is all.

Q. Did it used to be nice and light in there?

A. Most of the machines standing out on the front doors; we don't got no machines——

Q. How far from where your machine stands is this railroad, how many feet do you think?

A. I don't know, I didn't measure that.

Q. You can estimate, you are a machinist and work in lumber and one thing and another, and you can give us some sort of an estimate, can't you?

A. I think that is pretty near thirty feet.

Q. Pretty near as far as from here across to the other side of the street?

A. No, sir.

Q. How far is it over there?

A. That is fifty feet or something like that.

Q. You think that railroad standing there darkens that institution, does it darken it any more than that building does this room?

A. Yes, it darkens more up than the building here.

Q. It darkens that institution more than that building does this room (referring to building across the street).

A. No, sir, it darkens that up more than this.

Q. It is not half as high, is it, as that building?

A. I guess that is one story anyway.

Q. No, this building over here is twice as high as that railroad, isn't it?

A. No, sir.

Q. How high is the railroad?

A. I don't know, I never measured.

Q. How high do you think it is? You know about how long a fourteen-foot board is, don't you?

A. Well, I think that is pretty near thirty feet high.

Q. The railroad?

2282 A. Yes, sir.

Q. Down there where you work?

A. Yes, sir.

Q. It is 21 or 22 feet, they say. There cannot any air or light come in under it?

A. No, sir.

Q. It shuts it all out?

A. Shuts it all out.

Q. You have to burn more gas than you used to?

A. Yes, sir.

Q. Did you have any gas fixtures in your place before this was put up?

A. Yes, sir.

Q. What for, if it was light enough?

A. I got one flame more now than I had before.

Q. When did you put that in?

A. That is three or four weeks or more, it is longer, I don't know for sure.

Q. Well, it got darker the last three or four weeks?

A. Yes, sir.

Q. That is because the days are getting shorter, isn't it?

A. I don't know about that.

Q. You have had gas in there all the while, haven't you?

A. Yes, we got gas in right along. Sometimes we work in the night-time and so on, and then we use the gas.

Q. It was not light enough to work in the night-time before this railroad went up. That did not seem to make any difference with it in the night.

A. Sometimes we break down a shafting, and it turns off, and we got to do it in the night-time.

Q. Don't you use the planers there nights sometimes?

No answer.

2283 Q. I say you work nights there with the machinery making lumber?

A. No, sir.
Q. What time do you quit?
A. Half past five.
Q. The year around?
A. Yes, sir.
Q. Don't get too dark to work down there some days?
A. When it gets too dark we light the gas.
Q. It did before this railroad was put up, didn't it?
A. Well, since it was put up we got less light than we did before.
Q. I say you had to light the gas down there before you quit, before the railroad was put up?
A. In the night-time?
Q. In the afternoon?
A. When I set up my machine, yes, sir, when a fellow has got to put knives in the machines, he has got to put the gas on to see.
Q. What time do you stop in the winter?
A. We run eight hours, now.
Q. What time do you begin?
A. Seven o'clock. Then we work till half past three in the winter.
Q. You work from seven till twelve?
A. Yes, sir.

Mr. DICKINSON: Half past three is the time for shutting down in the winter.

Q. That is the time you always close in the winter, isn't it, half past three?
A. When we got lots of work, we work ten hours, too.
Q. Do you have about as much work now as you used to have?
A. We got lots of work now on hand.
Q. About as much as usual?
2284 A. Yes, sir.
Q. Hasn't your institution kind of petered out down there, going to seed, playing out?
A. Play? I don't know.
Q. Well, that's all.

Col. ATKINSON: He means planing out.

Q. You say you have just as much work down there as you used to have?
A. Yes, sir.

Mr. DICKINSON: That is, that he has.
Mr. ROBISON: Well, he has, he is running six or eight big planers that he has to take charge of. That's all.

LOUIS J. BUREAN, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?
A. I just moved from 807 Fifteenth street to Delray.
Q. How long have you lived in Detroit or been engaged in business here?

A. Well, on for 14 years.
Q. What is your business?
A. Engineering at present.
Q. You learned that trade?
A. That is one of them; yes, sir.
Q. And you have been engaged in engineering for how long?
A. While I was in the city.
Q. Anywhere, how long have you been engaged in it?
A. Well, I have learned the trade right out; that is, three trades, machinist and steam-fitter and engineer. I have been at it since a boy about that high.
Q. What is your age now?
A. I am 35 going on 36, or 36 going on 37.
2285 Q. You are at present engaged as engineer at the Backus mill?
A. Yes, sir.
Q. How long have you been engineer at the Backus mill?
A. Very nearly six years.
Q. You were, then, engaged as such engineer both before and since the erection of the union depot structure there on the River Street side?
A. Yes, sir.
Q. How far from the shavings-room is your engine-room, direct in that alley, between the dust and the engine room and the main building?
A. From the structure of the railroad to the engine-room direct?
Q. From the door of the shavings-room, that is in that same alley, the door of the shavings-room to the engineer's door?
A. Pretty well onto 25 or 30 feet.
Q. How far is the door of your engine-room from the elevated structure in the street?
A. I don't know the length exactly.
Q. About 90 feet?
A. Somewhere there, about 80 or 90 feet.
Q. You are in charge of the engine and boilers, and so on, there?
A. Yes, sir.
Q. Is that machinery in good condition?
A. All that I know of; yes, sir.
Q. I mean that you have charge of?
A. Yes, sir.
Q. A good, first-class engine?
A. Yes, sir.
Q. Boilers in good condition?
A. Yes, all excepting the joints.
2286 Q. What do you mean by the joints?
A. That is the connection between the boilers and the valves and cross-drum. There is a valve in between the cross-drum and the boilers.
Q. Where the boilers connect with the steam drum?
A. Yes, with the cross-drum.

Q. What is the matter with them?
A. They leak.
Q. What is your explanation of this difficulty that you speak of; what makes it leak?
A. Well, we didn't have any trouble at all to speak of before they drove a certain spile out in the street for the viaduct, and they almost shook the whole mill, and that had a great tendency, I should judge, on the boilers, from all appearances, from that time. I have never had tight joints since then.
Q. Have you tightened the joints?
A. Yes, I have repacked them several times.
Q. How often are you obliged to attend to that, to repack them and tighten them?
A. Since that we have repacked it about three times, and have the material there to repack it again.
Q. You say you had no such difficulty prior to the building of the superstructure?
A. No, sir.
Q. And you had an effect there in your boiler-room upon the engine and these joints from the driving of a pile that was driven in the street?
A. Yes, one of the spiles.
Q. As a support of the superstructure?
A. Yes. They could not drive it any further and they had to saw it off, if I remember right.
Q. When laying their foundations in places, they drove piles down and set the foundations on the piles and then reared the iron column from that?
2287 A. Yes, sir.
Q. Now, do you notice the effect upon your engine-room of the passing of trains since that, as to the jar?
A. Yes, sir.
Q. It does jar you perceptibly when a train passes?
A. Yes, hurts the engine quite a little when passing.
Q. Now, have you noticed the smoke and cinders coming from the passing trains?
A. I have.
Q. Give the jury some idea of the extent with which cinders come on you there, and smoke, and how far the smoke goes. Give us, in your own way, some idea of it.
A. I have noticed the cinders first out on Woodbridge street, near Twelfth street; that is, in the morning on the snow last winter, as I walked along; come inside and could see them all over the snow away back as far as the fire-room and sometimes a trifle farther back beyond the chimney, closer to the stairs, and I have noticed them up on the roof and had witnesses with me.
Q. How far back?
A. On the roof close by the edge.
Q. Close by the edge of what roof?
A. Over the sawdust department and the main building also.

Q. What have you observed of the cinders upon the roof the sawdust department?

A. I could also state I was burned once in the face by one of them.

Q. Whereabouts were you standing?

A. Right at the engine-room door, about three feet outside.

Q. Did you see what it was?

A. Yes, picked it up and it was warm and burned by finger also.

Q. After the passing of the train?

2288 A. Yes, sir.

Q. And have you seen the smoke come in around that building?

A. Yes, very often.

Q. Give some idea of the density of the smoke that you have seen very often?

A. Well, some of the smoke is light and other smoke is very heavy and black, when the train is coming up especially, and when they are going out of course they fire up fresh and the smoke is very black. At times rolls around there when the wind carries it over in that direction, the same as it did the day when it burned me in the face, and then also coming from the west, when the wind is from the west, it blows in my engine-room window.

Q. And does this carry soot?

A. Yes, sir.

Q. To what extent?

A. Well, I could not say so much about the soot, only it drops on my cup there on the bench in the engine-room every day, when the wind comes from the southwest like or from this direction.

Q. Comes from up the river way?

A. Yes, sir.

Q. Now, did you pick up some cinders on the roof of the engine-house or the roof of the shavings-room?

A. Yes, sir.

Q. What did you do with the cinders you picked up?

A. Put them in an envelope.

Q. Is that the envelope which I show you?

A. Yes, that is my signature.

Q. Did you put them in that envelope at the time?

A. Yes.

Q. Look at the cinders and see if they were those you picked up and when you did it.

A. Yes, those are the cinders I picked up.

2289 Q. Where did you find them?

A. Some on the main building and some on the shavings department.

Q. How far back?

A. Right close by the cupola where the dust blows in, and others on the main building close by the edge.

Q. How far back on the main building? At the time you picked

up these cinders did you see anything of any of the wood-work being charred?

A. There was this piece of wood, yes, sir, and the cinders was laying onto it. (Picking piece out of the envelope referred to.)

Q. The small piece of wood or a large piece?

A. I should judge an inch. There was a cinder that had charred it like that. There was a cinder laying as if it had burned this hole in it.

Q. How far back?

A. I should judge that was about three or four feet from that cupola where the dust goes up into.

Q. That is about how far back from the street?

A. I should judge that was 25 or 30 feet from the rails. Of course it is much higher than the rails.

The envelope referred to was marked Exhibit "Bureau 1."

Another envelope was shown to the witness.

Q. When did you pick those up you are now looking at?

A. April 12 of this year.

Q. Where did you pick them up?

A. Between the engine-room window towards the door and the fire-room door. The engine-room door is in between the two. One of them also is the one that burned me in the face.

Q. On the ground?

A. Yes, sir.

2290 Q. Your attention was called markedly to it, one of them burned your face?

A. Yes, it burned my fingers too, when I picked it up. I will show you the one if you wish. That is the one. (Selecting cinder from envelope.)

Q. That is the one that did the business on your cheek, is it?

A. Yes, and I have a good notion to sue for it too.

Q. At that time when you were burned, you picked these up from the ground and others right there?

A. Yes, sir.

Envelope marked Exhibit "Bureau 2."

Cross-examination.

By Mr. ROBISON:

Q. Is your engine in good condition down there?

A. Yes, sir.

Q. Runs true?

A. True.

Q. Haven't you had trouble; isn't it out of order; isn't that engine frequently out of order?

A. No, sir.

Q. A second-hand engine?

A. No, sir.

Q. In good, perfect shape.

A. Yes, sir.
Q. In every way?
A. In every way.
Q. Just as good now as it has been for the last year or so? Worth as much?
A. Just ask that again.
Q. Do you think it is worth as much now as it was a year and a half ago?
A. Worth more.
Q. Why?
2291 A. Because it has been kept up in shape right straight along, improved.
Q. But you say the joints are out of order?
A. That is on the boilers and on the top part of the engine. When speaking of an engine we do not speak of the joints.
Q. The engine is right near the boilers?
A. No, sir.
Q. How far from the boiler is the engine?
A. About twenty-five feet.
Q. Well, then, it is right there in the same building?
A. In the same building.
Q. In the engine-room, or boiler-room, or whatever you call it, it is all in one room?
A. No, sir, two different departments.
Q. Which is nearest the railroad, the boiler or the engine?
A. The engine.
Q. And yet you say this spile-driving and the rattling of these cars over this elevated road has racked your boilers so they leak?
A. Yes, sir.
Q. But it does not knock your engine out of line, but it runs as true and perfect as it ever did?
A. The engine is tied and cannot be pulled out of order by anything.
Q. Tied to what?
A. The foundation.
Q. But the foundation is in the earth there, isn't it?
A. Yes, the body of it is.
Q. But this rattling or shaking of this road ninety feet away has knocked the foundation of your boilers so that they are out of kilter and leak?
A. Yes, sir.
Q. But it has not affected your engine at all?
2292 A. It has affected the joint on top of the engine, but not affected the engine itself.
Q. Has it affected the joints on the boilers?
A. On top of the engine there is half a dozen joints there and a pipe runs across and connects up to the boilers.
Q. How could it affect these joints up there if the engine has remained perfectly solid?
A. Well, sir, it does on account of the boilers moving.

Q. And the boiler farther away from the railroad than the engine?

A. Yes, sir.

Q. And it has shaken the boiler so that it leaks and the engine remains perfect?

A. Yes. I could explain that if you wish.

Q. I would like to understand that.

A. We will say the engine lays in the engine-room like that; the pipe comes up here across the way, square joint clear through; now, she runs back here, the pipe does, and connects to a cross-dome here—call this a cross-dome there (referring to table), and one boiler here, and one here and another there and there; well, then, the boiler sets on rolls, plates under these lugs, and the engine connected there, to a certain extent, horizontally—it does not affect the boilers on account of its being on rolls, but let the earth shake under the boilers of this, like heavy thunder, the same as it does there, and it settles the mortar, that is, it crumbles the mortar under these boilers, and one sags and another sags, and then, of course, it twists the pipe and one boiler goes this way and stays there, and I have to jack it up, and the other boiler goes that way, and that makes the leak on the engine.

Q. On this pipe?

A. Yes, sir.

2293 Q. Then isn't that a result of defective foundations under the boilers?

A. It is only caused by this shaking; yes, sir.

Q. You say it is the mortar that is the matter?

A. The mortar works loose every time a train goes by.

Q. It is not the earth itself?

A. Of course it is the earth that shakes first, and then the brickwork.

Q. You say that heavy thunder does it sometimes?

A. No, sir. I say it is like heavy thunder; we ain't had no heavy thunder in the last two or three years.

Q. Nothing that would shake that mortar?

A. No, sir.

Q. Nothing but these cars running over there?

A. It is a fact; you go there and you will see it yourself.

Q. You think it affects it worse by being put up on those spiles than it would if it was on the ground, don't you?

A. Well, they are there, and of course I have not been in any place where they were down on the ground; I have not had the experience of it right alongside a railroad.

Q. You have been alongside of this road ninety feet distant from where trains of cars run along?

A. Yes, sir.

Q. Trains of cars run less than ninety feet from you by the end over on the Michigan Central?

A. Yes, sir; they are not on spiles.

Col. ATKINSON: Do you mean less than ninety feet from the Central plant?

A. They are more than that.

Mr. DICKINSON: Two or three hundred feet.

Q. Don't you suppose they would shake the earth over there?

2294 A. I don't know anything about that there; they don't shake the boilers or don't affect the engine.

Q. You say it is not on spiles?

A. No, sir.

Q. Then you have come to the conclusion that the fact that these are elevated on spiles shakes the earth more than they would if built on the ground?

A. I say the railroad is elevated on spiles there——

Q. I say the fact that this road is elevated on spiles shakes the earth more than it would if on the ground?

A. Yes, sir.

Q. Have you any theory of why it does that?

A. Yes, sir.

Q. Explain that.

A. The reason why it does more so there than any place I have seen, there is one or two columns west of the Backus mill that the piece that runs clear across runs away up, and the track is set right on there. There is a place there the rails go right across like that, and that goes away up to the rails, the girder. Now, over there closer to the Backus mill there is another girder that comes and sets on there, and the rails set on there, and the views that I have taken from that, that it has a tendency—there is a weak spot there.

Q. In the earth?

A. No, sir.

Mr. DICKINSON: In the structure.

Q. Oh, yes.

A. In this structure I have taken particular notice to it.

Q. There is a weak spot in the structure?

A. Yes. I am a pretty good mechanic myself and I can explain that. As the cars are going that way it has a great tendency to shove that structure along with it, more so right where this weak

2295 place is. Then it does this way, although when a train goes this way it bunts right up against this place here, that is, the girders that comes this way, runs along with the track. You see, that start two or three of the pillars that side of the Backus mill. The structure is there to be seen for itself.

Q. And for that reason it shakes the earth more?

A. Yes, and you will find it so some winter morning.

Q. And you think it will shake the earth that way ninety feet distant from where the post stands?

A. Well, it shakes the wires on the bridge there sometimes pretty bad.

Q. Clear over on Fort street?

A. No, sir; from pillar to pillar.

Q. It shakes the wires on the structure, but it don't shake the wires on the telegraph poles set along in the ground near by?

A. Yes; that is what I was explaining to you; right there it

shakes the wires a great deal more than it does any other place on the same structure.

Redirect examination:

Q. You know quite well, do you, whether you have this jarring effect or this breaking of the mortar before the structure was built?
A. No, sir; we didn't have it.
Q. Did you see anything of those cinders coming upon the property before the structure was built?
A. No, sir.
Q. What do you burn in your furnace, wood or coal?
A. We burn some fine kindling and shavings.
Q. You burn no coal?
A. No, sir.

Recross-examination:

2296 Q. You say that when your window is up, dust and ashes and cinders and smoke and one thing and another will settle in your water cup?
A. I didn't say that.
Q. What did you say?
A. I said there was soot; there is no ashes.
Q. That is all?
A. That is all.
Q. Don't throw ashes or anything of that kind?
A. No, sir.
Q. Any ashes settle around there at all?
A. No, sir.
Q. You do considerable firing there of your own?
A. Yes, sir.
Q. Don't any smoke come out of your chimney?
A. Very little.
Q. It is all consumed?
A. Pretty much all consumed.
Q. There does some?
A. There does some; yes, sir.
Q. Do any cinders ever come out of there?
A. No, sir.
Q. Any coke or coal?
A. No, sir.
Mr. DICKINSON: You don't burn coke or coal?
A. No, sir.
Q. These engines that you have seen along there—none of them burn wood?
A. I have not been on the engines.
Q. Did you ever see a wood-burning engine on this road?
A. No, sir.
Q. What railroad did you see them on?
A. I have seen them on a great many railroads.

Q. Here around this mill?
A. No, sir.
2297 Q. That is what I mean of course.
A. No, I have reference to other railroads.
Q. These are pine shavings you burn?
A. Yes, sir.
Q. Almost altogether, and little blocks of wood, too?
A. Sawdust, a great deal of sawdust.
Q. Kindling?
A. There is some little kindling.
Q. As big as your thumb?
A. Oh, yes, bigger than that, some.
Q. As big as your fist?
A. Yes, but they burn up clean.

BERNARD STANDLEY, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. You live in Detroit?
A. Yes, sir; born here.
Q. Like Mr. Godfrey. What is your business?
A. Foreman for A. Backus, Jr., & Sons.
Q. In what department?
A. In the cutting-up department.
Q. Whereabouts is that?
A. Third and fourth floors.
Q. How long have you been engaged in that business?
A. I have been engaged with Mr. Backus 26 years, and what little other time I have put in when a boy I worked in the same business, only a trunk business, on the same principle.
Q. What is done in the cutting-up department, and how does it get its material to cut up? Just give us an idea of the working you have, the system.
A. In the first place I get an order from the office that we want a half-inch car, we will say.
2298 Q. What do you mean by that?
A. A car-load of half-inch lumber, cut up into boxes. Well, I get the dimensions, size and everything, and I would go to work and make out a ticket and send it to the docks that I want 10 loads of inch and a quarter lumber, to make half-inch stuff.
Q. Is that about what you call half-inch lumber, a fair sample (showing witness a board)?
A. Yes, sir.
Q. That is what you mean when you need half-inch lumber?
A. Yes, sir.
Q. Go on.
A. Then it is brought up to me, and when I think that the ten loads are all——
Q. It is brought up to you in the raw state?
A. In the raw state to the first floor. I give them the orders down there of what I want, half inch, dressed two sides, and they

go to work at it and send it up to me through this elevator that you saw. I put it on the trucks and take it down to the saws ready to be cut.

Q. Take it from which floor?

A. From the fourth floor down to the third floor to be cut up to those dimensions that I received, and when I consider there is ten loads up I commence to look at my car and I find I am about two or three loads short. I got to give another order for another five loads, so I find that by being short that way I have lots to contend with in the dressing of lumber, and it don't dress up in thickness or something like that.

Q. When did you find that to be so?

A. Within about a year and a half; most, I think, I saw was in this time.

Q. Have you had that difficulty in the matter of the cutting up of lumber before the tressle-work was built?

2299 A. Once in a while there would be a knot get into it, but it would be only two or three boards, perhaps, a day or a week.

Q. Since the building of the superstructure there what has been your experience with the cutting-up shop there under your orders?

A. It has been a matter of perhaps a wasting of 2,000 feet of lumber a week, and extra help.

Q. What was the average waste prior to the building of the superstructure?

A. It would not average hardly nothing.

Q. Give us some idea as between 2,000 feet since the superstructure was built and trains running; what was the difference?

A. Oh, perhaps a board a day, or something like that.

Q. How do you find it as to getting a great quantity or a little of it before you discover it? Now, give me an idea of the quantity that comes to you. You have had it sent down to be cut up, and in what way does it come back to you? It doesn't come board by board?

A. It goes through a process, so that I don't discover it until perhaps two or three days afterward; we have so much ahead that way, you cannot notice it until it is matched; when we run over to the matchers there is where we have the contention of this thin and thick lumber, and after it is matched there is the thinness and thickness and we have to take those boards apart and make it right.

Q. It goes into stock?

A. It goes right into stock.

Q. Have you been down to investigate and find out what the difficulty is?

A. Yes, I have gone down there; yesterday afternoon is my last time down there; it is such a distance to run down it is discouraging sometimes.

Q. To run down from your floor——

2300 A. Away down to the first floor where they do this work.

Q. Since this began to come in upon you, about 2,000 feet a week, did you investigate to find out what the difficulty was?

A. As near as I could. I would go down to the machines and see the foreman about it, and he said he would try and correct it; I asked him what it was, was it the machine, and he said No, we are burning lights all the time here, he said, You must not think that I can do the work as I used to, he said, That is impossible.

Q. Is it a question of light in adjusting the machines?

A. That is true.

Q. That you have found from your investigation?

A. Yes, sir.

Q. You are positive of that from your 26 years' experience in this business?

A. Yes, I noticed men take the boards and they denied it and they said it is not so; and we have taken the board outside the door and we have seen it there.

Q. In this business the product that you made was of uniform thickness and well matched before, was it, about like that? (Showing witness samples.)

A. That is about the grade of work we would naturally do.

Q. That is the grade of work you did do?

A. Yes, sir.

Q. And that is a matched-piece sample of the kind of work you sent out?

A. Yes, sir.

Q. When were those made?

A. Made all of two and a half or three years ago.

Q. Did you bring any samples of the work that is done today?

A. Yes, I brought three pieces.

2301 Q. In getting these samples did you try to select bad samples, or did you take them as they come?

A. Oh, no, I just looked at the end of the trucks; you can pick them right out in that way.

Q. About 2,000 feet a week, you think, is bad and scattered through the stock?

A. Oh, yes, we would pick out that all right.

Q. (Showing witness a number of boards.) Will you pick out some of the samples of work that turns out badly as compared with what you used to, that you brought yourself and selected?

A. Yes, what we call the 2,000 waste, when it gets into work like that. (Selecting board.) What I mean by waste is this: We have to take this apart now and take it over to the small planer and dress it down to a thickness that will take out all this thin and make it of an even thickness.

Q. There is a waste of lumber from doing that?

A. Yes.

Q. The machines in proper adjustment make this even, the same thickness?

A. Yes. This is what we call the face side.

Q. What do you call the other side?

A. Well, it ought to be both face sides. (Selecting another board.) That is what we call perfect work, some of our work today. That come right from the same truck, right under it.

Q. Come off the same truck?

A. The same truck, the piece matched right before it.

Q. There is a piece of good work and this is a piece that came right under it, and that you say is imperfect work?

A. Yes, sir.

Q. What do you do when this comes up to you and you find out?

2302 A. We just take the piece that way and knock it apart that way and a boy runs to the matcher and gets a piece of the proper thickness and brings it back and puts it onto this and we put it together.

Q. You have to duplicate the labor throughout?

A. Duplicate the labor throughout, and while we do that the machine stands idle; this piece there is to one side and I have two boys running the machine and they dress it down to a thickness that will bring it to an equal thickness.

Q. In making these selections, have you taken them as they come on the trucks or on the piles, looked at the ends and found them?

A. Just looked at the end of the truck and noticed them; you can see the thinness right there; I generally do that before the nailer gets hold of them, because it saves trouble.

Q. Will you please tell us whether you have as good men as you used to have?

A. Why, the men are so long with us, they are pretty much the same.

Q. You have not changed your men?

A. Not much.

Q. The same old men in charge of the machines?

A. About the same.

Q. So far as the machinery is concerned, you have heard of no defect in that?

A. Not a particle.

Q. All in perfect running order?

A. Yes, sir.

Q. But in the fine adjustment of the machines runs these inequalities, in the false adjustment?

A. Yes, I attend to that myself, changing the thickness, to adjust exactly right.

2303 Q. To what extent has this annoyance been present in the class of work you have done throughout the mill; has it been a constant and serious matter?

A. Yes, it has; it aggravated me so sometimes that when I thought I would like to get a car off, when I find the defects in there I could not possibly stop it because the car had to go; I know we received orders from those parties, and that we would like to have their orders, and I expected to hear from them every day, but of course as luck would happen I presume that they——

Q. You positively had no such trouble before?

A. As I said, very little.

Q. Have you had a great many complaints about the character of work?

A. I didn't let it go that far; I would always correct it myself; I made that a study and a point.

Q. Has the work generally gone out as satisfactorily?

A. Once in a great while we would hear of a little complaint, that was all.

Q. But it has increased the cost of the good product very largely, has it not, this duplication of labor and resetting of the machines?

A. Yes, sir.

Q. And delayed the work of the machines?

A. Yes, sir.

Q. Delayed the mill altogether in every way?

A. Why, yes, it has.

Q. Now, in addition to these samples that you picked out, have you got a lot of this stuff that is imperfect there so that any one can see it?

A. Within the last few days I have picked out about 2,000 feet.

Q. You have laid out there now?

2304 A. Mr. Backus is kind of complaining, the work not going off satisfactorily, and I thought I would keep these pieces and show it to him.

Q. You got a lot more there?

A. Oh, yes, I got lots there.

Q. How many of those matchers have you got?

A. Six. We have three, but they are doubled.

Q. How many on the lower floor?

A. Well, I have not got anything to do with that, but they have got four there.

Q. Ten altogether?

A. Ten altogether.

Q. This work is done in which this trouble occurs on what is called matching machines?

A. Yes, hand matchers.

Cross-examination.

By Mr. ROBISON:

Q. You say Backus has been complaining considerably about the way the work was going on?

A. No, sir, the labor it took, the labor we have and the amount of work has not been turned out.

Q. You have not been doing as well?

A. No, sir.

Q. He has been kicking, so to speak, for some time, has he?

A. Well, I thought I could show him this and show him where the defects laid.

Q. You picked those pieces out to show him?

A. I not only picked those out, but I picked considerable long, 14 and 18 and 12 foot lumber.

Q. Where is that?

A. Down in the factory.
Q. When did you pick those out?
A. In the last three or four weeks.
Q. To show him?
2305 A. Yes, sir.
Q. That is the first his attention has been called to it?
A. No, I have been showing him this right along.
Q. He never found any way of removing it?
A. He told me to attend to that, I had charge of that, he had time and would not trouble with it.
Q. This is done on some of his machines that has got his pate arrangements on?
A. I don't know as he has got any patent on those machines all.
Q. Well, the defects in this is in the planer?
A. Yes, sir.
Q. Is this all done on one planer, do you think—these boards?
A. That I don't know, I could not tell you that. They have g three planers on the first floor; which one of them done it I do know.
Q. Do you think any one planer did it?
A. Well, not one certain planer. I should judge they have done it.
Q. Don't you think it has been done by having one planer pla ing one thickness, and another, another?
A. No, sir.
Q. If a board goes through one of those planing machines, it bound to be the same thickness?
A. No, sir.
Q. What is the occasion of that?
A. Their pressure bar works loose or a chip gets under it, but whe this work is done (referring to board) the pressure bar is perhaps little loose, and by going in and adjusting those machines, it pretty dark, and they got to look at the machine——
Q. When it is once adjusted it will stay there?
A. It will.
2306 Q. It will stay there just as long as it would before th elevated road was put up?
A. No, sir.
Q. You think the elevated road knocks that adjustment out?
A. Yes, I think the jar would.
Q. And knocks chips in under it?
A. No, sir, I would not say it would do that, no, sir.
Q. Did you ever try lighting a candle to see about adjusting thes things?
A. In my department we do not do that.
Q. But down below where all this damage is done?
A. I won't go any farther than my department.
Q. That does not come out of a regular planer?
A. Yes, sir.

Q. Do you say there is a machine down there that could run thing of that kind without being set on purpose to do it?
A. That is right.
Q. You think the elevated road causes boards to be run through a planing machine down there in such shape as that, or because it is so dark they cannot see to adjust it?
A. A man has got to try boards like that, and cannot see.
Q. Did you pick out the worst you could find?
A. No, sir, I got 2,000 feet down there.
Q. As bad as that?
A. Worse than that.
Q. All done on account of the darkness down there so that you could not see how to adjust?
A. That I would not say about the darkness.
Q. That is your theory. That is the only possible theory on which you can lay it to the elevated road?
A. This cutting up of this is beyond me.
2307 Q. Don't you think that the man running that planing machine was elevated rather than the railroad?
A. I won't say nothing about that.

Mr. DICKINSON: Are you looking for your jag-saw?
Mr. ROBISON: I guess I have found it, by George, and that is all there is about it. He says this board comes through a regular ordinary planing machine, and it is caused to run out in that shape on account of this elevated railroad.
Mr. DICKINSON: There is no doubt about it at all.
Mr. ROBISON: There is in my mind.
WITNESS: You ought to come down there some day, and you will see it.
Mr. DICKINSON: Well, you cross-examine these men and——
Mr. ROBISON: I would like to cross-examine you on that.
Mr. DICKINSON: And you will find out whether these men are honest or not—all of them.

Q. Are these ordinary samples picked out? (Referring to sample blocks.)
A. Yes, I was instructed to get out samples of this thickness.
Q. What were those got out for?
A. For samples to send to different parties, to see the thickness of the lumber.
Q. You probably picked out as good samples as you could get?
A. Cut up a board like that.
Q. You got one joint, made a perfect joint and then it is sawed in two?
A. Yes, sir.
Q. If it was not just the right thickness the first time, you would run it through a planer so as to get it exactly right?
2308 A. No, sir, this has not been. That is some of the work right there.
Q. What do you do with this in order to make it perfect now? (Referring to another board.)

A. We cannot make that perfect unless we take and run it down to quarter inch, both pieces.

Q. You could not have made out of those pieces any of these joints here, such a sample as that?

A. No, sir.

Q. They are not the same kind of lumber. If that had been a perfect kind of joint you could not make such a character of joint as that?

A. That is our heavy work, by running it a trifle slower it will do the same work.

Q. The lumber itself is of such a nature that it could not present such an appearance as that?

A. No, sir, the lumber is clearer than that. There is clear spots right in here that would give you the same samples exactly.

Q. This is better than your ordinary work, is it not?

A. No, sir, I don't think so.

Q. You think a year and a half ago all your box-work was as good as this?

A. No, sir, I did not say that.

Q. Don't you suppose these big knots and rough lumber that you have in these samples here has something to do with the shape this comes out in?

A. No, sir, I don't think so. As I said, once in a while there would come a few pieces that a chip would get under the board.

By Mr. BAKER:

Q. I want to ask one question. Do you think these two boards went through the same planer? (Taking one of the samples and separating it in halves.)

2309 A. Well, that I won't swear to, I received the boards in that way.

Q. You received them in that way. What is your judgment as to whether they went through the same planer or not?

A. They must if they came up together.

Q. How do you know they came together?

A. One planer is sometimes on half inch and the other planer is on seven-sixteenths, and so where they come up they are often together——

Q. How many boards go through the planer at once?

A. Sometimes one, sometimes two, and sometimes three.

Q. Was this tongue made on this when it came up to you?

A. No, sir.

Q. And this groove?

A. No, sir.

Q. You make that upstairs?

A. Yes, sir.

Q. Here are two boards of substantially the same timber and one is thinner than the other?

A. Yes, sir.

Q. How could those get through the same planer and be of different thicknesses?

A. Well, that is the work they do down there, that is the work they do and send it up to me.

Q. How do they set these planers? Is there a gauge, or can they make a different measurement?

A. Oh, yes, they can do that, there is a gauge to set it.

Q. Is there any difference in the nature of the timber as to whether some of it will come out more than the others of the same thickness?

A. Oh, yes, a cross-grained piece, or something like that.

2310 Q. A cross-grained piece will come out thinner?

A. Yes, a cross-grained piece would come out a little coarser than a smooth-grained.

Q. There is a man down there that is supposed to adjust these planers so that they will cut the same thickness all the time?

A. Yes, sir.

Q. You do not run a planer yourself?

A. No, sir, only a little one we have on the same floor.

By Mr. ROBISON:

Q. Isn't the knives of the planer set solid?

A. The planer solid?

Q. Yes, the knife that turns?

A. Yes, sir.

Q. That is, it don't lift up and down on the end?

A. It ought not to.

Q. How do you account for that? (Showing witness board.)

A. Well, I don't go into those details.

Q. It has got to do that in order to plane a board that thickness, it has got to set on a pivot in the machine?

A. I am just telling you the amount of stock I get like that within a year or a year and a half, the amount of stock I got to contend with.

Q. Now, that was set to plane a half-inch board, was it not?

A. Yes, sir.

Q. At the end of the planer that that went through it certainly was loose in some way?

A. Well, I cannot go into those details.

Q. It must have been, must it not?

A. Well, no, I don't think so.

Q. I would like to know how it would go through a space a half inch thick and come out that thickness?

Mr. BAKER:

2311 Q. Are there different knives that go across the board?

A. No, one solid, straight knife.

Q. It is set solid like that, isn't it?

A. Set solid.

Q. In order to get it as thin as that knife edge is there on this board, that thing has got to drop down like that?

A. In my experience with planers, I don't think so.

Q. Well, there may be some other way, but I would like to know how?

Mr. BACKUS: We will explain that.

A. That is not my department.

Q. You cannot explain it?

A. No, sir, I cannot explain it, only I am telling you the contention I have with the lumber I cut up, the amount of labor I got to waste.

Mr. ROBISON: There is no disputing here; we will have to admit that there is some almighty mean-looking lumber.

Mr. DICKINSON: Oh, well, we put it up on you.

Mr. ROBISON: If that is the kind of machines Backus has got down there, he better take off some of his patents.

Mr. DICKINSON: Your witness Spitzley said they were finely adjusted machines and in perfect running order.

Mr. ROBISON: This work must have been done by some of those Mr. Spitzley omitted.

Col. ATKINSON: If you are going to take a man's property, you ought not to abuse him, Mr. Robison.

By Foreman BAKER:

Q. Those two boards that are matched there, they come up separately into your room?

A. No, sir, they come up together.

Q. I mean they are apart and you connect them together?

A. Yes, sir.

2312 Q. You don't know that both those boards went through the same planer?

A. I am most positive they did, because they came up at the same time, and on the same truck.

Q. Suppose there are two planing machines planing the same thickness of lumber?

A. They very seldom do that. We have three-eighths and seven-sixteenths and half-inch and nine-sixteenths, all pretty near alike, and we are pretty careful.

Q. (Referring to board in question). That is about a sixteenth of an inch difference?

A. About that.

By Mr. F. A. BAKER:

Q. I suppose you know that the foreman of the machine, the man that gauges the machine, is constantly adjusting and changing it so as to get it right?

A. Before he could do that it would generally require a board.

Q. That might go through there just at that time? Suppose he puts through a board and finds it does not cut the same thickness, and those two boards come to you?

A. To me.

Q. He has got to adjust his machine?

A. When I come down I tell him this lumber is not right, and he stops his machine and goes to work, and I go upstairs.

Q. Wherever he makes a change in adjusting it, it is liable to produce that situation or that condition?
A. Hardly. If a planer is entirely clean I do not think it would.
Q. That is, if it is cutting a little scant and he adjusted it to make a full thickness, it would not show up in your room?
A. No, sir.
2313 Mr. DICKINSON: This lumber that comes up to you, comes up on the order for half-inch or quarter-inch uniform thickness?
A. Yes, sir.
Q. And goes through the machines that have that order?
A. Yes, sir.
Q. What is the standard finished lumber?
A. Three-eighths is about the standard.

FREDERICK SANTAG, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?
A. Detroit.
Q. How long have you been here?
A. Over twenty years.
Q. How long have you been in the employ of the Backus Company?
A. Pretty near fifteen years.
Q. What is your business there in the Backus mill?
A. Running machinery.
Q. Do you run the planer?
A. Yes, sir.
Q. How long have you been engaged in that business?
A. On the machinery?
Q. Yes, and this business, on the planing machine.
A. Fifteen years.
Q. Will you please explain to the jury, by giving a description of the machine-work, how such a thing as that happens. This is a board which I show you, which comes upstairs on the order for three-eighths, the thinnest that is made. Will you explain to the jury how, in that planing machine, such an inequality as that arises?
2314 A. Well, the machinery is all right, only sometimes it chips that right under, and the man that takes the lumber off he don't see it, and the other board is run through, and sometimes they come from upstairs and tell us something is wrong.
Q. They do not see it until they put the boards together?
A. No, sir; of course, we cannot see it down below there.
Q. How long does it take before they can discover the difficulty when the boards go through separately? You run through two of this width, do you not, through the machine?
A. Two at a time.
Q. Now, going through separately, what is done with them when they go through the machine?

A. Well, they send them upstairs.
Q. Do they go on a truck first, a lot of them?
A. Yes, put them right on a truck.
Q. Separately?
A. Yes, sir.
Q. They are not matched there?
A. No, sir.
Q. They go through separately and go upstairs. When is the first that can be discovered that they are not of the proper thickness—when they come to match them?
A. Sometimes their man can see it that takes the lumber away.
Q. But it is running constantly. How long does it take a board like that to go through the planer?
A. A second.
Q. And you are running probably 120 pieces to the minute, are you not—two of these pieces every second?
A. Yes, sir,
Q. So that you may get through there 160 in a minute, all with the same defect; is that so?
2315 A. Yes, sir.

Col. ATKINSON: A second is a very short time.

Q. About how many of these will you run through in a minute?
A. I don't know—long boards?
Q. I mean take the long boards; you will *will* probably run that through in a second. How many boards, long boards of the full length?
A. Forty-eight feet.
Q. About how many in a minute?
A. In a minute 48 feet of lumber, that makes twice two boards.
Q. Four boards?
Mr. Foreman BAKER: Twelve-foot boards.
Q. Four 12-foot boards?
A. Fifteen inches wide, two goes through there.
Q. Four, 12 feet each, is that right?
A. Yes, that is right.
Q. Now, what have you to say as to the necessity of having light about those machines?
A. Well, it ain't very much light now like it used to be before.
Q. And in the business you must have light?
A. Yes, we got to have sometimes light, when it is dark then we got to have some light.
Q. What light is necessary to do this work perfectly in a planing machine, in the adjustment of a planing machine?
A. The daylight is the best.
Q. You know of this imperfect work being made and sent up, don't you?
A. Yes, sir.
Q. What is your explanation of the defective work, what is the reason for this defective work going upstairs?
A. It is most about the light.

2316 Q. The trouble is about the light?

A. Yes, sir.

Q. Did you ever have such trouble in this sort of work before the structure was built there and the trains were passing?

A. No, sir.

Q. Now, will you tell the jury how that edge of this board comes up thin like that?

A. That is cut down below and the boards come right along and the knives are sharp and that goes right smooth down and you cannot hear it at all, and the man that takes it off sends it upstairs and it goes so fast through the machine the man don't take any notice.

Q. How does it come to be thin on the edge?

A. A piece sets under it; a little chip sets right under it.

Mr. BAKER: This is what he means: A board gets under the edge of it like that (adjusting two boards).

A. No, sir, not like that; a little chip sets under it.

Q. A chip or something gets under it. How big a chip will it take to make that thin edge upon one of those knives?

A. Well, not quite a quarter of an inch; about a quarter of an inch.

Q. A little chip will do it?

A. Yes, sir.

Q. Every one can see that, of course, if it is a big chip that takes the whole corner off, then a man can hear it; but when it is a small chip a man cannot hear it.

Q. He should be able to see, should he not, and have light enough to see the adjustment and see the chips or whatever there may be; it is necessary for him to see and hear clearly?

A. They are all right.

2317 Q. It is necessary, is it not, for him to see clearly and have plenty of light on these machines?

A I can't understand.

Q. If you have got light you will see this quicker?

A. Yes, sir.

Q. Have you run the matching machine downstairs?

A. Yes, sir.

Q. What have you to say as to the need of light in making a matching?

A. Only when we want to change knives or something; you cannot see very good.

Q. You must have good light for the matching machines?

A. Yes, sir.

Q. How long does it take to make a change in the knives?

A. On what kind of a machine, I want to know, a planer or a matcher?

Q. A matcher?

A. Well, it takes pretty long, just the same, what kind of work a man wants to get out.

Q. How long does it take to make a change? Take your own way to tell any change you please.

A. Well, I could not tell; it is just how the work is.

Q. Can you make a change better if you have a good light? Must you have a good light to make the change?

A. Well, of course, when I got a good light I can make it faster.

Cross-examination.

By Mr. ROBISON:

Q. Is the body of these planers iron or wood?

A. Well, I suppose, I don't know what it is exactly, but it is iron.

2318 Q. They are about as wide as this table here, or some of them wider?

A. Thirty inches; just as long as the knives are.

Q. You take a board and shove it right along like this (indicating with board on table)?

A. Yes, sir.

Q. And if this was the knife here?

A. Yes, the rollers come first, two rollers on top and two on the bottom.

Q. If a man is attending to his business there he will see whether there is a chip under it like that (illustrating)?

A. You cannot hear it; those machines are 16 feet long, I suppose.

Q. There is another man on the other side taking it out?

A. Well, yes, but he don't have no time to listen to that.

Q. Can he not tell by feeling if that board is not being cut right, if he is attending to his business?

A. I don't know.

Q. How many boards like that would probably run through the planer before you would find it out—three or four thousand feet?

Col. ATKINSON: They run very quickly.

Mr. ROBISON. We know how quickly it is done, it is 48 feet in a minute. How many feet like that would run through before a man would notice it, do you think? (Referring to board.)

No answer.

Q. Is it so dark back in there that you cannot see a board planed off in that shape?

A. Yes, in some places where I am it is dark too, but there a man can see——

Q. It is so dark you cannot see that?

2319 A. Yes, in some places. Some places you cannot tell nothing about it, before they get maybe half a dozen boards upstairs and they come running down and tell me. Then they stop the elevator and then the machinist comes back to the machine to look it up and then he says what the matter is and he has got to look after it, and then he cannot find out nothing, and then he has got to get a light and light up the gas and look for it.

Q. This railroad has made it so dark there you cannot see?

A. Yes, sir.

Q. You used to see all right, didn't you?
A. Yes, sir.
Q. What made this trouble then before? You say you used to have such trouble as this, only not so much of it. If there was plenty of light for you then, how did this happen? Carelessness, isn't it?
A. I don't understand it very well.
Q. Well, I don't know what a good word for that is. If you were attending to your business it would not happen?
A. That is no difference, not there.
Q. What kind of a thing is this? (Referring to another board.)
A. A man can hear that when that breaks off, there is a knot on that.
Q. What did you run it through in that shape for, if you could hear it all right?
A. That makes a noise, but not such a board like that.
Q. Did you fix those boards up on purpose to show?
A. No, sir; I didn't bring any.
Q. This is some of the regular work that is done down at the Backus establishment?
A. Oh, I know I made some already like that.
Q. Much?
2320 A. Oh, yes.
Q. How much?
A. I can't say how much.
Q. About how much do you suppose?
A. Well, I couldn't say that.
Q. How long have you been working for Backus?
A. Fifteen years.
Q. In that 15 years you have made considerable of it? It is something that is liable to happen in any planer, is it?
A. Yes, sir.
Q. Down at Backus' and every other planing mill? Did you ever work in any other planing mill?
A. No, sir.
Q. You have been in them—well, never mind, that is all.

Redirect examination:

Q. How fast do they remove the lumber from the planing machines? Who attends it, a boy?
A. No, sir, a man.
Q. How fast does he remove it?
A. Just as fast as it comes out of the machine; a man don't get no time——
Q. He has to take it and put it on a truck?
A. No, sir, just take it and send it right upstairs, right up through the elevator. When a man handles 48 feet a minute——
Q. He has got to take it to the elevator, has to lug it over to the elevator?
Mr. Foreman BAKER: That is the slanting elevator right there.
A. That is it.

Q. If he looked at it in removing it rapidly he might see a
2321 thin edge like that, but suppose two boards come through the same planer with that defect, he would not be apt to see it very rapidly, would he?

A. No, sir.

Q. Although that is a bad piece of work and no good?

A. That is no good at all.

Q. He must keep the two boards together when they come out of the machine?

A. Yes, sir.

Q. They must be put together when they come out?

A. Yes, sir; and each side has to be even.

Q. So that as the two boards come out, what does he do, lay them together and put them in the elevator?

A. Yes, sir.

Q. The two must go together to be matched?

A. Yes, that is it.

By Juror SAFFORD:

Q. Is this lumber split and planed at the same time as it goes through the planer?

A. Yes, the resaw splits it.

Q. Splits it and planes it at the same time?

A. No, sir; it has got to be resawed back first, and then it is got to go through the planer.

Col. ATKINSON: They are separate operations?

Mr. DICKINSON: It goes from the resaw directly to the planer?

A. Yes, sir.

Q. Now, let us see what the process is. As it comes from the resaw, then they come up two pieces?

A. Two pieces.

Q. What is the process of their reaching the planer, those two pieces; who takes them?

A. I do.

Q. You take them out of the planer?

A. Yes, when I am there.

2322 Q. You take them directly from the resaw, the same two pieces, do you?

A. I don't take them from the resaw, there is another man that takes them away from the resaw.

Q. But he brings the two pieces directly to the planer?

A. Yes, sir.

Q. So that the two pieces of board are kept together from the time of resawing until they reach the upper floor, both kept together all the time, to reach the matcher?

A. All the time, yes, so long as they be made.

Q. Until they are matched and put together?

A. Yes, sir.

A JUROR: Is this lumber resawed before it is planed at all?

Mr. DICKINSON: Yes, it is, as a matter of fact.

By Mr. BAKER:

Q. You don't mean that the same two boards pass through the planer at the same time?

A. No, sir; I would not say that.

Q. That is, they start with an inch and a quarter board and put it through the resaw and saw it in two edgeways?

A. No, sir; they saw it before they dress it.

Q. That is what I mean; they take a board off the trucks and put it through one of those saws that splits it right in two, up and down?

A. That is before I get it.

Q. That is a resaw, isn't it?

A. Yes, sir.

Q. And then it comes over to you to be put through the planer?

Mr. DICKINSON: They come in the same piece.

Mr. BAKER: I know, but the same two pieces do not go together all the time.

Mr. DICKINSON: Yes, they do.

Mr. BAKER: Do you pretend to say that those pieces con-
2323 stituted the same inch board? (Referring to two pieces of matched board.)

Mr. BACKUS: No, sir.

Mr. BAKER: That is what I am getting at.

Mr. HENRY BACKUS: I happen to know those two are from the same.

Mr. BAKER: They may happen to be, but you take an inch board and resaw it and dress it, and those two pieces do not always stick together, they might go through.

Juror SAFFORD: The way I understand it, you take two pieces of board, run it through the resaw and put it through the planer. If I understand it right, this is not in the planer but in the resaw in not splitting even.

Mr. BACKUS: No, it is in the planer. It is because a chip is under.

Mr. BAKER: What I am getting at, take that board there, whether those are the two sides of the same board, and I don't understand that it is. If it is I would like to see how they do it.

Mr. DICKINSON: Those pieces come from the resaw.

Mr. BAKER: Of course, but you do not necessarily put together the same board, the two pieces of the same board.

Mr. BAKER: Wouldn't it be a good plan to put some witness on that does understand it?

Mr. DICKINSON: This man understands it perfectly.

Mr. BAKER: He evidently does not understand the language.

Adjourned until next morning at 9.30 a. m.

OCTOBER 27, 1893—9.30 a. m.

FRED. A. BAKER, recalled for cross-examination.

Examined by Mr. ROBISON:

2324 Q. Mr. Dickinson asked you yesterday about the price at which the union depot company settled with the Diamond Match Company, or the price they paid, and I believe yesterday you could not remember. Have you refreshed your recollection any since then?

A. Yes, they paid for 210 feet frontage $16,000.

Mr. Foreman BAKER: Did they buy that land absolutely?

A. No, for the right of way in front of it. 210 feet for $16,000, or $76.18 a foot.

Q. Was that a settlement or a verdict?

A. That was a settlement.

Q. Do you know the price *that* any of the other parcels along there in the neighborhood?

A. Yes, I know what the verdicts were or what was voluntarily paid for the whole line of the street.

Q. There is a map here that shows the different parcels?

Col. ATKINSON: If your honor please, I would like to interpose an objection to this that the testimony is incompetent, there being no showing that the other property was situated like this property, and also that it is a matter between other persons.

Mr. ROBISON: This is cross-examination, if your honor please, this is testimony that was brought out by the respondents yesterday, and certainly we are not bound to stop there.

The COURT: I think I will admit the testimony.

Mr. DICKINSON: I would like to say a word to complete the record.

Mr. BAKER: I desire to call attention to this, you brought out the two highest parcels.

Mr. DICKINSON: That is because you interposed the statement——

Mr. BAKER: That would hardly justify, because I did not claim we had not paid for it.

2325 Mr. ROBISON: His question was not for that purpose. That was simply to show that in spite of the railroad going in front there other people had proceeded to improve their property, and to show that the passage of this elevated railroad did not destroy the property there as you claim.

COURT: As I stated yesterday when the offer was made, I question very much as to whether that was competent or material, but I admitted it upon the grounds, as I stated then, that I did not think very close lines ought to be drawn in a proceeding of this kind, as far as the admission of testimony is concerned. And in view of the admission, it strikes me, that I ought to admit this testimony now.

Mr. DICKINSON: In this connection as a further objection to the incompetency, in order to fix the record, we object on the further ground that the measure of damages in cases of this kind is not confined to the real estate, but that over and above that, it has al-

ways been considered a minor question, and reference has been had distinctly to the injury to the business involved, and our other objection is that there is no property upon the line of the road, by which the road passes, similarly situated to this in regard to being up grade in front of it and having switches in front of it, and also on the ground that this is a planing-mill property which is liable to be more damaged, according to the testimony, than any other kind of property, and that there is no similar property along the line of the road; and in this connection, I call your honor's marked attention, as I did not have the privilege of arguing the question before your honor at the last hearing, to the leading case, and ask your honor to examine it. In the case of The G. R. & I. R. R. Co. *vs.* Weiden, 70 Michigan, 395, Judge Campbell, in delivering the opinion, said: "Apart from the money value of the property itself (meaning the real estate), they were entitled to be compen-
2326 sated so as to lose nothing by the interruption of their business and its damage by the change, by the abating of it or by the injury to it present and future. A business stand is of no value to the owner of the business without regard to whether he has the fee of the land or not, and any diminution of the business facilities as they are carried on lead- to serious results for which he is entitled to compensation." In these condemnation cases the loss of locations, of particular locations, they destroy the business altogether, and whatever damage is suffered by the business as well as to the realty must be compensated. Appellants (that is the property-owners) are not legally bound to suffer one dollar's damage because of the petitioners' action in running a railroad by the property. The railroad can only be authorized to take possession upon making compensation for all of the losses.

The COURT: There is no question about that. I am familiar with that case.

Mr. DICKINSON: But now we are going into the question in this case of the damage to the realty in other places, where there is not a similar business, no similar business, none that can be so affected, and situated entirely differently, this having a grade in front, and also switches in front of it.

The COURT: It strikes me that those are matters for the jury to consider As I remarked a moment ago, I question very seriously the competency of that testimony in regard to what was paid to the Peninsular Stove Company for going along in front there, but I admitted that testimony. Of course, as far as the damage to the realty is concerned, that is merely one of the items to be taken in consideration in an enquiry of this kind. If a person's business is damaged, as stated by Judge Campbell and as read by you, that is a matter which the jury will have to take into consideration.
2327 In view of the admission of the testimony yesterday in regard to the Peninsular Stove Company, it strikes me that I will have to admit this testimony and let it go to the jury for what it is worth.

Exception for respondents.

Mr. ROBISON: Now, I offer the map in evidence.

Q. This is a map, is it not, of the elevated railroad?

A. This is a map showing the line of the elevated road and the property on each side of it, the property on the north side being marked with the names of the owners.

Q. That on the south side being the Michigan Central Railroad Company's?

A. Yes, sir. The elevated road strikes River street just this side of Eighth street and the first property affected, as being on the line of the street, is the property owned by George H. Hammond. It is 45 feet front on River street and is on the northeast corner of Eighth and River. Mr. Hammond has a meat-storage house there, and the elevated road goes pretty close to the corner of the building, within three or four feet of it. He accepted in compromise of that, $2,500 for the 45 feet.

Q. And what is his business?

A. He has a meat-storage house there, the meat being delivered on a side track that runs along River street underneath this structure from the Michigan Central track.

Q. In your judgment, would the smoke and cinders and dirt and filth and one thing and another hurt meat as much as lumber?

Objected to as incompetent.

Mr. ROBISON: Well, I don't care about that.

A. I do not care to testify about that.

Question withdrawn.

A. The next property is the Diamond Match Company property, property that was built up by D. M. Richardson and used
2328 for a match factory. You all have seen the property undoubtedly, and it has a frontage on River street of 210 feet. The south end of it is on the street, that entire building on the 210 feet, and some yard room there. That was settled without any litigation and without any award, and as I say, they accepted $16,000 for the 210 feet.

Mr. DICKINSON: Are you positive that was all that was paid for the whole deal?

A. That was the way it was reported to me. If there was something more paid it is unknown to me. It is possible that Mr. Dickinson may have received something in addition.

Mr. DICKINSON: If I did I accounted for it.

A. Certainly.

Q. That would not be the Diamond Match Company's damage; that was Dickinson's damage?

A. No, he was counsel for the Diamond Match Company here in Detroit.

Mr. DICKINSON: You don't know anything about my desire to have the figure kept down low for the effect on other property?

A. Well, I did not negotiate the settlement, it was made by Mr. Joy. The next property is the old Union mills, a flouring mill, and the elevated road goes right by the doors where they grind, where their purifiers and apparatus are. It is a large high brick building,

you all remember it. That was tried before a jury; they have 140 feet, and the jury awarded them $21,250. They manufacture flour; that is the sole purpose of the main building, and the rear part of it they use for a linseed-oil plant. The next property is that of the Peninsular Stove Company, which was referred to yesterday, and which includes the property that George W. Robinson owned and used for a lumber yard. It has a frontage of just about 300 feet.

2329 Mr. DICKINSON: Let us understand. When Mr. Robinson used that for a lumber yard, was it at the time of the condemnation?

A. No, sir, he was supposed to own it at the time.

Q. No lumber yard there then?

A. No, sir. One parcel of that is marked to William B. Moran, but before the union depot proceedings this property had all passed to the Peninsular Stove Company.

Mr. ROBISON: Including this of Mr. Robinson's?

A. Including that of Mr. Robinson's, so that there is a foot and a fraction less than 300 feet of it. They have the old glucose works turned into the stove works and have a large molding-room there, their principal molding-room is upon this street.

Col. ATKINSON: Stove molding?

A. Yes, sir. A very large room there for that purpose, and the jury awarded them about $49,000, a little less than $50,000. As I say, that case is still pending in the supreme court. From the Robinson lumber yard to the corner of Tenth street were a number of dwellings. Some of them were small and the buildings were not of much value, except a brick building that was owned by George W. Wetherbee; and those cases were all settled. George Kunze owned the first 25 feet and he accepted $1,000, or $40 a foot. George C. Wetherbee for 25 feet, on which was a brick dwelling-house, accepted $1,500, or $60 a foot. Hylet Barker owned the next parcel, with a building of not much value on it and he accepted $1,000, or $40 a foot. Frank Hildebrand owned the corner on the corner of Tenth street, which was a dwelling-house, and he had a saloon on the first floor. He had 25 feet and accepted $1,500, or $60 a foot. Since then that property has all passed to the Peninsular Stove Company, so that they own the whole frontage. Crossing Tenth street, the first property owned on the north side of
2330 the street is the flour shed of the Michigan Central Railroad Company. They own 166 feet of frontage there, and across the railroad crossing and near Mr. Backus's they own 47 feet more. That was condemned in a proceeding before the commissioners, and the commissioners awarded them $10 a foot.

Mr. DICKINSON: That is for running by their yard?

A. No, sir, for running by their flour shed. There is 166 feet.

Mr. DICKINSON: You include this side of the track, all west of the track of the Michigan Central?

A. They made the same award for both sides, but I am not referring to the south side of the track at all, it is on the north side. On the north side of River street the Michigan Central railroad

owns 166 feet, just as we get to the crossing, and they have a flour shed there; and on the other side they have 47 feet, and they have some sort of a little house there they use in connection with the road. As I say, they were awarded by the commissioners $10 a foot.

Col. ATKINSON: Let me understand where that is, that 47 feet?

A. There is 17 feet right next to Backus.

Q. Oh, it is the piece next to Backus?

A. Yes, sir.

Mr. ROBISON: These commissioners took the place of a jury?

A. Yes, sir.

Q. Under the law, when there is a contest between two railroads, there are commissioners appointed or was this agreed upon?

A. Under the law unless a jury is demanded by the respondents in a case, commissioners are appointed. The commissioners were George H. Barbour, M. W. O'Brien, of the People's savings
2331 bank, and Col. Hecker, of the Peninsular car works. The next piece of property belonged to Mary Specht, and that was disposed of by buying the property. Mr. Joy testified as to the general facts. And then selling it to the Michigan Central Railroad Company. It was bought for $8,000 as I remember it.

Q. How many feet?

A. 27 feet. We bought the property for $8,000 and sold it to the Michigan Central Railroad Company for $6,500.

Mr. DICKINSON: $8,500.

A. It may have been $8,500, but it is either $1,500 or $2,000 that we deducted for the damage and then let the Michigan Central have it for the balance of the consideration. I did that all myself, and I will give you the exact figures. The next property is the Backus property which is before this jury. We then come to a piece of property—the jury may have noticed a jog in the back of the property, and there is a back yard in the jog and a common kind of dwelling in front, which belongs to Barbara Stedly. That was an award of a jury, and they awarded her for 65 feet, $2,615.20, or $42.30 a foot.

Mr. Foreman BAKER: Does she live there?

A. She lives there as I remember. The next piece of property belongs to Louis J. Specht and Mary Specht, two parcels 27½ feet each. In that case the jury awarded each of them $1,100, or $40 a foot. Those are some very common buildings upon them, dwellings, that is, if they are occupied at all. I doubt whether those particular ones are occupied at all now. The next piece of property at the time we commenced the proceedings belonged to Barbara Baxter, and that is the property that Mr. Randall purchased and turned over to Mr. Joy. I don't know just what that was.

Q. That was a political consideration?

2332 A. I don't know. Mr. Joy has told you what there was to it, he took it off Mr. Randall's hands.

Q. Mr. Randall bought it for accommodation and Mr. Joy took it from him?

A. Well, I don't know what he bought it for. I do not care to state.

Q. If you did know?

A. No, sir. The next property belonged to Margaret Specht. She had 23 feet and that is marked here, and, as I remember it, was vacant property. There was not anything on it at all, and she was awarded $713, or $31 a foot. The next piece of property is marked to John Wineister. He lived at Howell, connected with the bank out there. That was disposed of for $1,500 on a settlement.

Q. How many feet of it?

A. Fifty-one.

Col. ATKINSON: Was that vacant?

A. No, sir, there are some buildings on it, but it might just as well be vacant, the lot would be worth more if the building were off. The next piece of property is 40 feet, that belongs to Jacques Ruhlman, half of it, and the other half to his wife, Rachael Ruhlman. That was an award of a jury. They occupied that for a residence, with a saloon, as I remember it, upon Fort street, and some tenants upon River street. They were awarded $50 a foot, or $1,000 for each twenty-foot lot. The next piece of property is owned by Catherine Hartser, with a frontage of 40 feet and some kind of a building, not very valuable, upon it. She was awarded $40 a foot, or $1,600. The next piece of property belonged to A. G. Boynton, of the Free Press, and a Mr. Boutell, and they had some sort of a manufacturing institution in there, I don't just remember what it was. The union depot structure passes south of the River
2333 road at that point, so that the superstructure is nearly the width of the street from the property, and they accepted $20 a foot, or $917.40. They had 45.87 feet. The next piece of property is 72.59 feet, and belongs to Mr. Joy. He testified as to the purchase of it and the object of it. Of course I do not know what they paid him, if anything; I do not suppose they paid him anything. That goes down to Twelfth street, where the superstructure is entirely out of the street, so that we have all of the property involved in this whole controversy.

By Juror CLARK:

Q. On that piece of land near the Backus property that Mr. Joy bought, was the price at which the union depot company paid agreed upon between the two companies?

A. The piece that Mr. Joy owned?

Q. Yes. From what you stated I should think it was between 25 and 30 per cent. which was allowed in the difference in the purchase of that in the damage?

A. I don't remember; there is no evidence in the case.

Col. ATKINSON: $1,500 out of $8,000.

A. I don't remember that Mr. Joy has ever received anything.

Q. Mr. Joy stated he bought it for $8,000 and said there was an allowance made for the damage?

A. Oh, you mean the piece out by the Michigan Central. Certainly, that was a piece of property that was a flat-iron piece; I

will show it to you. That is this piece of property marked here on the map, and of course this line ran back to these tracks of the Michigan Central here.

Q. What I was getting at, according to your statement it was about 25 or 30 per cent.?

A. It was either $1,500 or $2,000, one or the other. I will get the exact figures. Of course that property was peculiarly situated and we bought it because we could dispose of it to the Michigan Central. They wanted it and had been trying to buy it for
2334 years, but had never succeeded in doing it, and when we found out what we could sell it to them for we bought it.

Redirect examination.

By Col. ATKINSON:

Q. This Hammond property, you say, has 45 feet front on River street?

A. Yes, sir.

Q. Did it run through to Fort street?

A. I think not.

Q. What was the number of square feet in the Hammond property?

A. That is more than I know.

Q. Well, would you just see if you can obtain that?

A. I don't think the rear of the lot lines are marked here.

Q. I suppose it would be about half the depth, or does it run to an alley?

A. My recollection is that property probably runs back from 125 to 150 feet, maybe not more than 110 feet. I could not tell exactly, but it would be the length of a lot down there.

Q. Well, it would run half way to Fort street?

A. Yes, it would be proper enough to consider the property as running half way back.

Q. About half the depth of the Backus property?

A. Yes, sir.

Q. Now, that was used, you say, for a meat storage?

A. Yes, that is the only use I saw it put to. A freight car stands on this side track——

Q. What kind of a building is there on it?

A. A brick building.

Q. How large?

A. I think it is only one story; it might possibly be two low stories.

2335 Q. And is the meat taken in on cars?

A. There is a refrigerator car stands right on this side track in front of the building and the refrigerator cars have tracks on them where they run the beef around on little rollers overhead, and they are tracks that run from the car, that are adjustable, and can be run from the car right into the building, so that a man goes in there and takes a quarter of beef and shoves it right through.

Q. That is a building that is kept close for the purpose of keeping the meat cool?

A. I should judge it was kept at a low temperature.

Q. Light and air would not be particularly desirable for such a building?

A. I think cold is what they want principally, and reasonably pure air.

Q. Now, that was an agreement, was it, between Hammond & Company?

A. That was adjusted.

Q. Was there a condemnation proceeding threatened?

A. No, I don't think there was, any more than the property-owners down there were generally informed that if no settlements could be made the company would be compelled to commence proceedings?

Q. The company would condemn?

A. Yes, sir.

Q. And the condemnation proceeding takes considerable time, all these condemnation cases?

A. Took a long time.

Q. So that if a man was put to a great delay and expense in resisting, if he tried to litigate with the company——

A. He would be put to a large expense and so would the company, a very large expense.

2336 Q. And do you know whether Mr. Hammond, having owned the 45 feet there, was influenced a great deal by the expense that it would cost him?

A. I am sure I cannot tell you what influenced Mr. Hammond.

Q. It would have cost him over $100 a foot, would it not, to contest it?

A. Well, if you take one of these cases and litigate it through, I think it would cost $2,500 for the property-owner, if you went to the supreme court.

Q. You cannot tell whether Hammond was buying his peace or whether he was getting full value for his property?

A. Of course I don't know what influenced him. I know that he settled and the company was willing to, because it would cost the company fully that amount to go through the condemnation proceeding.

Q. The company have counsel by the year and other parties have to hire them for a short time? And I suppose they would probably cost more?

A. There is not much difference, I guess, in the compensation, one way or the other; it is a pretty expensive business all around.

Q. A pretty expensive luxury?

A. Yes, sir.

Q. Mr. Hammond, too, had special relations with the company, and with the railroad?

A. I could not say that. Of course Mr. Hammond and the beef companies generally are large patrons of the railroad.

Q. They depend a good deal on the railroads for accommodations

and for their rates, etc., so that their relations in a business way are quite intimate with the railroad company?

A. Well, that depends largely upon the railroad companies and the temper of the man. Sometimes the more a man has to
2337 do with the railroad companies, the more he is disgusted, and I cannot tell you how Mr. Hammond looks at that.

Q. Such a business as his, requiring dispatch and cars and accommodations, it would behoove a man like Mr. Hammond to be on good terms with the railroads if possible?

A. I do not think he would be specially antagonistic as long as he was getting proper service.

Q. Well, his kind of business would require prompt and proper service?

A. Of course the shipment of beef requires rapid service and it is a large business. The beef trains from Chicago and Boston to New York are one of the large items of railroad business, as I understand it.

Q. Do you know anything about the interstate-commerce case, in which Mr. Hammond appeared for one of the railroad companies?

A. No, sir.

Q. In which it appeared that there was a discrimination in his favor against other shippers?

A. I know of no such case.

Q. Well, let us see about the Diamond Match Company; what depth have they?

A. I think that goes through to the alley.

Q. That would be half the depth.

A. There may not be an alley there, although I think there is. The Peninsular Stove Company has the Fort Street front.

Mr. DICKINSON: The Peninsular Stove Company comes in behind them. I think you are right about the Diamond Match Company going back to the alley.

A. They go back to an alley, whether a public alley or one they have opened for their own convenience, I don't know.

2338 Q. They go half the depth, then, the Diamond Match Company, of Backus?

A. They are half the block.

Q. Have they railroad connections to their establishment?

A. All that property, from the Hammond property down to the Michigan Central crossing, has a side track that was put in under the management of Mr. Richardson. The original grant was made by the common council to Mr. Richardson.

Q. And that side track connected them with what road?

A. The Michigan Central.

Q. What do they do in the Diamond Match Company establishment?

A. It was a match factory when Mr. Richardson owned it and it is a match factory yet.

Q. Is it in use?

A. Well, at one time it was not in use, when the Diamond Match

Trust was first organized, I think for some years, they did not make matches there, but I am not certain.

Q. Was it in use at the time this compromise was made?

A. I think it was, but I am not certain.

Q. Which way does the Diamond Match Company front?

A. I should judge the main entrance to their building is upon Eighth Street.

Q. Now, do you know how they are situated with reference to light from other sides than the side on which this structure was built?

A. Well, of course they have that end of their property, the Eighth Street end.

2339 Q. They have Eighth street clear, and does the building run to the alley?

A. I think it does, but it may not quite.

Q. Do you know anything about the relative machinery in a match factory and a planing mill?

A. I never was in a match factory and I could not tell you.

Q. So that you are unable yourself to give us any parallelism between the two kinds of business?

A. Nothing, except that it is a wood-working institution.

Q. Except they both work in wood?

A. Yes. The character of the machinery with which they split matches I have heard something about, but I do not know anything about it. I never saw one of the machines work.

Q. How long has this match company been in actual operation since this structure was built, if you know?

A. Well, I say I could not tell you. I think they have done some work there all the time.

Q. It is, I suppose, in the match trust?

A. They operate it when they want to.

Q. It is idle most of the time, isn't it?

A. I don't think that is so, that it is idle most of the time. I think they are doing some work there most of the time.

Q. Well, it is not running up to its full capacity, as it was in Mr. Richardson's day?

A. You are asking me something that I do not know but little about. What I called attention to before was, they have recently made large improvements there.

Q. Now, we will take the Union mills. What depth was that?

A. Well, that property goes back to the Peninsular stove

2340 works property. I should say it went back about 140 feet; that is my recollection of it.

Q. That would be about half the depth, then?

A. Yes, sir.

Q. That was 140 feet wide?

A. That is 140 feet wide.

Q. About 140 feet square, then, and was that an award or compromise?

A. That was an award.

Q. Did you conduct the proceedings?

A. Yes, sir.
Q. $21,250?
A. Yes, sir.
Q. Do you know what the Union mills paid for the entire property when they bought it?
A. I did know, but I have forgotten now.
Q. About $28,000, was it not?
A. No, it was something more than that. It had been abandoned for a number of years; that is, it had been a failure as a flour mill. A firm down in Buffalo owned it and Mr. Kidder and his partner came here from Minneapolis and I think they bought it on a foreclosure of a mortgage and then put in some $75,000 worth of machinery, and have run a flouring mill there ever since.
Q. $75,000?
A. I think it was something like that. Mr. Dickinson was in the case; he put in a lot of machinery; it may not have been more than $40,000, but they put in this improved milling machinery they have nowadays.
Mr. DICKINSON: The total equipment of the mill, re-equipped entirely new, was just $22,000.
A. Well, they made other improvements.
Mr. DICKINSON: Whatever they did in the oil department is another thing, but the testimony is $22,000 there and a flouring equipment.
2341 A. I would not undertake to state what they did do, but they made large improvements.
Q. What kind of a building have the Union mills?
A. They have a large, tall, brick building, with windows right along this superstructure along the street.
Q. This railroad runs practically in front of it, then?
A. Runs right close to it, only a few feet to it.
Mr. Foreman BAKER: Does it run any closer to this mill than it does to the Backus property?
A. Yes, you can almost touch the superstructure from their building.
Q. Their building is built out to the street?
A. Yes, and the Backus building is forty feet back.
Q. You paid them $21,250?
A. Well, the jury said we should pay that.
Q. I suppose you paid it?
A. Yes, we paid it. There was testimony in that case that it would affect the manufacture of flour in some way in discoloring it.
Q. And I suppose that was one of the elements the jury considered, probably?
A. Well, I don't know just exactly what they did consider. They made that award, and we wanted to get through with it some time or other, and it costs us five or six thousand dollars to try one of these cases and we paid it.
A. Well, in addition, I suppose, to the award, you paid their expenses of contesting it?
A. No, sir.

Q. In these cases where awards were made, has there not been an allowance for expenses?

A. Not in this controversy. Judge Reilly ruled that attorney fee was a taxable attorney fee.

Q. So that a party, then, in contesting, loses the expenses, with the exception of ordinary attorney fees?

2342 A. Yes; in those old cases we were in, Colonel, where they made an allowance, they only allowed one-tenth part of what the lawyers charged.

Mr. DICKINSON: One-tenth part of what the services were worth. Put it that way.

Q. I know we did pretty well when we contested it.

A. I think we always try to do the best we can.

Q. Now, with reference to the Peninsular Stove Company, the superstructure runs in front of their place, and I suppose about the same distance that it does from Mr. Backus'?

A. Well, somewhat more; it is 300 feet.

Q. About the same distance from their building?

A. Oh, no; their building is right down close to it.

Q. Comes up close to the street?

A. Close to the superstructure, and their molding-room is right on the line of the street. You can touch it with a ten-foot pole, anyhow.

Q. What depth is there?

A. Their property, as they own it, runs through to Fort street.

Q. There is an alley in the center, is there?

A. No, sir, I don't think there is. If there ever was one they have closed it up. They use it as all one main stove plant.

Q. They have practically the same depth as Backus?

A. Yes, sir.

Q. They would have about 300 feet wide all the way through there to Fort street?

A. I think it is about 300 feet; 280 or something like that.

Q. They were allowed $48,900?

A. Yes, sir.

Q. What machinery did they have on the side where the structure is built?

2343 A. Well, they had a great many elements of damage that they figured in on us. The principal controversy was over the molding-room; that was one of the main items.

Q. How did it affect the molding-room?

A. Well, they had a large amount of testimony indicating that it would jar the molds, and we had a large amount of testimony that it wouldn't do anything of the kind.

Mr. ROBISON: Do you know if they are still molding there?

A. They are still molding.

Q. Well, there was a large amount of testimony that there would be a jarring and vibration from the passing of trains, was there?

A. Well, there was some testimony to that effect, but I would not care to express an opinion about it.

Q. Well, I do not care to have you. I never knew a railroad

attorney yet who thought there was any truth in anything said against the railroad company.

A. Well, I hardly want you to put me in that category.

Q. But anyway, the jury, on the testimony introduced in that case, allowed them about $50,000. What other elements were there for damage besides the vibration?

A. They had a nickel-room, a place where they did nickel-plating, right close to the superstructure, that is, right next to the south part of their building, with a door through that goes down to the floor, there is a door, if you look right out onto this superstructure as it exists, and they had a place there where they hang stove-trimmings in a fluid and nickel them.

Q. Their plating room?

A. Yes, sir. And then above they had a pattern-room and
2344 a good many rooms there where they used the light that would come in these side windows, and then they claimed all the damage that anybody could claim in such a case.

Q. One of the elements then was for darkening the building?

A. That is what they claimed.

Q. The other for the vibration, and what else? I suppose the dust would not have affected their work?

A. Well, another item. They said that when these molders were working in this molding-room and a train went by, they would all stop and look at it.

Q. That is, it would distract the attention of the workmen?

A. It would distract their attention.

Q. Any other elements?

A. Well, I cannot remember it all, but I can say generally that if there was any way that damage could occur, it was not omitted.

Q. That I suppose was a mere matter of humor on the trial about the men being distracted. The principal claim was for vibration and the closing out of the light, was it not?

A. Well, I could not say what was considered by the jury. I could not say what they really based their award upon. This testimony was in the case of course.

Q. Kunze had 25 feet you say.

A. Yes, sir.

Q. How deep was his?

A. It goes back half the way, if I remember right. His may possibly go the whole distance.

Q. He had a dwelling on that and accepted $1,000? It would have cost him five or six thousand to contest it if he had not made peace with the company?

A. No, sir, it would not cost a property like that for a
2345 small piece. Of course, down below there we did have contests and they all combined.

Q. You would have to have precisely the same litigation for a small piece as for a large piece?

A. It would depend on who they employed and how far they went with the litigation.

Q. Well, if they surrendered without much of a contest it would

not cost them so much. Now, do you know who made the settlement with Kunze?

A. Well, I do not just remember now that particular settlement, but in a general way I had charge of it all.

Q. Do you know whether that was the actual consideration paid?

A. Well, I think this was managed in this way: The Peninsular Stove Company wanted that property and they were willing to give $100 a foot, and the owners were willing to sell it for what they could get from the stove company and what the union depot company was willing to pay them, and in that way it was all closed out, except, maybe, Mr. Hildebrand's. They may not have settled with him.

Q. I am speaking now of the Kunze matter. Then the way that was settled was to buy the property of him and sell it over again to the Peninsular Stove Company?

A. No, sir, we did not buy the property; they could make this sale.

Q. You combined to buy it

A. No, sir, we did not com[illegible]e to buy it. It come about in that way and so we did not have to litigate it. The stove company was in the market to buy.

Q. They bought it?

A. Well, we settled with these property-owners individually and then they sold to the stove company upon such terms as they
2346 could agree upon. I knew at the time, but it is about $100 a foot; some of them may have got a little more.

Q. So that they practically parted with their property?

A. That is so, unless it is Mr. Hildebrand, on the corner.

Q. How was it with Wetherbee?

A. Wetherbee had a brick building, and we settled with him for $1,500.

Q. Did he sell to the stove company?

A. Yes, sir.

Q. And Barker did the same thing?

A. I believe he did.

Q. And Hildebrand the same?

A. Well, the stove company may have paid more. He had a saloon there and they were anxious to get rid of the saloon; they did not want it near their works.

Q. What I want to get at is, Kunze, Wetherbee, Barker and Hildebrand, instead of selling the easement to pass the property, practically all disposed of their property so that they ceased to be interested in it?

A. No, sir, they did not. In selling the easement they sold the easement of the property, and then sold to the Peninsular Stove Company.

Q. Was it a part of the understanding by which the easement was acquired that they should part with the rest of their interest?

A. No, sir, it was not. I merely state that as a fact that they did make these sales afterward.

Q. It had nothing to do with the arrangement at the time?

A. I don't know what actuated them. I know that the union depot company and the Peninsular Stove Company did not act together, but they all had this property, and the union depot
2347 company was willing to pay them certain amounts and the stove company to purchase.

Q. Did they have a sale to the stove company in view at all at the time of this settlement, do you know?

A. I don't know how far those negotiations had progressed.

Q. Do you know whether they had been mentioned at all?

A. I do not.

Q. Now we come to the Michigan Central flour shed. They have 166 feet there that they run their trains up to, I suppose?

A. They have a side track that runs by this flour shed and then they have this Richardson side track that goes up there, and they have a side track that goes into the flour shed, I think. There is one marked here on the map.

Q. What kind of a building have they on that property?

A. They have a one-story shed forty or fifty feet wide and about 150 or 60 feet long.

Q. Which side of River street is the shed on?

A. On the north side.

Q. Before leaving the Peninsular Stove Company plant there, how were they situated with reference to light, aside from the River Street light?

A. Well, in their main building there they received their light on the south side.

Q. Any other side where they had light?

A. I don't remember just exactly of how many windows they have on the east side, but they have some.

Q. They run to Tenth street, don't they, between Eighth and Tenth? Do they run to any of the cross-streets there?

A. They do. They run to Eighth street, and it is up on the Fort Street corner a half block from the superstructure.

2348 Q. So that down on River street they do not go to Eighth or Tenth, any cross-street there?

A. No, sir.

Q. Did they have a large court inside for light inside their property?

A. On the Fort Street property, on the jog north of the Diamond Match Company, they have a large foundry-room there, which is lit——

Q. My question is whether they had a court which gave them ample light inside their property aside from this front?

A. There is an alley that runs up there that they drive into, but there is no court.

Mr. DICKINSON: A big yard inside, isn't there?

A. Down on this vacant property and on the Fort Street front there is a large yard.

Q. Was all this 300 feet occupied by buildings?

A. I think it all is except this ten-foot alley; there is a passageway.

Q. No, but was there 300 feet of front of buildings on River street?

A. I think there is, but it may not be quite 300 feet.

Q. It is substantially all built up there?

A. Yes; that is, with this new molding-room they put up.

Q. Is there and difference between the distances from the Peninsular Stove building and the distance from the Backus line? I do not mean the Backus building now—does the railroad come any nearer to one than to the other? I think the structure in each case comes right up to the line, does it not?

A. The superstructure is built on the line of the curb.

Q. Of each?

A. Of each.

Q. So that the line fence on the Backus property, between
2349 the property and River street, would practically stand where the wall of the Peninsular Stove building stands?

A. I think so. The sidewalk there may not be of the same width in both cases, but it is not a wide sidewalk.

Q. There would not be a material difference?

A. No, sir, there is no substantial difference.

Q. Now, what is the grade in front of the Peninsular stove works?

A. I don't remember just what it is.

Q. It is less than it is in front of Backus'?

By Mr. DICKINSON: There is no grade in front of the stove works.

A. I don't think there is any grade that amounts to anything.

Col. ATKINSON: That is also very much nearer the depot, is it not, so that trains would naturally run slower both ways in front of the Peninsular Stove Company?

A. Well, I could not say whether trains at that point would be going any slower or not. It is quite a ways up to the depot from there.

Q. Do you think they would not be slowed up when they passed the Peninsular stove works, going in?

A. They would slack up, of course, when they get into the yards. I don't know how fast they do run. Some of the witnesses here testify that they run about six miles an hour.

Q. In front of Backus'?

A. Yes, sir.

Q. You do not know, then, whether they would be running any slower or not naturally when they get as far as the Peninsular Stove Company?

A. A man would naturally assume that they would slack up, but just how a man handles an engine and where they slack up is beyond me.

2350 Q. Haven't you railroad experience enough to know they usually stop exhausting when they slack up?

A. I don't know anything about it.

Q. So that there would be less cinders and dust. That would be the natural effect, would it not, in slacking up?

A. I suppose the natural effect of shutting off the steam would be——

Q. That there would be less dirt thrown from the engines?

A. I should suppose so, but I don't know.

Q. Now, we come to the Michigan Central Railroad Company. The Michigan Central Railroad Company's shed, you say, is there, and that they got $10 a foot front from the commission?

A. Yes, sir.

Q. Did that include nothing except the shed?

A. There was a separate award for that.

Q. They actually got $10 a foot, didn't they, for the entire distance from Twelfth street?

A. No, sir, that is on the south side.

Q. Well, on the south side, all the way from Twelfth street, for running along their tracks, didn't they get $10 a foot?

A. Different amounts were awarded on the south side.

Q. How much did they get altogether?

A. Altogether it was about $28,000.

Q. About $28,000, instead of $1,660?

A. That is for the entire frontage. Of course this viaduct runs on the side of their property for the whole distance.

Q. Runs right along their yard practically?

A. And cuts off a triangular piece at the corner of Twelfth street.

Q. Took a piece of their property?

2351 A. Yes. That is, it went over a piece of their property.

Q. But that land was occupied by tracks?

A. There was a track there they had to move or shorten.

Q. Did you buy the land from them, or the right of way?

A. We took a right of way over it.

Q. How high is this shed of the Michigan Central's?

A. One story.

Q. And that is made for storing flour in barrels?

A. That is what they call it, their flour shed.

Q. It is not a manufactory of any kind?

A. No, sir; it is just the place where they store freight, principally flour.

Q. When you speak of flour you do not speak of flour open at all?

A. No, sir.

Q. When it is taken in there it is in barrels?

A. Yes, sir.

Q. So that it would not be affected by dust?

A. I should not think it would.

Q. It is a low building, is it?

A. Yes, sir.

Q. They run their trains right under this superstructure up to the flour shed now?

A. No, sir. I think their side track by which they reach the flour shed is on their property; it is not in the street.

Q. This flour shed is some little distance back from the structure?

A. Yes, I think there is a side track between the street line and the shed, or it may be on the other side.

Q. At that point the superstructure practically runs between the Michigan Central yards proper and this side track?

2352 A. Well, of course, this superstructure covers the roadway on River street.

Q. That would be between this side track and the Michigan Central yard?

A. Certainly, but I guess their side track is on the north side of the flour shed and the flour shed comes down very close to the street.

Q. Now, I see by referring to the old records that the compensation to be paid by the Fort Street union depot to the Michigan Central railroad for the right of way, as ascertained and determined by us—this is from the east line of Twelfth street to the westerly end of the westerly approach of the passageway—shall be $8,250; then the right of way to construct the viaduct on River street in accordance with the ordinance, $15,750, and then the right of way on the north side along this flour shed, $1,660. Those are right, are they?

A. I think they are.

Q. And there is another part of it that is east of the crossing, isn't there? As I recollect it, they made two different awards?

A. They had $8,000 in one place and $15,000 in another.

Q. And wasn't there one, another one, $15,000 for just going over the crossing, or was that east of the crossing?

Mr. DICKINSON: That was east of the crossing.

Q. I suppose there was also an award, but it does not seem to be here, for actually crossing their railroad tracks?

A. Of course, we had a great controversy with them about building that crossing there for teams.

Q. This does not seem to include the right of crossing their railroad, but running alongside of it?

A. They were interested in that quite as much as the union depot company was.

2353 Q. That was arranged in some other way, I suppose?

A. The railroad commissioner directed the two companies to divide the expense.

Q. What were the elements of damage for running along their railroad on the south side?

A. Well, they claimed it would interfere with their building freight-houses along there.

Q. Freight-houses on the side of the street?

A. Yes, sir. They brought in all the usual elements of damage, that it would interfere with their building, and that it would damage their property.

Q. How would it interfere with their freight—by interfering with the approach?

A. I could not see that it did them very much damage myself.

Q. That was the idea; that it would interfere with the approach to the freight sheds?

A. I don't know what the idea was. Their testimony indicated a damage of about $250,000; they figured it out that way.

Q. And the commissioners allowed them only what is stated here?

A. The commissioners allowed them about $28,000.

Mr. DICKINSON: Of which $1,660 only was for the flour shed.

Q. Well, we will call them in and see what they figured on, if you don't remember. Now, you spoke of 47 feet in connection with the Michigan Central flour — besides the 160 feet?

A. That was over on the other side and that was omitted from the awards by accident in some way.

Q. That is not included at all in this?

A. That is not included at all in the award. The commissioners, in making up their report, omitted that; but the Michigan Central received $10 a foot.

2354 Q. I see this compensation for damages to said respondents resulting from the construction of said viaduct for teams and foot passengers is not included in the award?

A. No, sir.

Q. That viaduct is also in front of Backus'?

A. Well, partially; that is, on the south side of the superstructure, and the bridge commences, where you can start to drive up onto it; in front of Backus', as I remember it.

Q. The approach is pretty well in front of Backus'?

A. Yes; that is on the other side of the superstructure. When you come up that street you can go right through over the Michigan Central crossing or up overhead, just as you are amind to, and that superstructure for teams is maintained by the two companies at their joint expense. There is a sidewalk on the north side and there is a stairs to go up.

Mr. DICKINSON: Well, the viaduct is opposite Backus'?

A. Well, partially. I don't remember it exactly.

Mr. DICKINSON: As I remember it, it commences at Twelfth street and gets up as high as it ever goes before it leaves the Backus front. It approaches down at Twelfth street.

A. No, it is down by Mary Specht's.

Q. So that it is up even when it gets to Backus'?

A. Well, it is not on a level.

Q. Now we will go on with this interesting inquiry. We had this Specht 27 feet. That, as I understand, you bought for $8,000 and you sold to the Michigan Central for $6,500; all that you bought, except the right of using this superstructure in front of it?

A. That is what I did.

Q. You paid for that little piece $8,000?

A. Yes, sir.

Q. Was it not $8,500?

2355 A. Well, it may possibly have been. My recollection of the difference is $1,500. That was a piece of property that belonged to a Mrs. Specht, a relative of a John Babillion, a neighbor of mine, and I negotiated with her through Mr. Babillion, who is a relative by marriage.

Q. Of hers or yours?

A. Of hers.

Q. So that you attacked her through her affections, then?

A. Well, it was a piece of property that was practically worthless for what they had on it. They had a brick building on it; it was very doubtful whether you could get any rent for it; they did get a little for it, I suppose, but it was a triangular piece, with the Michigan Central property on each side of it, and in purchasing it the question was what it would cost the Michigan Central to condemn it, if they did condemn it, and what it would cost the union depot company to condemn a right of way in front of it; and the cheapest way out of it was to give them whatever they asked. They asked four or five times what it was worth.

Q. Oh, yes.

A. There is not any doubt about that and I will leave it to anybody who will go and look at it.

Q. Now, what is the size of the piece?

A. It is 27 feet front, and it may possibly be on one line 100 feet deep.

Mr. Juror SAFFORD: I would like to ask if the cider mill was on it?

A. I would be very glad if there was one there now.

Q. I want to get at the size of that if I possibly can?

A. Well, sir, it is a small piece, and I can bring you the exact dimensions.

Q. It is about 27 feet front?

2356 A. Yes; well, on one side it has got a short line and on the other side a long line; the Michigan Central track cuts it on a bias, as the ladies would say.

Q. You paid $8,000 for it?

A. We paid under the circumstances $8,000 or $8,500, in order to dispose of it and get rid of it.

Q. Well, were there any circumstances peculiar about that, beyond any other piece of property of the same size; were you in any way at the mercy of that old lady—this company—so that it could be imposed upon to any extent?

A. Of course it was a piece of property that anybody could see the Michigan Central would want some time or other.

Q. Did she have any peculiar advantage over the company?

A. No more than any other property-owner who has property and wants to get the best he can for it.

Q. Most anybody that is selling property wants to get all he can for it.

A. Yes, and they take advantage of every circumstance, of course.

Q. If another man wants the property they usually take advantage of that fact to get what they can for it?

A. It depends upon their situation; of course some men are compelled to buy and some are not.

Q. This piece was practically impounded by the railroad, was it not?

A. The Michigan Central owned on both sides of it, and on this bias also.

Q. You would not consider it at all as valuable as the Backus property, would you?

A. For any business purpose it had little value indeed.

Q. But for the railroads it was valuable?

A. Well, it separated a part of the property of the Michigan Central from their main line; it was something that I suppose
2357 the Michigan Central would be glad enough to acquire even if they did not have any immediate use for it. It was something in their way there, and at any rate after some negotiations with Mr. Russell I succeeded in selling it to him for $6,500.

Q. Then, as I understand you, these prices you have put in do not indicate the market value of the property; they only indicate what the parties, to avoid litigation there, accepted or paid in certain instances?

A. As I understand the market value of property, Col. Atkinson, it is what it will bring if the seller is not obliged to sell and the purchaser has not to buy; that is, perfectly fair conditions, but if either party is at a disadvantage, it is not the market value. Sometimes a man has property which is mortgaged, upon which the interest has become due, and he is not able to make his payment and has to sell for less than a man would who was independent and did not care whether it is sold or not; and the market value, as I understand it, is what it would fairly bring, all conditions being equal.

Q. It is also affected by the fact, is it not, when a man has a little property and he knows the railroad company will condemn it and he will be at considerable expense in litigation, and he has to take less than he otherwise would to avoid litigation?

A. It is not my experience that they take less from a railroad company than they would from any one else.

Q. You think in that instance he would not be affected by the fact that it would cost him a large amount of money to maintain his position?

A. No, sir. The moment it is known that a railroad company wants a piece of property it doubles and trebles in value usually in the estimation of the owner, and that is illustrated in this case strongly.

Q. That, I suppose, is the general opinion of the railroad attorneys?

2358 A. No, I think that is the general opinion of people generally, as far as my observation extends; that if you have a piece of property and a railroad company has got to have it you can make a very advantageous sale.

Q. These condemnations are made by juries, aren't they?

A. Yes, sir.

Q. Picked out from the community?

A. Yes, sir. Mr. Dickinson sold out without knowing who he was selling to, and we got his property at quite a reasonable price.

Mr. DICKINSON: Do you swear to that?

A. No, sir.

Q. You better not.

A. I would not say that you did not know who you were selling to.

Mr. DICKINSON: You are under oath, and you better not say that. I got the market value of the property.

A. I think you did; yes, sir.

Col. ATKINSON: As I understand you, then, your statement with reference to this 27 feet is that you purposely paid a great deal more than it was worth?

A. Yes, sir.

Q. It was bought by yourself in your own name, was it not?

A. Yes, sir.

Q. You bought it for the railroad company?

A. I didn't buy it for the railroad company. I bought it for Mr. Joy. Mr. Joy furnished the money and I took the deed in my own name for the purpose of conveying it to the Michigan Central railroad if I succeeded in making the negotiations.

Q. There was also an award made in the Backus property, wasn't there, this very property that you have omitted from the statement of awards?

2359 A. That is the case we are trying. Yes, sir.

Q. What was the amount of the award made there?

A. $96,410, I think.

Mr. DICKINSON: How much for the realty and how much for the damage?

A. About $17,500 to Absalom Backus and the balance of about $78,000 to the corporation known as A. Backus, Jr., & Sons.

Q. So that the award there that you paid at the time was about $96,000?

A. Yes, sir.

Q. Did you make that payment yourself?

A. Yes, sir, very much to my regret.

Q. You paid that to one of the Mr. Backuses?

A. I paid that to Mr. Dickinson, I think.

Mr. DICKINSON: The checks were made payable to the order of Backus?

A. Yes, sir, I handed the check to Mr. Dickinson, but that, of course, was without waiving any of our rights to the supreme court, and of a new trial.

Q. Was there any condition at the time you made your payment?

A. We did not have to make any condition.

Q. You did not make any condition?

A. No, sir, we relied upon——

Q. You made no condition; the award was made, and you paid it and took the property?

A. We paid it, certainly, to go on with the work.

Q. Since then you have been in the full enjoyment of the property?

A. The company has.

Q. Well, I do not want you to think I am confusing you with any old union depot company. When I speak of you I refer in this case to your clients.

A. Certainly.

2360 Q. I do not want to mistake you for an establishment of this kind.

A. Well, I would be very proud to be responsible for such an enterprise. I am only connected with it as an attorney.

Q. Well, the enterprise is all right, but still you are worth more in the kingdom of heaven than a thousand union depots. Now, in the Specht case, there was 55 feet for which $2,200 was paid. Was that an award on a compromise?

A. That is 65 feet there.

Q. There were two pieces there, 27½ feet each?

A. I am referring to Barbara Steadly, which is the next piece.

Q. Oh, Steadly; yes, 65½ feet. Was that an award or compromise?

A. That was an award.

Q. How deep was that?

A. Well, I think her lot just goes back to that jog in the Backus property.

Q. About 100 feet, then?

A. It is more than that, I think; it is 110 or 120, something like that.

Q. That would be about half the depth or less—65 feet?

A. She got $2,615.20, or $42.30 a foot.

Q. For about 110 feet in depth, you think?

A. Well, whatever it is. It is half of the block there; about half of the block.

Q. That was used for an old dwelling?

A. There is a brick dwelling and some vacant land, as I remember.

Q. A little brick dwelling?

A. Yes, sir.

Q. That is back some distance from the street, is it not?

2361 A. Well, it is so indicated on this map.

Q. There would be no manufacturing of any kind interfered with?

A. I think the old lady lives there, but I am not certain.

Q. But no business interference, I mean, of any kind connected with it?

A. No, sir.

Q. Now, in the Specht piece below that?

A. Well, there are two parcels there, 27½ feet each, belonging to Mary Specht and L. J. Specht.

Q. They got $40 a foot? How deep are they?

A. I think they go back halfway, but I am not fully informed as to that.

Q. Now, the Baxter piece. That is the Randall piece, that goes back halfway, I think?

A. I suppose it does.

Q. You don't know anything about that price, I suppose, beyond what Mr. Joy tells us?

A. No, sir, I don't know anything about it.

Q. Now, this Specht 23 feet of vacant property, how deep is that?

A. I assume that is only half of the block. That is vacant property at $31 a foot.

Q. And Weineister, how deep was his?

A. I think that was somewhat deeper than the others, but not very much.

Q. Practically one-half?

A. Yes, all that property there.

Q. And the Rohlman property?

A. Their property goes way through to Fort street, as I remember.

Q. They had a saloon on Fort street, and what did they have on River street?

2362 A. Well a bakery or something. They were in some business of that kind.

Q. What did they have on River street?

A. I think those are tenements, that are rented.

Q. Well, they got $50 a foot, didn't they?

A. Yes, they were awarded $2,000 for the 40 feet.

Q. Now, isn't that the same piece that Mr. Joy testified could be bought entire for $50 a foot?

A. No, sir. I do not think he bought that property.

Mr. DICKINSON: He said that it could be bought; that it was offered for $50 a foot.

Q. That he was offered it for $50 a foot, but there was actually $50 a foot paid for the structure in front of it?

A. No, sir.

Q. How near did the structure come to this building?

A. Close to the building, just the same.

Q. Was the building close up to the street?

A. Almost.

Q. Thep are vacant houses?

A. I don't remember just what were there, but it seemed to me that those buildings there were originally stores.

Q. Stores down there?

A. Yes, they are built in the shape of stores; that is, with an entrance and door.

Q. A store entrance?

A. But just exactly how that property is occupied, I do not remember. He had tenants in there, a number of tenants, and the property ran through to Fort street and they lived in front, I think. I think that is the property where there is a building on River street that is rented, and then you go in the back yard and there is a building in there that he rents.

Q. What was that, an award or a settlement?

A. That was an award; all those were.

2363 Q. There was no business being carried on that, was there?

A. I am not certain, but I don't think there was.

Q. Now, Hartfer's lot, 40 feet. What was being done on that?

A. I could not tell you. I think that is a dwelling, but I am not certain.

Q. Was that an award or a settlement?

A. That was an award, as I remember it.

Q. Was there any building at all interfered or anything on the Hartfer lot?

A. Just the same as all those buildings there.

Q. Was there a building on it at all?

A. There was when this survey was made.

Q. Do you know whether it has been occupied since at all?

A. I do not. Of course all that property you can see is in a dilapidated condition.

Q. The occupation of this street by the railroad practically destroys the property for almost every purpose, does it not?

A. That is a mere matter of opinion; but the property was in a dilapidated and unsalable condition before the railroad went there.

Q. That is, these pieces we are speaking of?

A. These pieces we are speaking of around there.

Q. They were neglected, tumble-down old affairs, as a rule?

A. Yes, as a rule it was abandoned property, and I should judge it existed there as a sort of quasi-business property when the sawmills were down there.

Q. And since then has not been used for much of anything?

A. Except for the very cheapest kind of rentals.

2364 Q. Now, Boynton & Boutell had some kind of a manufacturing establishment, you say?

A. Well, yes. That property was used for some kind of manufacturing institution. A Mr. Andrews located some kind of fluid works on that property, and when he abandoned it it passed into the hands of Boynton & Boutell, and they had something there, but I don't remember now.

Q. Were they using it?

A. Yes, sir.

Q. What kind of a building did they have?

A. Well, I could not describe it, but not especially valuable.

Q. It is an old building that is boarded up, isn't it, with barn boards?

A. I should think it was a valuable building.

Q. They got $20 a foot?

A. Yes, sir.

Q. At that point the structure is some little distance away?

A. There is a piece in front of the property with a long girder that runs over to the curb on the other side.

Q. But the actual railroad runs some little distance from that?

A. The actual railroad is almost out of the street there, but not quite.

Q. On the opposite side?

A. Yes, sir.

Q. This girder is made to sustain the railroad, and only put there so as not to have a foundation in the street?

A. As you go up Twelfth street that is the first girder you come to; but there is no railroad track over it.

Q. You don't know anything about the purchase of Mr. Joy's piece there, and what he got for it?

A. I don't know as he got anything.

2365 Q. In front of him the superstructure would practically be on the other side of the street?

A. In front of him, in order to get out of the old union depot grounds on Twelfth street, they had to take a corner of the Michigan Central.

Q. So that the street remains practically undisturbed there?

A. Except for a very short distance, it is partially in the street.

Q. Mr. Joy also has the advantage of Twelfth street in connection with his property?

A. Yes, sir.

Q. Now, do you know how long Mr. Joy had that property?

A. I do not, except that he stated here that he bought it along in '82 or '3, in there some time, when they talked of widening Twelfth street, and thought they would have a great passenger business at the foot of Twelfth street.

Q. Now, what would the Backus property be worth at the same rate per foot that you paid for the Specht property?

A. Well, I have not figured that. It is a mere matter of figures.

Q. The Backus property is more valuable for business purposes, is it not?

A. The Backus property is a valuable piece of property.

Q. Well, it would be more valuable for business purposes a good deal than the Specht property?

A. The Specht property had a value of a proportion; that is, an actual salable value out of proportion.

Q. And somebody needed it?

A. I don't know whether they needed it or not; they were willing to buy it.

2366 Q. Did you need the right of way in front of the Specht property any more than in front of Backus'?

A. No, sir. Of course the company needed it all.

Q. Just exactly the same necessity for use, then?

A. Yes, sir.

JAMES DWYER, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. How long have you lived in Detroit?

A. A little over fifty years.

Q. You are president of the Peninsular stove works?

A. Manager.

Q. Have you been in charge of the works down there before and since the building of the union depot structure?

A. Yes, I built those works; or they were built under my supervision.

Q. Before the building of the superstructure you had your front on River street?

A. Yes, sir.

Q. Did you use that front in your business?

A. Yes, sir.

Q. In the ordinary course of your business it was constantly used, was it not?

A. Yes, we used that. It is shorter to get to the depots. We drive out that way.

Q. The people drove down there on business?

A. Yes, they come there for stoves sometimes—dealers come there.

Q. How has it been since the building of the superstructure as to your use of that front?

A. Well, since that structure has been up there we have
2367 not used it at all. That is, we do not drive out that way with our goods, nor do our customers come in for goods in that way.

Q. Do you know why?

A. Well, it would be the danger of something dropping onto them or getting their horses frightened. They would not want to drive under there unless they are obliged to.

Q. It has operated as a discontinuance to your River Street front?

A. Yes, we do not use it any more.

Q. Your frontage is even longer on Fort street than upon River street?

A. Yes, our frontage on Fort street is nearly 400 feet.

Q. You know the general situation of the Backus property?

A. Well, somewhat.

Q. What have you to say as to the effect that structure has upon the Backus property, situated as it is?

A. I don't know that I get that question.

Q. You know the situation of the Backus property, with reference to the rear and the front on River street?

A. Yes, sir.

Q. That it has no front on River street except the office front there and roadway up, and that there is a hill on that side?

A. Yes, sir.

Q. Will you please state whether the Backus property is so constructed as to make its front wholly upon River street, whether it has any front as a business except the corner of the street?

A. As it would appear to me, it destroys the use of the River Street front of the Backus property.

Q. Is that property situated so that they can utilize any other front?

A. No, sir.

2368 Q. With convenience?

A. That would be where they would have to use it I should say, that could be used mostly for its greater length upon the street.

Q. What do you say the effect is upon the Backus property then, taking the plant right through, of the construction of this railroad?

A. Well, I should say in my judgment that it virtually destroys that street, that it don't give us the use of the street.

Q. The street in front of you has been practically abandoned for a front, as a street?

A. Yes, and what I should be willing to do, what I stated before, I would do in a case of this kind, if they would take away their superstructure from that street, I would be willing to give them back all I received from them and give them $10,000 in addition, because I should feel it destroys that whole front.

Q. Destroys the street facilities and roadway facilities entirely in front of you?

A. Yes, sir.

Q. Now, suppose your property was only half as large, and you had no other access to the street, or any convenient one, one like the Backus', do you think you could successfully carry on the manufacturing business of stoves there? Suppose you were located as Backus is substantially, with the frontage he has of 238.2 feet front, and situated relatively as his is, with reference to the property?

A. I would say, if I was obliged to conduct my business in that way, that it would be doing it under a great disadvantage. It would almost prevent you from doing it, there is so much you have got to depend on, carting in and out.

2369 Q. Would it make it of so much disadvantage that you would not, if you were purchasing a new site for a stove works, buy such a site for stove works?

A. I would not think of purchasing a place in that locality at all for a stove works.

Q. The tendency is, you think, to drive away trade approaching on that street, altogether, approaching the front?

A. Well, for a manufacturing purpose what you want is the very best facilities for light, and that interferes with our light.

Q. Does it interfere in your business with the light?

A. It does.

Q. Since it has been built?-- ---.

A. Yes, sir.

Q. Is it a serious obstruction, a serious trouble?

A. Yes, while the trains are passing it prevents the men from working; that is, it stops them from working—the shadows—and it seems to have that effect mostly on a bright day.

Q. Now, you have to have your windows open for ventilation during the summer, I suppose?

A. Yes, sir.

Q. Have you noticed the flowing in of smoke there?

A. Yes, we get some smoke and cinders through the windows.

Q. Give us some idea of the amount, whether it comes in in clouds.

A. Well, I am not so much in the place there, and I would not of my own knowledge be able to say; but I have been shown the number of cinders by the foremen, the men that have charge of those departments.

Q. In what quantity do they come in?

A. They claim they come in when the windows are open,

2370 and we have a nickel-plating part there, and the cinders fall into the solution so that interferes with that considerably.

Q. They do come in there in quite large quantities?

A. Yes, sir.

Q. Situated as the Backus property is, what have you to say as to whether the superstructure, running along there, situated as it is, and remembering the shape and condition of the property, as to whether that is any longer an eligible site for any manufacturing business?

A. Oh, in my judgment it would not be desirable for manufacturing purposes, as far as my knowledge would go.

Q. And before the building of the superstructure was it an eligible site for manufacturing, with the Michigan Central connection, its full front and wide street?

A. I should think it was very desirable.

Q. Two ground floors, as it has?

A. Yes, sir; that would make it extra.

Q. And extra eligible site without the superstructure?

A. It would make it, I should say, with their switching there, very desirable.

Q. Do you know of anything anywhere near the center of the city and within access to the city, easy access, as eligible as that was before the building of that superstructure?

A. Well, that I do not know. I do not know of anything that would be as good; that would look as good to me. Of course that place had been improved and fixed for their business, and in that way it would be worth more to them, perhaps, for their line of business than it would be for any other line.

Q. That is before the superstructure?

A. Yes, sir.

Q. You understand that this plant is run in connection with the lumber yard below and the storehouse above—the
2371 planing mill on River street that we have been discussing? Did you understand that a part of the same plant is the lumber yard that feeds the mill, and the storehouse on Fort street, in which their surplus is deposited?

A. Yes, sir.

Q. You understand that is run all as one plant?

A. Yes, sir.

Q. How, in your judgment, would the rental value of that whole plant be affected by this superstructure where they are running as one plant?

A. Well, my judgment would be that it would not be desirable for that business on account of destroying their frontage.

Q. What, in your judgment, before the superstructure was placed there, was that property worth to the Backuses, situated, as it was, with the Michigan Central switch in and those facilities as they are, and that frontage as it was with two ground floors, running clear through to Fort street as it does before the incumbrance on River street by this railroad structure?

A. I should reply to that question by saying that there would be a value to it on account of their machinery and appliances for their

business. Of course that would bring a value to it that otherwise it would not have.

Q. But as to the value of the site, we will say, without the business—of the real estate prior to this superstructure?

A. Well, do you mean to ask that question by including the building, machinery and everything?

Q. No, irrespective of the building and machinery, just the real estate. You can take, however, into consideration the shipping facilities that existed there with the Michigan Central railroad and with River street free of obstructions, the property having two ground floors and running through to Fort street.

2372 A. Well, perhaps it would be worth about $350 a foot. I should say somewhere about that.

Q. It would be worth that as an eligible manufacturing site?

A. I should think so, yes, sir.

Q. Did you include in that estimate the fact that it runs through to Fort street, or would you put another valuation on the Fort Street front?

A. Well, I would include that on account of its great depth, having two fronts.

Q. Include all at $350 a foot?

A. Yes, that would be exclusive of any improvements they put on it.

Cross-examination.

By Mr. BAKER:

Q. You were a witness in your own case with the union depot company?

Cross-examination:

A. Yes, sir.

Q. You personally know, don't you, what your company paid for the property down there?

A. I do.

Q. You have a piece of property, have you not, that used to be used by Mr. Robinson for a lumber yard?

A. We have, yes, sir.

Q. Do you know what your company paid for that?

A. Yes, I think I do.

Q. What was it?

A. I think it was $33,000.

Q. That is for both frontages?

A. For both frontages, yes, sir. It was about $33,000, I don't remember just what it was.

2373 Q. You also purchased the old glucose works, did you not?

A. Yes, sir.

Q. That is where your main storage building is?

A. Yes, sir.

Q. How does that Fort Street frontage compare in value with River street; which is the most valuable?

A. Well, I would say for our purpose that the River Street frontage would be the most valuable.

Q. I mean the value of the land.

A. Yes, the value of the land.

Q. Do you use that side track that runs along River street?

A. No, sir.

Q. You have an independent side track that comes in from the Michigan Central flour shed, or by the Michigan Central flour shed?

A. Yes, somewhere in that neighborhood.

Q. What makes you think that for your purpose the River Street frontage is so much more valuable?

A. Its access to the depots, and then it is the incline it gives you for flooring.

Q. Access to the depots in delivering goods?

A. Yes, sir.

Q. Now, you have an alleyway, have you not, near the glucose works there that you drive into?

A. We have.

Q. You can still drive in and out there, can you?

A. We do not do it, but we can.

Q. Your case with the union depot company has not been finally disposed of, has it?

A. I think so.

Q. Well, it was tried and an appeal taken to the supreme court, but that has not been disposed of?

A. Well, I don't know of that.

2374 Q. You don't know of the legal part of it?

A. No, sir.

Q. You bought this Robinson property or some adjacent property there immediately after the union depot scheme was announced, didn't you?

A. No, sir, we did not.

Q. Well, soon afterwards?

A. I don't remember how long after it was, but we had no knowledge of the union depot when we bought that property.

Q. Is it not true, that just as soon as the union depot plan was announced and made public here that William B. Moran went off to New York and bought a lot of property there?

A. No, sir, it is not true.

Q. When did he go to New York?

A. He went to New York at the request of our board of directors.

Q. And purchased the property?

A. Purchased the property for the purpose of manufacture.

Q. Well, the deeds on record to William B. Moran show when it was done?

A. When the purchase was made?

Q. Yes.

A. They ought to show it.

Q. There was a contract, as I understand it, it would not show—the contract?

A. No, sir.
Q. He first made a contract?
A. I think there was a contract made first.
Q. And got the deeds afterward. Well, now, you have built a moulding-room right alongside of this superstructure, have you not?
A. Yes, sir.
2375 Q. How long is that on the street there?
A. I think it is 180 feet.
Q. There is 180 feet frontage?
A. Yes, between 180 and 160. I am not sure about that.
Q. Almost solid windows on that side; that is, windows just about as close as you can put them?
A. There are windows about as close as we can put them.
Q. You also have windows on the west side?
A. Yes, sir.
Q. Have you skylights, too?
A. No skylights. We have windows in the roof, what we call the ventilation part or upright part of the roof.
Q. This moulding-room is on the second floor?
A. No, sir; it goes right up.
Q. How deep is it?
A. About 210 feet, I think.
Q. How many workmen usually work in there?
A. Maybe 275.
Q. 275 moulders?
A. Yes, moulders and helpers, and others that are in there.
Q. A blast furnace is in one side of it?
A. The cupola sets near the center.
Q. Near the Fort Street side?
A. It would be a little closer to the Fort Street side, yes, sir; I think.
Q. That is, it is on that end of the building?
A. Yes, sir.
Q. You receive your coal and pig iron and such things on this siding that comes up by the flour shed?
A. From an elevation, yes, sir.
Q. That is between this molding-room and Fort street?
A. That is why we built that molding-room floor in that
2376 way, so that we would not have to elevate the stock quite so much.
Q. When you ship stoves by rail they are loaded there on that side track?
A. They are loaded in the cars there.
Q. So that you do not rely on the siding on River street at all?
Mr. DICKINSON: They have their own switch right into the yard.
Q. I say you do not rely on that siding into River street at all?
A. No, sir; we use our own switch.
Q. You also acquired the property on the corner there where these dwellings were?
A. Yes, sir.
Q. Paid on an average of about $100 a foot for it?

A. Well, I have not in my mind now just what we did pay for it, and I could not say. We bought those several pieces at different times. I don't recollect now just what we paid for them. I recollect distinctly about the Robinson piece, because that was all in one piece and a large piece.

Q. I am referring to the smaller parcels down on the corner. You occupy it all now?

A. Yes, sir.

Q. And you own all the way through to Fort street?

A. Yes, sir.

Q. So that you own everything in that square now except what the Diamond Match Company have got and Kidder & Company?

A. Yes, sir.

Q. Now, you say a train passing by there makes some shadow, I suppose?

A. Yes, sir; makes a very heavy shadow.

Q. And that interferes with the workmen in the room?

2377 A. Yes, sir.

Q. Just describe how that is.

A. Well, if a man is drawing his pattern from the sand, if he happens to get one side a little past the other, or if anything happens to come just at that instant, he has to distribute his sand, and in drawing his pattern it is a very delicate affair and he has to have good light to do it.

Q. Well, you got a large amount of light there, haven't you?

A. Well, we did have.

Q. You made it just about as light as you could make it?

A. We tried to.

Q. The superstructure itself does not darken the room perceptibly, does it?

A. It does.

Q. To what extent?

A. It darkens it. Of course, on a very bright day, we would not notice it so much, but on a dark day, a day like this, it darkens it very materially.

Q. And does the passage of trains there produce any jar in that room, that moulding-room?

A. Well, we have not been running that part down in there lately, and I have not noticed it so much; I have not paid so much attention to that. I should think it would jar it some.

Q. What I want to know is, whether by actual experience it does jar the floor of the molding-room any?

A. It jars the walls there and jars the mortar out of the wall.

Q. The question is whether it jars the mould. There was some testimony——

A. It certainly must jar the mould when it jars the wall.

2378 Q. There is not any question about that?

A. No, sir.

Q. You have not observed it personally?

A. No, sir, we have not been working in that lower shop.

Q. That is, you work on the other end of it?

A. We work closer to the cupola, yes, sir.

Q. And this summer you have not been working to your full capacity?

A. No, sir.

Q. How many men would work in there ordinarily? Suppose you were carrying on your business in what we call flush times, making all the stoves you could make?

A. We would work nearly 300, I should think.

Q. You have been working about how many, 200 or 150?

A. Yes, we work over 200 in there. We put them on as the trade requires.

Q. During this summer you have worked the full hours, ten hours?

A. Yes, sir.

Q. You have not cut down your hours any?

A. No, sir; instead of doing that we have shortened up some day. We will work four days a week and sometimes five and sometimes six; it depends on the trade.

Q. You have not worked the full number of days this last summer?

A. No, sir, our works have been idle for about six weeks. I think we have not done anything.

Q. For about six weeks you have not done anything now?

A. This past summer.

Q. That, I suppose, is because of the state of the trade and the fact that you do not want to have a large stock of stoves on hand for this winter's trade?

2379 A. Well, it has been because the trade did not require them.

Q. And you have cut down your capacity on that account? I think that is all.

Redirect examination:

Q. You still use the old moulding-room?

Mr. BAKER: Of course there is another big room there?

A. Yes, we still use the old moulding-room.

Q. You have light from that court? There is a large space inside where the cars come in there? It is light between the moulding-room and the Fort Street front of the building?

A. Yes, we have light all around our building.

Q. You get light from Eighth street as well on that side?

A. Well, the moulding shop does not front Eighth street, only a portion of it.

Q. I went in there and did moulding myself, you remember?

A. There is a part of it that fronts on Eighth street, but not all of it.

Q. I got so I could make a good mould, too, didn't I, Mr. Dwyer?

A. You made a good attempt at it.

Q. Do you have the lights in the roof so that you can get all the light you can?

A. Yes, we aim to get all the light in the building that we can.

Q. Mr. Baker has asked you about your getting an award, and whether you knew it had been appealed to the supreme court? You got your money unconditionally, didn't you?

A. Yes, we got our money.

2380 Q. Did you have a note from Mr. Baker that he would let it alone if you would give him back $5,000?

A. Well, something of that kind had been reported to me. I did not get anything personally.

Q. Well, you have not heard anything about any appeal being prosecuted in the supreme court, have you?

A. No, sir, I have not.

Recross-examination:

Q. You don't just — what has taken place in regard to that, do you?

A. No, sir. All I know with reference to that is, that we got a certain amount awarded to us and we got our money. Further than that I don't know.

Q. You do know, in a general way, that the case was appealed to the supreme court, do you not?

A. Well, I did not know it had been appealed. I understood they had talked of doing it or it was to be done.

Q. And you know there has been some talk about adjusting it without litigating it further?

A. I have heard something of that kind.

Q. But nothing has ever been done in regard to it?

A. No, sir.

Mr. DICKINSON: How long ago was that payment made?

Mr. BAKER: It was right away after the award.

A. I think it must be two years ago.

Q. You have not heard anything from the supreme court about it since?

A. No, sir.

Mr. BAKER: The appeal has simply been taken and neither side have noticed it for trial. That is all there is of that. If you are specially anxious to try it in the supreme court, why notice it.

Col. ATKINSON: Why should the party who has received his money notice it?

2381 Mr. DICKINSON: I have not had any notice of appeal, as far as I am concerned.

Mr. BAKER: You are not the attorney of record. The attorney of record is Mr. Conely.

Recess till 2 p. m.

2 P. M.

HENRY BACKUS recalled for further direct examination.

Examined by Mr. DICKINSON:

Q. You have practically for the firm charge of the mill, haven't you?

A. I have always had, for a great many years at least.

Q. And are familiar with the machines and the workings of the inside of the mill?

A. Yes, sir; I am the man that gets up the largest amount of the machinery, and I have to follow up the business to see that it is properly done. It is my department.

Q. Will you please take the lumber through the resaw and the planer to the upper floor, to the matching, the place where it is ready for shipment, this matched lumber? Take a board through so the jury will understand it.

A. We bring our lumber up from our yard on the wagons and we dump it behind the resaws in the mill. Our resaws, you understand, are next to the doors; our planing machines are back from the door. It has to go through the resaw before it goes to the planer in order to bring it to a uniform thickness. Our rule has always been to dress our lumber after it is resawed, and we have to arrange our machinery for that purpose, and we have got our start, 2382 our reputation, by having our work uniform and having our work go together. As these samples indicate, they are worked in two pieces of standard thickness, and if you put them together they will match like that. Now, we take this board and resaw it, and then after this board has passed through the resaw, the man takes it in this way in his arm and holds it down, holds it together, in the planing machine.

Q. Both pieces?

A. Yes, sir; both pieces. It is necessary to keep these parts together for this reason: For instance, here is a large knot. If those boards are separated when they come to be handled upstairs, the man can only cut one board at a time, because he has to watch that knot-hole, and he can cut two boards at the same time, therefore our rule is to keep those boards together as much as possible. They go into the planing machinery, the same two pieces; they go up the elevator, the same two pieces; and they go to the saw in two pieces, carried in together all the time, and that is the rule to save ourselves labor and time.

A JUROR: In going through your planing mill, does it plane on the upper and the under side at the same time?

A. No, sir.

Q. Then what is the advantage——

A. It planes both sides at the same time. It will be like this: We dress off this rough side; the resawed side is much smoother than this side, therefore we keep this next to the cylinder. These two boards are put through the planing machinery at the rate of about 60 feet per minute.

Mr. DICKINSON: Is the planing machine so arranged that the rollers hold these fast on the planing machine?

A. Yes, sir; one there and one here. Now, the lumber passes through, and the man who takes care of it has to hustle to take it away or one board would pile on top of another; and he
2383 takes them like this and places them up this traveling carrier which you saw down there, and they are kept together that way.

Q. Are those same two pieces matched in the matching machine?

A. If it takes the two pieces to make the one width they are matched together, but ordinarily he takes two other pieces and puts up against them like that. We have our lumber gauges—it is of uniform thickness—with that we put this lumber in there to gauge it, to get the thickness.

Q. In which machine?

A. In the planing machine. We use that gauge to determine when our lumber is of the proper thickness. That lumber goes through the machine, is placed on the carrier and goes upstairs. Unless we have the best of light we cannot see to do this work——

Q. That is another branch of the subject. I only wanted to clear up what we could not get from our witnesses on the stand yesterday.

A. We saw out the lumber first, and then we dress it so as to bring it to a uniform thickness.

Q. Something has been said about its going through the resaw of different thicknesses. Can it do that in the resaw?

A. No, sir.

Q. Is the resaw so adjusted that it can vary the two pieces?

A. It has to come directly in the center.

Q. And does that automatically in the machine?

A. Yes, sir, it is a self-centered machine. I cannot say this piece is a fair sample, because I pushed it up and pulled it out, so that is not as perfect a job as it would be if it was continued through.

Q. If it was continued through, it would have been a more perfect job?

2384 A. Yes, sir. My men are all German, and they are not very well educated; they talk German among themselves, and he could not explain it here very well yesterday. I understand them, perhaps, when a stranger would not.

Q. How does that come to go through uneven in the matcher—of different thickness?

A. You mean to say, what causes this?

Q. What makes the defect?

A. The reason is the two boards are of different thickness and we use one gauge. The defect will of course show on the other side. You could match those two sides together (indicating with boards) and they would be pretty even, but the other you could not.

Q. But how did the matched stuff come through uneven? That is not good stock, is it?

A. Oh, no, we cannot shift that.

Q. Now, how does that come?

A. It comes by not being uniform in thickness.

Q. How does that come about?

A. By the men not being able to see what they are doing, and he cannot keep the machine set with the nicety that he used to do.

Q. The machines were set with the same gauge?

A. Yes, sir, the same thing.

Q. And always should do the work the same, sending out the work of uniform thickness?

A. Yes, sir, we used to have our boards come out with perfect uniformity.

Q. Those two boards go through the planing machine—the planing machine is gauged to give you three-eighths of an inch—and those two have come through the sawing machine and gone through the planer and come out as they are here?

A. Yes, sir.

2385 Q. Now, in the process, is there any way to discover that in the rapidity with which the work is done until it reaches the matcher to match it—the different thickness?

A. I will explain that: It is a good deal like waiting until a train has gone by and then try to run and catch it. After the lumber has gone upstairs there will be some in the piles, in the racks, and there will be others at the saw, perhaps, before we could get onto that. If we could stop the thing the instant it occurred, we would not have this trouble to amount to anything. We used to be able to discover it almost at once, but it is utterly impossible for the men on account of the darkness to discover it for some time, and I am ashamed to say that I have found too much fault with my men for this poor work, when in fact it is owing to the changed conditions of things down there.

Q. When you attempt to take three-quarter stock, and it comes upstairs in that shape, gone through the same adjustment, and it is discovered when you come to match it, that it is three-eighths stock, it makes bad stock, does it not?

A. Very bad.

Q. Is there a varying of the thickness as much as that?

A. Yes, sir, one-thirty-second of an inch is very unsatisfactory. Our shooks, as we used to put them up, we will say 10 sides of a box like this, we will say that we put our shooks up in 10 sides of a box in one package, or 10 of these boards in a pack. And we put nails down here to hold it for shipment, and when they get to their place of destination they are put together to make one complete box, and you can readily see the difference between good work and poor work. Our work never looked like that before, never in all our experience until this trouble, but since we have not had sufficient light, as a result we have to take the board out in the court next to the engine and get a gage on the board the best we can.

2386 Cross-examination.

By Mr. BAKER:

Q. Now, Mr. Backus, do you mean to say that when those boards went through the planer that the planer was set at the same gauge?

A. Yes, sir, sure pop, it has to be. You can't set a planing machine that way, Mr. Baker.

Q. Here are two boards of two different thicknesses. Do you mean to be understood that the planer was of the same guage when they were dressed?

A. Yes, sir, those boards are uniform at one place, and that inequality is brought about by our men not being able to see what they were doing.

Q. How does the inequality arise except from the way the gauge is set?

A. You don't comprehend it. If you will come down there and stay 24 hours you would understand it.

Q. Just explain that to us, then. I would like to know how a machine works, with two boards dressed of different thickness?

A. It is because the chips get under there.

Q. Well, explain that then?

A. We will say here is our machine. This lumber is entered here the rough side up so as to dress it. If a knot or a chip breaks off at the corner of one board it will get under here and raise this up.

Q. Now, how does it get under?

A. By getting under and dropping.

Q. It was just as liable to do that before the elevated road was there as it is now?

A. Yes, sir, exactly, but we can't see as well now. We don't know it has happened.

Q. It is a big steel plate that the board runs on?

A. Yes, sir.

2387 Q. And you shove the end of the board right on that plate and the board may be warped a little, and the end does not always——

A. You don't understand it at all.

Q. Then explain it?

A. We put this board under the roller——

Q. But there is a flat surface made of steel it goes on?

A. Certainly.

Q. Does this sliver or chip get under on that plate or on top of the board?

A. It gets under here. It does not get under this same board as a rule, it catches the next board that comes along.

A JUROR: When the boys are running that board, do they have a gauge?

A. Yes, sir, every half hour or hour between those intervals is the time they get caught.

Mr. BAKER: How often do you have to set those gauges?

A. If we want to set up a machine——

Q. But suppose you have set your machine for three-eighths and cutting three-eighths day in and day out, how often do you set that?

A. It may run for a day and it may run for an hour.

Q. Then it is like a threshing machine or anything else, it gets out of gear from time to time?

A. Not ordinarily.

Q. It requires constant attention to keep it set at just such a thickness?

A. Yes sir, and without the proper light I defy any man to keep watch of it.

Q. When you get your gauge once fixed, why don't it stay fixed?

A. It does stay until we change it. We don't change the gauge until we are through with this thickness of lumber.

Q. It won't change itself?

2388 A. No, sir.

Q. Won't it get out of gauge at all?

A. No, sir, not at all.

Q. Then what is the use of watching it after it is once set?

A. Of course the lumber comes out just the same; if any little piece gets under the lumber it will produce this result.

Q. Suppose the gauge is set at three-eighths in the morning when you commenced working, all you have to guard against is these slivers?

A. After we stop at night we sharpen the knives——

Q. Every time you sharpen the knives you have to set it over again?

A. Yes, sir.

Q. And I suppose when they undertake to sharpen the knives and set it over again, they don't get it exactly the same?

A. Yes, sir; I have never known it to vary. We don't change the gauges until we sharpen the knives.

Q. Then you don't have to give it constant attention during the day?

A. We have to give the lumber constant attention, but that is because of the slivers or chips getting under there. It is not because the machine gets out of gauge. Our machine does not get out of gauge.

Q. That is just what I wanted you to testify to. All you have to do is to watch the slivers. When you get those knives set and bolted down they are not very apt to change?

A. They don't change at all.

Q. What I want to know is whether running that machine, whether the bolts will unscrew, or whether it will get out of adjustment just because you are using the machine?

2389 A. Not on that machine; not on those machines. If you will talk about the molding machines I will talk differently.

Q. But on a planer you can adjust it and it is absolutely rigid; it never gives from the work it is doing?

A. No, sir, the knives never give.

Q. So you don't have to watch the gauge; you have to watch the refuse?

A. Yes, sir, we have to watch the refuse.

Examined by Mr. ROBISON:

Q. Have you got any moldings of different thicknesses where slivers got under?

A. We haven't any here. We may have down at the mill. They generally take those moldings and destroy them.

Q. Can you tell what causes that board to be thick at one side and thin at the other?

A. Yes, sir; the same reason as I have explained.

Q. That sliver?

A. Yes, sir.

Q. Is there anything except a sliver under it that will cause that board *is* to be planed that way?

A. I don't know of anything else.

Q. How do you set the gauge of that machine?

A. Let me have that photograph and I will explain it. Here is a photograph of one of our machines. That is not the machine I am speaking of now, but it is one similar to it.

Q. This don't show the plane at all, does it?

A. There is no plane about it, there is a cylinder.

Q. The plane is a cylinder?

A. The planing knife is on the cylinder.

Q. How far from the rolls?

A. Just annexed to it.

Q. About how far?

2390 A. About a foot.

Q. How high up are those rollers? What is the diameter of a roller?

A. They are eight-inch rollers.

Q. And a foot from that is the plane?

A. Yes, sir.

Q. How far from the end of the planer—this steel plate—how far from that does the man stand with the board?

A. The man that puts the board in?

Q. Yes, sir.

A. About 6 or 8 feet.

Q. He would have ahold of a 12-foot board in the first place, would he not, somewhere near the end?

A. No, right in the middle.

Q. But would be about 6 or 8 feet from the end of the plate over here?

A. Yes, sir.

Q. Then comes one roller two feet through?

A. Two rollers.

Q. And here comes the board in there?

A. Yes, sir.

Q. This is up eight inches?

A. No, the roller is down there. Here you put the board in here and there is the roller.

Q. This is eight inches up?

A. It is eight inches in diameter.

Q. The lower roll runs even with the plate?

A. Yes, sir, practically.

Q. This is eight inches from the top of the plate?

A. Yes, sir.

Q. Then a foot from here is a knife?

A. No, sir, there is another roller.

Q. There are two sets of rollers?

A. Yes, sir.

2391 Q. How far is the second roller from this?

A. They are both alike, both duplicate; this roll is to pull the lumber through.

Mr. DICKINSON: There are how many rollers on the machine?

A. Two sets.

Q. Four rollers?

A. Yes, sir.

Mr. ROBISON: A man standing over there six feet from the end of this thing, can he see back in there and see a sliver in behind the rollers?

A. Yes, sir.

Q. He has got to be 6 or 8 or 10 feet high to see over there?

A. Oh, no; you are tall enough to see them.

Q. You can see it by going around on the side and looking for it?

A. We don't always notice it in that way. The man that takes the lumber from the machine is the man that would notice the imperfection.

Q. He is back in there in the dark?

A. He is now, but he didn't use to be.

Q. There are always rollers between him and the slivers. He can't see over there?

A. He don't try to look over there.

Q. Whose business is it to see the slivers?

A. It is the duty of the man who takes the lumber away to call attention to it.

Q. It is not because it is so dark that he can't see the sliver, but it is because it is so dark he can't see the thickness of the board?

A. Yes, sir.

Q. The man who dresses the lumber, it is his duty also to watch the machine?

A. It is both their business to watch it.

2392 Q. And they could always see these slivers before this elevated railway was put up?

A. Oh, yes, sir.

Q. There was never any such trouble before?

A. No, sir, we caught it quicker. These slivers used to get in there just the same, but we detected it at once. Now we run 10 or 15 minutes, perhaps a half an hour before we get onto it.

Q. The least imperfection is just as bad, the one-thirty-secondth of an inch would make it just as bad?

A. Yes, sir, it would make it defective.

Q. You don't have very many boards as bad as that?

A. Oh, yes, a great many of them.

Q. Like this one I have been whittling on?

A. No, sir, we could hear that. We could detect that by the sound.

Q. Then the darkness you complain of don't affect the man taking away the lumber?

A. It affects them both. If the man has not sufficient light to attend to his business you can readily see he is under a disadvantage.

Q. How far from the end of this bedplate is the knife?

A. About 6 feet, I should say.

Q. And you think a man standing 6 feet from the end of that, that is, from 12 to 14 feet from where this knife is, with these rollers in between, can see the slivers over there?

A. He steps to one side and sees them.

Q. If he does, then it is light enough?

A. No, sir.

Q. Why don't you light a lamp down there?

A. We have the gaslight, but we can't see very well with that.

Q. Can't you light a match and go in behind and see it?

A. We don't allow matches to be lit in there.

2393 Mr. DICKINSON: If you attempted to run this mill you would have it blown up in 24 hours.

Mr. ROBISON:

Q. You have a gaslight there?

A. Yes, sir, we have a gaslight there.

Q. Have you ever blown up with it?

A. No, but you can't get that gaslight near enough to that machine to see anything.

Q. Why don't you have an electric light in there? How is it these other planing machines are run nights with electric lights, without any daylight at all?

A. Oh, well, they put in ample light, but they can't do near as well as by daytime. There is no factory in our line can run nights and do as good work as in daylight.

Q. Don't you think by very small expense you could fix it by the electric lights?

Q. We could improve it, but we never could get back to the quality of daylight.

Q. But you could put in electric light?

A. I suppose we could put in electric light, but we haven't felt like putting in any more expense while this litigation is going on.

Q. It is in the cellar where you need the electric light?

A. No, sir. You can't get sufficient electric light in there to make it daylight.

Q. Don't you think you could get enough electric light in there to enable you to see these slivers?

A. It would help some, but we could not get men to work there all day long with electric lights.

Mr. DICKINSON: So far as the planing of the lumber is concerned and making this particular matched stuff; I simply introduce this to show the process.

A JUROR: I would like to ask a question. Can't you always tell by the sound of a planer when a chip gets in there?

2394 A. We can in this case. We cannot always tell. We can when it gets to a dead edge like that.

Q. It makes an unusual noise, not a steady buzz?

A. On a very fine piece, but not where it is solid. If it breaks away you will hear it crack.

(By Mr. ROBISON:)

Q. How is it with this beveled edge?

A. Well we might and we might not tell by the sound.

A JUROR: Does that sliver remain on that table or does it go out with the board?

A. We have to stop the machine and take them out.

Q. Does it adhere to the bedplate more than it does to the board?

A. It will remain there and the board will pass over it.

Q. Is it a traveling bed?

A. No, sir.

Q. What holds the sliver there?

A. It gets against the edge of the machine.

Q. Does not the sliver travel with the board?

A. It stops up against the edge of the cast iron.

Q. Then it will only spoil the board where the sliver stops up against the edge of the machine? Where it travels along with the board it drops out with the board and the next board will be of uniform thickness?

A. Yes, sir. They are not little bits of chips of that size, but perhaps a piece of that size.

Q. What holds it there?

A. It comes up against the side of the machine and it can't get out and the board rides up on top of it like that.

Mr. ATKINSON: Then it does not go with the board, but remains on the bed?

A. It remains there, but in some instances it might go out with the board.

A JUROR: If it went out with the board, the next board would be all right?

2395 A. Yes, sir, the next board would be all right. Sometimes before our attention is called to it we have perhaps two or three hundred feet out. They catch it just as quick as they can.

Mr. ATKINSON: I suppose as the board goes in over the rollers, there is nothing to keep the end absolutely down; it rises a little as it passes under the roller?

A. From one roller to the other, it will raise up, of course. I would say again that were this all clear lumber, pannel lumber, it would not be so bad. It is the knotty lumber, it is our box lumber that causes this trouble to a great extent. It is these knots which break out and clog up. You take that same machine and put through a thicker board, a seven-eighth, and we would not have this same thing to contend against. The thicker the lumber is the less trouble we have.

Mr. ROBISON: How high is this bedplate from the floor?

A. About as high as that. (Indicating the table.)

Q. How do you adjust those machines?

A. With a crank. There are setscrews and we loosen the set-screws and run it up to the gauge on the side.

Q. You don't have to take a rule?

A. No, sir.

Q. The light don't affect you in that?

A. Oh, yes, sir, there is our trouble. A man may think his gauge is set perfectly when it is not.

Q. Where is this gauge?

A. On the side about the center of the machine.

Q. Have you any machines of this kind over on the east side?

A. No, sir.

Q. Have you ever tried to change them around, put them on the east side?

A. Oh, no, we could not do that.

2396 Q. You say it is almost impossible to adjust them even now?

A. Yes, sir, to see your gauges.

Q. How do you do it, anyhow?

A. We do the best we can. The man lights his gas to see that.

Q. You do light the gas to see about that?

A. We have tried to, but we can't see it.

Q. The only way you have to do that is to cut and try a board?

A. Yes, sir, take it out to the light. We take a board and run it through, and set our cylinder, and take the first board that comes through to the light and see whether it is correct.

Q. You didn't used to do that?

A. We never had to take it outdoors.

Q. Is it not light enough down there so you don't have to take it outdoors?

A. It is better on a light day. It is a great deal better on a light day than on a dark day.

Q. Can you see what time it is by a watch down there on a dark day?

A. Oh, no, Mr. Spitzley could not see the figures on his tape-line the other day. There was a train passing, and he had to wait until it passed by.

Q. You never know when to quit except by going outdoors to see what time it is?

A. There is a whistle that tells us that.

Q. That is somewhere where this darkness does not affect it?

A. Yes, sir.

By a JUROR:

Q. As I understand you, before this structure was built, when one board came through with a sliver you detected it right off?

A. Yes, sir, we detected it immediately. We had no trou-
2397 ble, but now it passes us some time before we detect it. I will say we have had the same men running these machines 15 or 20 years, and there is no reasonable excuse for a man not doing as good work today as he did ten years ago. We keep these men on these machines all the time.

JAMES A. JONES, sworn on behalf of the respondent.

Examined by Mr. DICKINSON:

Q. Where do you live?
A. Detroit, Canfield avenue.
Q. Where is your place of business?
A. 84 Griswold street.
Q. What is your business?
A. Fire insurance.
Q. Engaged somewhat in real-estate business, haven't you?
A. Very little for the last three or four years.
Q. And what amount of fire insurance do you write a year in your business?
A. You mean premium for risks?
Q. I mean the amount of risks.
A. Oh, from four to five millions a year.
Q. You take premiums in that office, how much?
A. From $124,000 to $130,000 premiums.
Q. You know the Backus property?
A. Yes, sir.
Q. They have been insured in your companies, by your office?
A. Yes, sir.
Q. Have you examined the property for your companies with reference to the valuation of it from time to time?
A. Yes, sir.

Q. And is it a part of your duty to keep advised as to value?
2398 A. Yes, sir, and as to machinery and the property we insure as near as possible.

Q. We will take the Backus property as it stood; you insured it, I think, prior to the building of this elevated structure?
A. Oh, yes, I have insured it for the last 12 or 14 years.
Q. They have been insurance clients of yours?
A. Yes, sir.
Q. You know the present situation with reference to the union depot structure?
A. Yes, sir.
Q. We will take the Backus property without that, free of that structure on the street entirely, what in your opinion is the value of the property there, if you have examined it for the purpose of ascertaining its value, irrespective of the machines?

A. You mean the grounds and the buildings?

Q. Yes, sir.

A. I should consider the ground worth $125,000, and the buildings somewhere in the neighborhood of $45,000 to $50,000.

Q. Without any machinery, engines and all that?

A. That includes the mill, the power-house and the office.

Q. And for the purpose of insurance in your companies have you formed any judgment of the value of the machinery in the yard?

A. We are carrying $68,000 on machinery, which we consider about 80 per cent.

Q. Sixty-eight thousand dollars is about 80 per cent. of the value?

A. Yes, sir; it might vary from that if you come to figure it down close, but that is the estimate we reached.

2399 Q. Now, will you please state whether, prior to the building of the structure, about what amount of insurance was carried on the property?

A. There was in the neighborhood of from $65,000 to $80,000; $65,000 would be an average they were carrying before this railroad was put up.

Q. Sixty-five thousand dollars an average?

A. Yes, sir; some years a little more, and some years a little less.

Q. Will you please state if, by reason of the structure, they have been required to carry more insurance?

A. They are obliged to carry 80 per cent. of the value more. They have an 80 per cent. insurance clause that in case of loss they have to take the place of insurance companies.

Q. Just explain to the jury what that is, that 80 per cent. clause.

A. Suppose a man had property worth $10,000 and carried over $5,000, in case of loss he would get five-eighths of the loss and he would have to stand three-eighths himself. He would have to stand the difference between eighty per cent. and the total; he would have to take that himself.

Q. Has that been so apportioned to the property since the building of this structure?

A. That took place a year ago last August.

Q. On what account?

A. That is the rule of the company. All manufacturing risks have to carry 80 per cent. insurance.

Q. And that has been so since the structure has been put up?

A. Yes, sir; in many places where they carry 80 per cent. they reduce the rate. In others they continue the same rate, but in this case they have raised the rate.

2400 Q. Will you please tell the jury the amount of increased rate, if any, by reason of the passing of the superstructure in front of their property?

A. Seventeen and a half per thousand, lacking it may be a few cents less than that, but in that neighborhood.

Q. Is that the increase?

A. That is the increase in premium. Their average rate before that structure was built was $51, and today it is $68.50, or very near that.

Q. Why has that been put upon the property?

A. They are afraid of the sparks of the passing engines on the elevated railroad.

Q. And on how many thousand has that increased to?

A. It makes an increase of their insurance premiums of about $3,500 per annum.

Q. Do you state that as wholly by reason of this structure?

A. Yes, sir, the power-house was raised from 4½ to 8 per cent.

Q. Nearly double?

A. Yes, sir, nearly.

Q. Now, if you please, will you tell us the amount of insurance they are obliged to carry on their buildings?

A. They are carrying $30,000 on the factory proper, $68,000 on the machinery, $15,000 on the stock, $7,000 on the power building, and $10,000 on the machines, engines, boilers, etc. I think that figures up $130,000.

Q. Then by reason——

A. The rate would have probably been reduced instead of increased if it had not been for that structure.

Q. How much more does that cost? You say it would have been reduced but for the structure? Were all rates on manufactured property reduced?

A. Not all. It depends upon the exposure.

Q. The general rule was reduction?

A. Yes, sir, more insurance and less rate.

2401 Q. This was considered an exceptional risk to which the rule did not apply?

A. Yes, sir.

Q. By reason of what?

A. By reason of the elevated road.

Q. Then in addition do they have to pay by reason of the elevated road, under that 80 per cent. clause, more for insurance than they would have to pay if the road had not been constructed?

A. They probably would have saved from $4,000 to $4,500 per annum.

Q. Including the reduction and the increase?

A. Yes, sir, the reduction and the increase.

(By Col. ATKINSON:)

Q. The net loss to them now, as I understand, is something like $4,000 a year on account of the railroad being there?

A. $4,000 a year would be a fair estimate.

Q. Whatever there is of this insurance, you did not take it all in your company?

A. No, sir, I placed about one-third of it only.

Q. You placed that in your office?

A. I do not place all in my office. I place about one-third of it, and the rest is placed with different agents. Mr. Margaugh has about one-third of it, and Bierce & Sage——

Q. You place it for Backus with these other insurance compaies?

A. Not all, no, sir, it is a difficult matter to place it. About one company out of every four declines it.

Q. Don't want it at all?

A. No, sir.

Q. Do you find it extremely difficult to place insurance on the Backus property then?

A. Yes, sir.

Q. And your own companies would not take it at all, notwithstanding you have been doing business with them for the past ten or fifteen years?

2402

A. Yes, sir, it is difficult to place it.

Q. Why is that?

A. They make the objection on account of the elevated road and the danger from sparks, that is the principal trouble.

Q. It is considered an exceptional risk?

A. Yes, sir, I think they are short pretty nearly $10,000 of insurance; they cannot place it in the city of Detroit.

Q. They have tried to place?

A. Yes, sir.

Q. Do you anticipate in the future that they may not be able to get any insurance at all?

A. I think many companies now will refuse to renew.

Q. Why?

A. On account of the danger of sparks from the locomotives, sparks going into the warehouse.

Q. There is no risk as far as that is concerned from the sparks from their own warehouse?

A. No, they have large smokestacks.

Cross-examination.

By Mr. BAKER:

Q. How long have you been in the insurance business?

A. Well, I don't know exactly; it is long before the old mill burnt down.

Q. Did you have insurance on them when it burnt up?

A. No, sir.

Q. Did the railroad set that on fire?

A. No, sir, they did not have the railroad along there then.

Q. Do you know what did set it afire?

A. No, sir; some internal cause, I do not know what.

Q. It was not from any outside exposure?

2403

A. No, sir.

Q. Now, Mr. Jones, you insured their lumber yard down there before the Wabash railroad was built there at all?

A. Yes, sir.

Q. And you have always testified in these cases when the railroad did go through you would increase the rate?

A. Yes, sir.

Q. As far as you could, you did increase the rate when it did go through?

A. Yes, sir.

Q. Now what companies do you represent?

A. The Western, of Toronto; the Fireman's, of New Jersey; the Eagle Fire, of New York; the United States, of New York; are some of them.

Q. Your company does business with Mr. Chapman's agency, the insurance bureau?

A. No, sir, we do not belong to the board.

Q. Do you have authority in your companies to do business in Michigan?

A. They all have authority.

Q. Does Mr. Backus get any insurance outside of the State?

A. I think not; I do not think he has got a dollar.

Q. You know Mr. Chapman, don't you?

A. Yes, sir.

Q. You know he is an experienced insurance man?

A. I do not know anything about that.

Q. You don't have any business with that office?

A. No, sir.

Col. ATKINSON: What office is that?

A. The board of underwriters.

Mr. BAKER: Don't they represent the bulk of the insurance business in this city?

2404 A. Yes, sir, I think they have got about seven-tenths—seven-tenths of the companies belong to them.

Q. To that agency?

A. That is not an agency. It is a bureau for selling rates.

Q. Who makes the rates?

A. He makes the rates.

Q. Have you, in your business with Mr. Backus, in pursuance with your former testimony, increased the rate uniformly?

A. Yes, sir.

Q. All around?

A. Yes, sir.

Q. As long ago as the condemnation proceedings when the Wabash road went through there, before it was built, you testified you were going to do that?

A. Yes, sir.

Q. You have been doing that ever since?

A. Yes, sir.

Q. As an insurance man have you any explanation to make of Mr. Chapman's testimony that the risk down there has not perceptibly increased and they have not increased their rates?

A. On the mill?

Q. Yes, sir.

Objected to as incompetent and immaterial.

Overruled. Exception for respondents.

A. Mr. Chapman has increased them; those are the rates made by Mr. Chapman.

Q. Do you swear that he has increased the rate on the mill?

A. On the power-house, and it increases the rate on the whole thing, and it makes $17.50 increase on every $1,000.

Q. That is when they increased the rate on one building, that would increase it on another?

2405 A. The average policy is increased from $55 to $68.

Q. Don't you know the only increase he has made is on the shaving-house?

A. On the warehouse.

Q. It is all one?

A. Yes, sir.

Q. Now that is the only increase that he has made, is it not?

A. That is the only one.

Q. Is that the only increase you have made?

A. Yes, sir.

Q. Every policy carries the same rate; so that it all arises from that power-house?

A. Yes, sir.

Q. But you don't increase the rate on the rest of it?

A. No, sir, there is no increase on the mill, only the increase on the power-house brings the whole up to about $17.50.

Q. How much insurance have you got on that power-house?

A. There are $7,000 on the building and $10,000 on the boilers and engines.

Q. How much have you got on the mill proper?

A. $68,000 on the machinery, $30,000 on the buildings, and $75,000 on the stock in mill; I do not have it all.

Q. How much is in one company?

A. $3,000.

Q. Is it not a fact on as large risk as that they divide it up in small amounts, into just as many companies as they can?

A. Certainly.

Q. And the most in one company is $3,000?

A. I think so.

Q. And that is distributed over the different parts of the plant?

2406 A. Yes, sir, here is the form of the policy (producing paper). Every policy is *pro rata*, each item——

Q. How much do they have to pay on the power-house?

A. Eight per cent.

Q. What did they pay before the elevated road was built?

A. Four and one-half.

Q. How much did you carry there?

A. $4,000 altogether.

Q. And now they have increased that to how much?

A. To $17,000.

Q. Before the railroad was built they carried $4,000 on it and now they carry $17,000 on it?

A. Yes, sir, they have to carry it now. They could not get a single dollar of insurance from any company unless they carried that amount on it.

Q. Do you mean to say these companies insist upon having so much insurance?

A. Yes, sir, you could not get a dollar of insurance on it without it.

Q. Then they are anxious to insure it?

A. They wanted so that in case of partial loss they won't be stuck for the whole sum.

Q. You contradict yourself.

A. No, sir.

Q. Then what you mean is this, that they will only pay a proportion, they will pay in proportion of their policy, to the value of 80 per cent.; you do not mean to say that a company that was insured in that property for $4,000 previous to the building of the elevated road would insist that after the elevated road was built on their having $17,000 insurance on it?

A. Yes, sir, I do mean to say that.

Q. They had insisted on having that increased insurance whether the property-owner wanted it or not?

2407 A. Yes, sir, or else he would not get a cent of insurance.

Q. You are forcing them to take $17,000 insurance where they only had $4,000?

A. Yes, sir; the companies say you can have our policies on those conditions or else you cannot have any insurance.

Mr. ROBISON: That 80 per cent. operates on all manufacturing institutions?

A. Yes, sir.

Col. ATKINSON: It lessens the rate on others, but it has been increased notwithstanding that 80 per cent. clause on account of this elevated road?

A. Yes, sir.

Mr. ROBISON:

Q. You say—you formerly said you have $4,000 on this powerhouse?

A. Yes, sir; formerly the companies did not dictate as to how much insurance a man could put on.

Q. Four thousand dollars was all he wanted on them?

A. Yes, sir.

Q. And at that time you paid 4½ per cent.?

A. Yes, sir.

Q. And now you charge 8 per cent.?

A. Yes, sir.

Q. So now there is 3½ increase?

A. Yes, sir.

Q. So all this elevated road increases on this insurance is 3½ per cent. on the $14,000; it amounts to $17.50 on $130,000. It amounts to 3½ per cent. on the amount that is increased?

A. That is averaged——

Q. What do you average it for; can't you find out how much insurance——

A. He has to pay $17.50 now on $130,000 average.

Q. He has to pay 8 per cent. on the $17,000?

2408 A. Yes, sir.

Q. But that $17,000 has not anything to do with the elevated road?

A. Yes, sir, it has.

Q. How much does he pay a year on the power-house?

A. Eight per cent. on $17,000.

Q. That would be $1,360?

A. Yes, sir; now, he paid 5½——

Q. That has nothing to do with this elevated road; I want to know how much more money he pays out a year because of this elevated road?

A. You will find about $3,500.

Q. He pays $1,360 altogether on the power-house?

A. Yes, sir.

Q. And you say the rates have not been raised on the rest of the property?

A. No, sir, only increased the amount of insurance.

Q. The elevated road did not do that?

A. No, sir, I did not say it did. I say that all manufacturing risks have to pay that.

Q. He takes three or four times more insurance than he used to?

A. Yes, sir.

Q. But not on account of the elevated road?

A. No, sir.

Q. It is because the companies have raised that—this amount?

A. Yes, sir.

Q. He paid $1,360 on the power-house?

A. Yes, sir.

Q. How much did he used to pay?

A. Four and one-half per cent. on $4,000.

Q. That is only $180?

A. Yes, sir.

Mr. BAKER: You testified a year ago last August the
2409 companies, as to all manufacturing institutions, adopted this 80 per cent. business; it had nothing to do with the elevated road at all?

A. I testified that if it had not been for the elevated road they would have reduced the rates.

Mr. DICKINSON: So the net loss to them is about $4,000 a year?

A. Yes, sir; this was an A No. 1 special hazard.

Mr. ROBISON: And that means good or bad?

A. That means good.

Q. It burned out two or three times?

A. It burned out once.

Q. You have paid insurance on it three times, have you not?

A. We paid one loss on the mill and on some lumber.

Q. At the mill?

A. No, at the yards.

Q. It has been testified to that the mill got afire three times?

A. I never knew it to catch fire but once, and then we paid it. I have never been called on to pay but one loss on the mill.

Q. On account of this extra risk it is 3½ per cent. on $17,000?
A. Yes, sir.
Q. How much does that amount to; can you tell off-hand? That amounts to $595 a year he has to pay them?
A. It has been raised from 4½ to 8 per cent. I have not figured it. I presume you are right.
Q. What are you mixing in the $4,500 business for?
A. I say he pays that much more insurance now.
Q. If he would insure for $4,500, he would have to pay still more, would he not?
A. Certainly.

2410 Redirect examination.

By Col. ATKINSON:

Q. Now, Mr. Jones, as I understand, this rule of 80 per cent. insurance has been adopted as to all such risks as this?
A. Universally throughout the country.
Q. But as the general rule the adoption of the 80 per cent. clause has resulted in lowering rates?
A. Yes, sir, all from half a cent to two and a half cents.
Q. On this particular risk the rates would have been lowered had it not been for the elevated road?
A. It would.
Q. And so, from your knowledge of the business, you can say Backus & Son- are suffering the loss of about $4,000 a year on the insurance, on account of this structure being near their mill?
A. Yes, sir, that is the best I can figure it.
Q. You have no interests in it, as to figuring it out accurately?
A. Not a bit.
Q. The object of this 80 per cent. clause is something like this: A piece of property is hazardous; no company will take over $3,000, and a company will say we don't want to carry $3,000 on that, and perhaps have to pay the whole $3,000 in case of a loss, but if you will get others to get $3,000 each up to 80 per cent., so they will share our loss, we will take it. Otherwise we won't insure?
A. That is it exactly.

Recross-examination.

By Mr. BAKER:

Q. Let me ask a question right here. Could not you apportion that $4,000 among a number of companies just the same way?
2411 A. Certainly.
Q. You do not mean to say a company forces a man to take a certain amount of insurance?
A. I do mean to say that.
Col. ATKINSON: And I understand you to say that Backuses are in that position today; that is, they have not got up to 80 per cent., and in case there was a loss they would be treated as co-insurers up to within 80 per cent.?

A. Yes, sir, that is exactly the case.

By Mr. ROBISON: Suppose Backus was insured today for $4,000 on the power-house; what would happen?

A. He would get only $\frac{1}{4}\frac{4}{7}$ on the $1,000, and he would have to stand the rest himself; he would have to stand $\frac{3}{4}\frac{3}{7}$ himself.

Q. Do you insure other property around in that neighborhood?

A. No, I don't think we have anything in that vicinity.

Q. Nowhere else on the line of this railroad?

A. No, sir.

Q. Anywhere near it?

A. Well, we have Backus' lumber yard.

Q. How much is that raised?

A. That is 2½ per cent.

Q. Raised 2½ per cent.?

A. Yes, sir.

Q. On account of the elevated road?

A. Oh, no, we used to carry it at 2 per cent.

Q. What raised that?

A. The railroad passing through it. There is a grade road passing through the lumber yard.

Q. It has been raised ever since it passed through?

A. Yes, sir; they had to put on this 80 per cent. insurance clause the same as the rest.

Q. Didn't you reduce the rate any down there?

2412 A. No.

Q. Wherever you reduced it or where have you reduced it, around what manufacturing institutions?

A. Oh, a great many of them. In Grand Rapids and Saginaw——

A. I mean right at home; where have you reduced the rate?

A. Oh, a great many of them.

Q. Tell us some?

A. Oh, a hundred of them. I don't carry them all in my head.

Q. Have you any in your head where the rate remains the same?

A. The McGraw boot and shoe factory.

Q. That is extra hazardous?

A. No, sir, that is an extra good one.

Q. Why didn't you reduce it, then, if it was an extra good one?

A. We didn't reduce it because it didn't stop in operation until after this went into effect. It would have been reduced about 50 per cent. under this new system.

Q. Any other that you have not reduced?

A. Oh, yes, sir, there are a great many others.

Q. You said—give us some others that you have not reduced?

A. We don't have many like Backus'. In Grand Rapids they have some forty furniture factories, and some of them have been reduced one-half.

Q. You haven't any other institution like Backus' here at home?

A. No.

Q. You have no other planing mill in town?

A. Oh, yes, we have Lafferty.

Q. How is that, has that been reduced?

2413 A. Well, that is a frame mill. Then we have Miles & Weeks.

Q. How is that, reduced or raised?

A. That is reduced a quarter of one per cent.

Q. Do you insure Henry George's mill?

A. No, sir. We have Spitzley's. We have reduced his from 6 to 5 per cent.

Q. You had Backus' pretty low all the time?

A. Backus' was a good risk. He had lots of room; no crowding. It was a good mill.

Q. A planing mill is a hazardous risk, anyway, is it not?

A. Not at the rate. I have just as soon take a planing mill as a dwelling-house if there is no outside exposure.

Q. It is certainly a hazardous risk?

A. Any wood-working factory is a hazardous risk. Anywhere where machinery is in use is a hazardous risk.

Q. You don't know of any fires that have been caused by this railroad, do you?

A. No, I don't know of any.

Q. And I understood you to say that you thought it was impossible for Mr. Backus to get his property insured there in the future?

A. I think a good many of the companies will refuse to renew.

Q. Do you think any of yours will quit?

A. Two of them will quit. I have orders now to drop two when they expire.

Q. Who gave you those orders?

A. The companies.

Q. East?

A. Yes, sir.

Q. Haven't they adopted a general policy of stopping insurance on property of this kind?

A. Oh, no, they insure it.

2414 Q. Do they have personal knowledge of this particular property?

A. Yes, they have personal knowledge of it.

Q. Do they send on a man here?

A. Oh, yes, sir.

Q. Have you tried any of the board companies? I understand you to say that Mr. Backus is unable to get all the insurance he wants?

A. Yes, sir, every agent in Detroit has got insurance on that property, and I think every agent has companies on their books who have declined it.

Q. Would you be willing to pay a part of your percentage if you could get it placed right away?

A. Yes, sir. We get 10 per cent. commission, and I will give you all of it if you can place it. That will make you $60.

Recross-examination.

By Mr. BAKER:

Q. Now, Mr. Jones, will your companies make you the standard policy?

A. All companies doing business in Michigan do.

Q. Your companies do?

A. Yes, sir, mine are duly authorized.

Q. (Showing paper.) Is that the 80 per cent. clause to which you refer?

A. Yes, sir, that is it.

Q. Is that in the Michigan standard policy?

A. No, sir, that is a condition of the company's.

Q. Do you know by what authority they put that in?

A. Their own.

Q. There is no law that authorizes it?

A. No, there is no law to authorize the form of any policy; but it is made, though.

2415 Q. In order to do business in Michigan they have got to comply with our statutes, and they have got to issue the standard Michigan policies?

A. Yes, sir, and they have all got them.

Q. That provision is not in the standard policy?

A. No, but it says any additional riders they may see fit to put on. That is one of the riders.

Q. But this qualification of the liability upon the policy, in my judgment at any rate, is wholly illegal and void, and don't amount to anything, and I desire this put in evidence.

Percentage co-insurance clause is offered in evidence and marked Exhibit "Jones 1."

Mr. BAKER: I would like this introduced in evidence and copied in connection with Mr. Jones' testimony.

Mr. DICKINSON: That is objected to as incompetent.

Mr. BAKER: The Michigan law provides a form of policy.

WITNESS: I think you will find it has been tested heretofore.

Mr. BAKER: Yes, I am testing it myself. I will read this 80 per cent. clause.

"If at the time of fire the whole amount of insurance on the property covered by the several specific items of this policy on property, as described in each of the above items, shall be less than 80 per cent. of the actual cash value thereof, this company shall, in case of loss or damage, be liable for only such portion of such loss or damage as the amount insured under said items, shall bear to the said 80 per cent. of the actual cash value of the property covered by such items."

Mr. ROBISON: Do I understand that all the companies doing business in the city require that 80 per cent. clause?

A. Yes, sir.

Mr. DICKINSON: I now ask your honor to tell this jury or 2416 to direct them, as in a common-law trial, that Mr. Baker's

statement that this is an illegal clause or condition of insurance should not be taken into consideration by them.

Mr. BAKER: That is a matter for argument.

COURT: I shall let the matter stand for the present.

Mr. DICKINSON: Note an exception.

Col. ATKINSON: You have had some experience, have you, in real estate in the city?

A. Yes, sir.

Q. How many years did you pay some attention to it?

A. Oh, about 15 or 16 years.

Q. You know something about the local values of property about the city?

A. Yes, sir.

Q. Have you been acquainted with the way in which these properties of Backus have been used?

A. Yes, sir.

Q. That is, the connection of the three properties together?

A. Yes, sir, I know it well.

Q. They have all been substantially one plant, have they not?

A. Yes, sir, one necessary for the other.

Q. Have you observed yourself the elevated road since it has been built there near them?

A. Yes, sir.

Q. In your business have you occasion to investigate somewhat, and know something of other manufacturing business of other kinds throughout the city?

A. Yes, sir.

Q. What in your judgment has been the effect upon all this property, taking it as a whole, the lumber yard, the mill, and the warehouse, as to its rental value, supposing you had to rent it
2417 now, or rent it without that elevated road being there, what in your judgment, even in percentages or in the lump?

A. I should think it would be half.

Q. You think the rental value of the property taken as a whole would be less than fully one-half?

A. Yes, sir, I do.

Mr. ROBISON: What do you think the actual cash value of the property would be?

A. Machinery and all included?

Q. Yes, sir, just as it stands there today, just the mill?

A. I think the ground without anything on would be worth about $125,000.

Q. How much would it be worth if the railroad was not there?

A. Oh, it would be worth—well, I won't say——

Q. How much is it worth as it stands for the purpose of selling?

A. Well, I don't think it would bring half that.

Q. Well, I don't either. You think $60,000 would be a big price for it today?

A. In the present state I think it would.

Q. How much do you think the mill and machinery would be worth there today just as it stands?

A. Well, the mill and machinery, they can move them and they can't move the building very well. There would not be such a big depreciation in the machinery as in the building.

Q. When did you insure it last?

A. In March, I think, our policies expire.

Q. How much is the building insured for?

A. $30,000.

Q. How much the machinery?

A. $68,000.

Q. You insure it every year?

A. Yes, sir.

2418 Q. And only insure it for only one year at a time?

A. Oh, the policies scatter along. They don't expire all the same month.

Q. But they are all yearly policies?

A. Yes, sir.

Q. Do you know how much it was insured for before—the power-house—you raised that from four to seventeen?

A. Yes, sir; I think somewhere around there. That has been carrying about that amount all along.

Q. There is about $30,000 on the building?

A. Yes, sir.

Q. They have not reduced it any on account of the depreciation in the price?

A. Well, I suppose they depreciate the value in making that 80 per cent. They estimate it every year and put on the 80 per cent.

Q. But they insure it about the same price as they did before the elevated road went through?

Mr. DICKINSON: You mean the same price or the same amount?

Mr. ROBISON: I mean the same amount.

A. Yes, sir.

Q. Then it has not depreciated in price so much but what they are willing to insure it up pretty well?

A. I suppose they estimate it every year.

Q. You give the value it is insured for, the building and the machinery aside from the power-house as $98,000?

A. Yes, sir, I think that is about 80 per cent of the actual value.

Q. Of what it is worth?

A. Yes, sir; I think that is what they consider it worth.

Q. And you think the power-house and the engines are worth $17,000 more?

A. Yes, sir; they have very fine engines, very fine machinery, very fine boilers.

2419 Q. What is the total amount of insurance they carry there?

A. $130,000.

Q. And you say that is $10,000 less than what they want?

A. They have not been able to place this. They have not been able to place only about $120,000. They are trying to place the rest.

Q. They are trying to carry $130,000?

A. They are carrying it now. Several companies have declined to reinsure 80 per cent. of the value, and some of the companies within the last few months, after examining the property and after carrying it for 6 or 8 months, have canceled their policies. The Franklin, of Philadelphia, went off. The Oakland Home, of California, went off.

Mr. DICKINSON: By that you mean canceled their policies?

A. Yes, sir, canceled their policies after a personal examination of the risk.

Q. Before their policies expired?

A. Yes, sir.

Mr. ROBISON: I suppose in fixing the amo unt of insurance you examine the property and fix its actual value?

A. We consider its value and then the assured put a value on it; and in case of loss they have got to substantiate their value.

Q. As I understand, they had not come down on their value since the elevated road was built?

A. They have had to put in new machinery, which has maintained the value; very much like household furniture maintains its value by constantly getting new furniture. I don't think the building has depreciated much.

Q. That you don't know anything about whatever?

A. Yes, sir.

2420 Q. You guess at that just as much as any business you never had anything to do with?

A. Well, I have been through the mill frequently.

Q. Do you know anything about that lumber business?

A. No, I don't.

Q. You are as ignorant of that as of any other kind of business you don't know anything about?

A. No, sir.

A JUROR: In the cancellation of these insurance policies, was that done solely on account of the elevated road?

A. Yes, sir.

Mr. DICKINSON: Then your value of the real estate, irrespective of the elevated road and of the machinery and buildings, is about $255,000.

A. Yes, sir.

Mr. ROBISON: How many of those policies were canceled?

A. Oh, there has been probably—do you mean all along from the time of issue or lately?

Q. From the time they were issued?

A. Probably 20 or 30.

Q. When was the first cancellation?

A. Some were cancelled in September, some in August.

Q. Have you ever had one canceled in years gone by?

A. Well, no, when the policy would be issued for the year it would run out and sometimes they would not renew them, but these policies were canceled on account of the exposure.

Mr. DICKINSON: You have canceled 20 or 30?

A. Yes, sir.

Q. And you get notices from some of your people that they will not renew?

A. Yes, sir.

(By Mr. ROBISON:)

Q. As I understand it, Mr. Backus will shortly be left without any insurance?

2421 A. Oh, no, I would not say that. I will tell you where there has been two or three policies canceled within the last 60 days. Homer McGraw has had two or three policies canceled within the last 60 days.

Q. When these companies were looking for risks, didn't they go to Mr. Chapman and ask him about this risk?

A. No, sir; they go and look at it themselves. They have their specials going through the country examining all the risks.

Q. Have you local agents here under you?

A. Yes, sir.

Q. You place this insurance yourself?

A. I only placed about one-third of it myself.

Q. Who placed the rest?

A. Margah, Bierce & Sage, McGraw and Parker & Bonninghausen. I think every agent in the city has got a line of it.

Q. Is there any other institution in town that has trouble in getting insurance?

A. No, except the Exposition building down there. They won't insure that.

Q. Because that is vacant?

A. Yes, sir.

Q. The Exposition building and the Backus property are the only two institutions in the city that can't get insurance?

A. Oh, no, there are the fertilizing works, but I don't know of any other wooden warehouse. It is difficult to get the sanitary works insured or anything that is called a nuisance. That is called a moral hazard.

(By Mr. ATKINSON:)

Q. There are differences in the rates of your companies?

2422 A. Not on this risk. The rates are precisely the same, and the policies are identical in every respect, form and rate and everything else.

Mr. BAKER: This $17,000 on the power-house and engine, is that supposed to be 80 per cent. of the value?

A. I suppose that is it.

Q. How do — get at the actual cash value when you come to adjust the loss?

A. They would have to substantiate it.

Q. Your theory is, they would make a correct statement?

A. Yes, sir.

Mr. DICKINSON: And you put your estimate for the purpose of insurance at the minimum in the estimate?

Mr. ROBISON: In getting the amount of insurance you placed on this particular property, you took Mr. Backus' statement of the values?

A. Yes, sir.

Q. You didn't know anything about it yourself?

A. We have some knowledge.

Q. You took no expert down there with you to ascertain its value?

A. No, we get that if there is a loss.

DANIEL STEWART, sworn on behalf of the respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?

A. 140 High street west.

Q. How long have you lived in Detroit?

A. About 46 years.

Q. Are you familiar with River street?

A. Yes, sir, I own property there.

Q. Whereabouts?

A. Between Sixth and Seventh.

Q. On River street?

A. Yes, sir.

2423 Q. Have you been in business there?

A. Yes, sir.

Q. How long?

A. About 19 years.

Q. How long have you been familiar with business up on River street?

A. I was there pretty near all my life, seeing that I was employed by the Michigan Central, and passing there three times a day. I was there all the time.

Q. Then you carried on a business there yourself?

A. Yes, sir.

Q. What was it?

A. Grain.

Q. Grain, flour and feed?

A. Yes, sir.

Q. And how much of a place did you have there, how much width on River street?

A. We occupied 40 feet, I owned 20.

Q. You rent 20 and own 20 and run back how deep?

A. About 75 or 80 feet.

Q. Now, are you familiar with the street below, down as far as Twelfth street?

A. Yes, sir.

Q. Quite so are you not?

A. Yes, sir.

Q. Been familiar with it for years?

A. Yes, sir.

Q. You know the Backus property?

—. ——.

Q. You know its situation running through to Fort street?
A. Yes, sir.
Q. Seen it?
A. Yes, sir.
Q. Been on it?
A. Yes, sir.
2424 Q. Before the days of the elevated road?
A. Yes, sir.
Q. What is the valuation of that property, the real estate itself? We will not ask you about the machinery, with which, I suppose, you are not familiar, are you?
A. No, sir.
Q. But the real estate itself, that piece of real estate of Backus', and their buildings, what do you think it was worth before the elevated structure went through?
A. About $500 a foot.
Q. It is a very eligible piece of property?
A. Yes, sir.
Q. Situated well with reference to the railroad and with reference to the river?
A. Yes, sir.
Q. Now, as to property on River street there since the building of the elevated structure, what have you to say as to its effect on property on the north side of River street?
A. It ruins it; that is all there is to it.
Q. You think the depreciation is very great from the effect of it?
A. Yes, sir.
Q. Why is that?
A. From the danger of fire from the locomotives and the closing up of streets and leaving it on an island.
Q. The street is not much used since the structure is built there?
A. No, sir.
Q. Are the fronts of the property of any value upon that street since this structure was built?
A. I don't think it is.
Q. It practically makes that property frontless property, as far as a street is concerned?
A. Yes, sir.
2425 Q. You say it has ruined the property. Can you give the per cent. of depreciation?
A. Well, I would not want to give one-half for it.

Cross-examination.

By Mr. ROBISON:

Q. What do you think has ruined it?
A. The elevated road.
Q. In what way?
A. By cutting it off so that nobody wants or can do business there.
Q. Why?

A. Well, I will tell you why. I had my warehouse filled with about 60 tons of hay in it and the elevated-road sparks put it on fire and burnt 60 tons of hay and 30 tons of straw. That is why.

Q. When was that?

A. The 16th of September. I think that is correct.

Q. Just a short time ago?

A. Yes, sir.

Q. Where was this warehouse?

A. Between Sixth and Seventh?

Q. The road runs right alongside of you there?

A. The road runs within 7 feet of the corner and there are two lots between me and the corner.

Q. You can do business in the street so far as drawing loads in the street are concerned yet?

A. Yes, sir, or you can go around far enough.

Q. You can drive in the street just as you could before?

A. To drive under the structure, in my opinion, you would require three kinds of horses to do that with; either deaf, dead or blind.

Q. Is this the only railroad of this kind in the country?

A. I have not travelled much, I don't know.

2426 Q. You never saw any other elevated road but this?

A. Well, I am not sure.

Q. You have seen them, haven't you?

A. I do think this is the first I have seen.

Q. In Chicago?

A. I have been in Chicago 40 years ago, not since.

Q. In New York city have you seen any elevated roads?

A. I have not been there.

Q. You know they do business in the streets there as they used to?

A. Oh, yes, I read of it.

Mr. ATKINSON: Of course business can be done to a limited extent under those roads, but it is very much interfered with, I suppose?

A. Yes, sir; you must have very quiet horses if you do it at all.

Mr. ROBISON: Ain't you aware that it is the plan generally now of entering cities by elevated road rather than on the ground?

A. I don't know.

Q. Do you think this would be better if it came in the city on a level?

A. Yes, sir, and cheaper.

Q. Cheaper for whom?

A. Cheaper for everybody.

Q. Do you think it would be better for the business, doing business on the street?

A. I know it.

Q. You think horses would not get scared so much?

A. I know it. They get the idea the locomotive is coming down, and it is a hard thing to do anything with them.

Q. Do you think property was worth $500 a foot down there?

A. I think the Backuses' was. It is a peculiar lot. That
2427 is almost two planing mills in one, because the back part is high, and it makes two stories or better before you come on a level with the other part. So you have three floors there before you get up into the air.

Q. Are there two stories on the ground really?

A. No, I don't think it.

Q. One entering from Fort street?

A. I think you come in on Fort street level with the second story, if I recollect right.

Q. You enter on the ground from Fort street on one story and on River street one the other?

A. Yes, sir.

Q. It don't hurt the front of Fort street so much?

A. You must consider the height of your viaduct. When the train is passing it is pretty near it to the third story.

Q. How many feet high is it? Do you know?

A. I don't.

Q. Don't you know it is 14 feet in the clear there?

A. I don't. The car goes to the third story. I was there when they were passing, and it was perfect dark. You could see between the cars; it was yoop, yoop, yoop, and then you could see between the cars. That is what it was precisely.

Q. Was this a freight train you were seeing or a passenger train?

A. It was a passenger train, I think. It didn't take long to go by and then there was a perfect flood of light. You had the gloom of the viaduct afterwards, of course.

Q. How far from the viaduct was the room?

A. I would not be sure.

A JUROR: This gloom was down in the lower story, not above?

A. Oh, yes, sir.

2428 Q. The bottom of the viaduct is even with the second story?

A. Yes, sir.

Mr. DICKINSON: It is even with the floor of the third story.

Cross-examination.

By Mr. BAKER:

Q. Mr. Stewart, where did you say you lived?

A. 140 High street west.

Q. Where is your place of business?

A. 312 and 314 River street.

Q. Near what street is that?

A. Between Sixth and Seventh.

Q. How many years have you been there?

A. Between 19 and 20.

Q. The Michigan Central yard is right opposite you?

A. Yes, sir.

Q. The viaduct does not come up to you, does it?

A. It runs in on the corner of Seventh.
Q. So it don't go in front of you at all?
A. No, sir.
Q. It goes back of you?
A. It goes behind.
Q. What kind of business do you carry on?
A. Hay and oats and corn and bran, etc.
Q. You still in business there?
A. Yes, sir.
Q. And you have been in business there how many years?
A. Between 18 and 19 years.
Q. Have you brought an action against the union depot Co.?
A. No, sir, not yet. I hope to in the future.

2429 A JUROR: In estimating the value of the Backus property, do you reckon the value in a lump from River street to Fort street?

A. No, sir, I value it like this; I base my valuation upon the sale of the D., L. & N. property to the Michigan Central.

Then adjourned to 9.30 next day.

OCTOBER 28, 1893—9.30 a. m.

PETER DUPONT, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?
A. 340 High street east.
Q. How long have you lived in Detroit?
A. 50 years.
Q. How long have you been engaged in business in Detroit?
A. Since 1865.
Q. In what business?
A. In the building business.
Q. Were you formerly for some years foreman of the Pullman car shops when they were situated here?
A. I was of what we used to call the old Russell car shops.
Q. How long were you foreman?
A. A year.
Q. Are you engaged at all in setting up machinery and that sort of thing?
A. In 1869 I went into the business of putting up—I was the first man that set up these blowers to convey shavings and dust from wood-working machines by the process of a fan or blower. I commenced in 1869 and I continued till 1874.
Q. Just five years?
A. Yes, sir.

2430 Q. Are you familiar with wood-working machines?
A. Yes, sir.
Q. You have worked in wood all your life?
A. That is my line of business.

Q. And are familiar with the different products of wood that come from machines in planing mills and so on?

A. Yes, sir.

Q. And familiar with all machinery?

A. Yes, sir.

Q. Familiar with setting up and are now engaged in business which makes you familiar more or less with that sort of inside work?

A. Yes, of my own knowledge in the building business and I have some small machinery that I am running myself in my shop.

Q. You have done some business, I suppose, and purchased goods of Backus?

A. Frequently deal with them—occasionally.

Q. Where is your place of business?

A. 340 High street east; I have my shop in the rear of my residence.

Q. You work in all kinds of fine inside wood-work?

A. All kinds of work.

Q. Now, you have been familiar with the Backus property how long?

A. In the neighborhood of twenty years.

Q. You have bought their material, I suppose?

A. Considerable.

Q. What have you to say as to the class of material produced by them, comparatively, for fancy inside work and for all kinds of wood-work, prior to 1892?

A. I find their lumber, such as to use an oil finish is not as desirable——

Q. Before?

2431 A. Oh, found the manufacturing of the Backus lumber very nicely manufactured.

Q. Their moldings fine and inside fancy work fine?

A. Their moldings are very fine and their dressing is very fine, the journals of their machines seem to be substantial so that it leaves the surface clean.

Q. Give us some comparative idea of their work as they did it prior to 1892 as compared with other work in the market, whether it was standard?

A. Oh, the Backus manufactured material is above the standard in Detroit.

Q. And do you know from what that is caused?

A. From the good repair and good attention to machinery.

Q. Have you examined the machinery in the Backus mill?

A. I went through a few days ago.

Q. You have seen it before without making any special examination?

A. I have already done some millwright-work; I put up the first blowing machine they had.

Q. Now, tell the jury in your own way and in your own view of it, what you have to say of the machinery in the Backus mill from your examination?

A. I find by examining the planers, saws, resaws, cut-off machine—a device to save labor, such as I have never seen in any other mill—in their cut-off saws I find gauges, that whole surface of it springs back when the board goes onto it, and as soon as the board leaves it it springs back again, they could put in there one for a different length without having to set in their gauge, they are all set a number of them. It is the only one I have seen in the city of Detroit.

Q. Or anywhere else? Have you been in mills anywhere else?

2432 A. I have put up machinery in other States, New York, Michigan and Ohio.

Q. How does this compare——

A. I have never seen anything got up as good a device as I have seen at Backus'.

Q. Go on with anything else?

A. I find even in the rip-saws, where the rip-saw travels, where you put in the lumber, there is a fine little steel knife, to separate the lumber and to prevent a board from catching upon the saw and injure a man, or to prevent from squeezing the saw, all of which is very perfect.

Q. Many things in the Backus mill they have added from their own experience and genius?

A. It is all from their experience.

Q. That you do not see in any other mill?

A. That I don't see in any other mill.

Q. Now, as to the firmness?

A. There is quite a vibration in the whole mill; I have gone on all the floors.

Q. Fineness of adjustment?

A. All pulleys are well balanced, otherwise they would shake, everything is so well balanced and complete, the building so firm, there is no vibration in it at all.

Q. Foundation of the machinery?

A. Foundation of the machinery must be very good.

Q. How about the extra heavy hangers and that sort of thing to keep the balance good.

A. I find the hangers very perfect hangers; they have also separate hangers to hang what they call the loose pulley, a sleeve pulley. Formerly in the case of a factory, with the loose pulley on the shafting, when the belt is thrown off from the main pulley on the loose pulley, there is a friction upon the shafting; in this case there is a sleeve and the shafting goes through a sleeve; it does

2433 not have any friction, and the loose pulley is on that sleeve and with a separate hanger at great expense, so there is no friction when the machinery is not running on that loose pulley.

Q. Is this peculiar to the Backus mill?

A. This is peculiar to the Backus mill.

Q. Do you find a great many arrangements of that kind to secure correct adjustments peculiar to that mill?

A. Peculiar to the Backus mill, we do not find in other mills but very seldom.

Q. What have you to say as to the extra cost of these many adjustments?

A. Oh, the adjustment of a large sleeve pulley of the kind with hangers and sleeves would cost from $75 to $80 per piece to make the adjustment.

Q. I think you sold Mr. Spitzley, who has been a witness here, his first shop, did you not?

A. The first shop that Spitzley Bros. operated I sold to them in either '67 or '68; the first little frame shop that they operated which I owned myself.

Q. Now, Mr. Spitzley has given us some testimony as to the floors there in the mill. Have you examined the floors?

A. I have examined the floors.

Q. So that you knew the kind that there are in the Backus mill?

A. Yes, the top floors.

Q. It is a part of your trade, I suppose, to lay floors of that kind?

A. Oh, yes, we have to lay floors in all our buildings.

Q. What is the cost of laying such floors as you found in the Backus mill, laying the lumber and all, everything included, maple flooring?

A. You have reference to maple flooring?

Q. Yes, maple flooring, is it not?

A. The top floor is of maple, but underneath it is pine.

2434 Q. Tell the jury what the cost of laying these floors is, including the lumber, of course?

A. The maple floor laid would be worth in the neighborhood of $38 a thousand.

Q. Now, then, the other flooring. You don't know the amount of it?

A. I don't know the number of feet, no, sir.

Q. Are the floors elaborately and particularly well laid?

A. They are very well laid, substantial.

Q. Now, you observed the mill timber and examined it, did you not?

A. Yes, sir.

Q. Twelve by fourteen?

A. Big beams.

Q. Could that be put in in 1892 or at any time for $24 a thousand?

A. It could not. It is worth $6 per thousand for the framing alone, without the cost of material; just for the labor.

Q. What are they worth, laid as they are?

A. Those timbers in 1892?

Q. Forty feet long?

A. That is special billed stuff, and would cost about $22 a thousand at the mill.

Q. Taking it right through?

A. Figuring it right through.

Q. And the labor in addition?

A. In addition $6 a thousand for the framing.

Q. Does that include the freight?
A. It does not include even the nails or the bolts to bolt them.
Q. Does it include the raising of the timber into place?
A. Yes, I have framed timbers for $6 a thousand.
Q. In giving the amount at the mill, which mill do you
2435 mean, the Backus mill or the mill where it is purchased?
A. Yes, at the Rouge, at Salliotte's.
Q. Where it is purchased?
A. Yes, special billed stuff.
Q. That does not include the transportation to the Backus mill?
A. Yes, have to be added. Yes, that is, Salliotte would charge that much aboard the cars at their mills.
Q. Does not include the transportation by rail or whatever it is?
A. No, sir.
Q. Now, have you observed there in your trade with Backus, any difference in the dirt and soot upon the lumber since the building of the elevated road?
A. Yes, I have observed that the lumber is dark, black, a lot of black soot upon it.
Q. And did you ever observe anything of this kind in your own knowledge of Backus' product prior to the building of the elevated road?
A. I have, I have been using Backus' products in the neighborhood of twenty years.
Q. Did you ever notice this impurity upon the lumber as it is now, prior to the building of the elevated road?
A. No, not so great.
Q. You have seen some?
A. I have seen a little, yes; that will accumulate, but not much; it is a great difficulty to use that lumber for oil finish now, it soils the men's hands and creates spots on the lumber.
Q. You bought largely, did you not, from the storehouse?
A. Mostly from the storehouse.
Q. You did not buy from the mill itself?
2436 A. Not from the mill. I always give my orders at the storehouse on Fort street.
Q. Do you find anything on the lumber to impair the usefulness of it for oil finish at the storehouse, the product from the mill?
A. The product from the mill at the storehouse is black and we have to take great care to sweep it and wipe it off with rags, the shavings, to get the dust away before a man can put the plane onto it. Even the bottom of the plane will blacken up.
Q. Upon the Backus lumber?
A. And when you get through dressing a piece, it will make streaks upon the other.
Q. Now, have you seen the method of their transportation from the mill to the storehouse?
A. I have.
Q. Have you seen the lumber as it was in the course of transportation piled there at the mill?
A. I have seen it piled in carts there ready for——

Q. Have you seen there this soot upon it?

A. I have seen the soot upon it right in the mill.

Q. As it was being transferred out for transportation to the storehouse?

A. Ready for the storehouse.

Q. Did you have any such difficulty as this about the soot upon the Backus product prior to the construction of the elevated road?

A. No, sir; not to that extent.

Q. To what extent?

A. Oh, there always is a little soot accumulated on lumber that lays a great length of time exposed outdoors, a trifle, but not enough to injure it; but at the present time there is an abundance or an accumulation upon it, a lot of it, and it stays on the hands.

Q. It actually makes the fine Backus product undesirable
2437 because it will not take an oil finish rightly, the best you can do?

A. No, sir, it is very difficult to make oil finish with it.

Q. So that it makes that more unsaleable and undesirable, does it not?

A. Most decidedly.

Q. Now, did you use to go to Backus when you wanted to do an especially fine oil-finished job, before the construction of the elevated road, did you go to Backus for that kind of product?

A. When I wanted lumber, good clean lumber, I always went to Backus for it for a special job.

Q. For that fine work. Is it or is it not true that since this sort of thing falls in their place there you go there for special work for oil finish?

A. That is, prior to that; yes, sir.

Q. Since then?

A. Well, not so very much recently. The only lumber I bought of him was flooring and ceilings.

Q. You found this such a difficulty you have had to buy other products?

A. Yes, very.

Q. You have dust so that it interferes with your purchasing?

A. It interfered with the finish.

Q. Although you were an old customer?

A. Oh, yes, for a number of years.

Q. Now, you know the property down there pretty well?

A. Tolerably well.

Q. You have been familiar with Detroit, as a man, for how many years, manufacturing sites and manufacturing businesses, especially in wood-work?

A. I have been in the manufacturing business since I was
2438 quite a young man. I went into business in 1865 and I have handled a large amount of property and now handle a great deal of property, real estate. I am handling all of Mrs. Barnard's property.

Q. What have you to say in the way of proportion of percentage, from what you know of it, is the injury to the Backus property there,

real estate and mill, taking into consideration its situation with its front on River street and your own knowledge of the property and of the business they formerly did, of the practical workings of the business since—what in your judgment is the depreciation if any, in the Backus plant?

A. The depreciation would be all of one-half.

Q. You know, do you not, they run in connection with the mill, and to make it run properly, the lumber yard below and the storehouse above, running as one plant?

A. Yes, the mill is the main guide, that supplies the other.

Q. Without the mill the others would be practically useless?

A. Useless for the business at all.

Q. For any paying business?

A. Yes, sir.

Q. Will you please state whether, in your judgment, the value of the whole plant as one plant, has been impaired by the impairment to the mill property?

A. By the impairment of the mill plant it would affect the others to quite an extent. Of course the other could be used with the mill elsewhere.

Q. But it is very conveniently situated with reference to this mill?

A. One of the best mill sites that there is I guess in the city of Detroit.

Q. Now, prior to the erection of the elevated railroad along in front of this property, if the Backuses desired to go out of the
2439 business themselves, the successful mill as it had been and its condition and situation with the lumber yard and storehouse on Fort street, would have had a very fair rental value, would it not?

A. Yes, sir.

Q. The whole property together?

A. Yes, sir.

Q. Do you think the whole plant as it stands, with this structure in front of it, from your knowledge of the effect of it, could be fairly rented today for planing-mill purposes, for wood-working purposes?

A. I do not think that that plant and the whole combined would rent for half the amount of what it would previously.

Q. It is no longer desirable as a wood-working plant?

A. Not at all; it is not desirable. I would not have it for a mill.

Cross-examination.

By Mr. ROBISON:

Q. Have you an idea of what the mill site is worth now, cash?

A. Mill and site?

Q. The real estate, without the machinery?

A. At what time do you want to place that value?

Q. Now, or a year ago now, since the elevated road was built or after it was projected, at any rate?

A. For that very purpose of a mill?

Q. For what it is?

A. I would not want to place a value on it for myself?

Q. You say it has depreciated in value, in your opinion, one-half?

A. Yes, sir.

Q. Suppose it to be worth $500 a foot now, it was worth a thousand dollars a foot before?

A. It would be that.

2440 Col. ATKINSON: He does not mean to swear it was worth a thousand dollars a foot?

A. No, sir, I don't.

Mr. ROBISON: That is just what he is swearing.

A. You are saying that yourself.

Q. That is what I understand. Let us see if you don't say it?

Col. ATKINSON: Where did you get the idea of $1,000 a foot?

A. You said when it was a thousand dollars a foot——

Mr. ROBISON: I am supposing it to be $500 a foot. He said it is worth half now of what it was before, and if that doesn't make it worth $1,000 a foot before, I don't know what it does. Well, at any rate, without any figures, it was worth twice as much two years ago as it is now?

A. Yes, sir.

Q. Then if it is worth $250 a foot now it was worth $500 then?

A. Yes, sir.

Mr. ROBISON: That is right, isn't it?

Mr. DICKINSON: Now, you got it right. You do not intend to be unfair.

Q. To what extent do you think it has impaired the actual value of the lumber yard, what percentage do you think?

A. The valuation of the lumber yard would be based upon the amount of business that that mill would be doing.

Q. Well, get it as near as you can. You say that the loss to the mill itself has impaired the value of the yard?

A. Yes, sir.

Q. Have you any idea of how much that is, what percentage you think it has taken off the actual value of that yard?

A. It has taken off some value, perhaps one-quarter.

2441 Q. Twenty-five per cent.?

A. Yes, sir.

Col. ATKINSON: That is the yard itself?

A. Yes, sir.

Q. As used in connection with the mill?

A. Yes. I base my judgment in this way. If this mill could be removed to some suitable place, the yard could be used as it is now.

Q. Then, if the property is worth $2,000 a foot now, in your judgment before this road went up there it would be worth $2,500 a foot?

A. Yes, sir.

Q. You think that would be a fair price for it?

A. I think that would be fair.

Col. ATKINSON: A fair proportion?

A. A fair proportion. I have not stated any price on that property, you are supposing the value and I take you at your word.

Mr. ROBISON: I wanted to see if I could not kill two birds with one stone. There is testimony that it was worth $2,000 a foot.

Col. ATKINSON: Now——

Mr. ROBISON: Mr. Backus said it was worth $2,000 a foot. Now, where are you building principally, in what class of buildings?

A. Oh, I build some good class of buildings, put up some fine brick buildings.

Q. What buildings have you put up this present season?

A. I have put up a brick house for Mr. Engle, hardwood finish.

Q. What Engle?

A. John Engle on Charlotte avenue. I have put up an elegant frame house on Alfred street that cost $2,200.

2442 Q. Where have you been purchasing this lumber since this elevated road went along?

A. I have purchased some at Larkins', some at Backus' and some at the Scranton Lumber Company and Hunton, Myles & Weeks, the West Side Lumber Company.

Q. Hardwood and all?

A. Both; all kinds.

Q. You say that the buildings you are putting up now are hardwood finish, most of them?

A. Some of them, some pine and some oil finish.

Q. Mr. Backus has not been in the business of making hardwood much, has he?

A. That is, we build some rooms of hardwood, such as kitchens.

Q. Backus has not been making hardwood?

A. Oh, yes, he deals in hardwood.

Q. Not to any extent?

A. Yes, maple floorings, etc.

Mr. DICKINSON: We are going to show you the extent of it before we get through.

Q. That is all right.

A. I have bought cherry lumber there and ash lumber for finishing.

Q. Not lately?

A. Not this season.

Q. Buy any soft wood of him?

A. Oh, yes.

Q. Moldings and things of that kind?

A. No, sir; I make my own moldings.

Q. What kind of wood did you buy of him?

A. Principally flooring and ceiling. I did get about a thousand feet of fine lumber, that is about all.

Q. Where is your shop?

A. 340 High street east; I have my carpenter shop there.

2443 Q. You live in front and have the shop in the rear?

A. Yes, I have got a little shop, machinery to make my moldings; I don't manufacture my sash or blinds.

Q. How large a shop is that?
A. 30 by 20, two stories.
Q. You say that you started Spitzley in business?
A. I did not start Spitzley in business; I did not say anything of the kind.
Q. You sold him his shop?
A. Yes, but that is not starting a man in business?
Q. That is, you were in business before he came along and went in?
A. That is what I mean.
Q. And that is what I mean.
A. Yes, exactly. Mr. Spitzley was capable of starting his business himself; he paid me for his shop.
Q. Well, I thought you meant by that—well, never mind what I thought. Spitzley Brothers are considered among the prominent builders here in the city?
A. Yes, prominent good men; they are good people; good prominent builders.
Q. They are among the most prominent builders in the city?
A. Yes, sir.
Q. Do more building, I guess, than you do?
A. I think they do. I do not devote my time only to the building business. I cannot do as much. I am handling a million dollars worth of property, and that keeps me pretty nearly busy.
Col. ATKINSON: I suppose since it ceased to pay so well you got out of it, too?
A. I keep out of building business all I can now. I just accommodate a few customers.
Q. Well, you know Henry Spitzley?
A. Yes, sir.
2444 Q. He is considered a careful figurer and builder?

Objected to as incompetent.
Mr. ROBISON: I do not believe it is competent.
Col. ATKINSON: Why do you ask it?
Mr. ROBISON: I thought I might possibly be mistaken.
Col. ATKINSON: I wish you would have more confidence in your own judgment, and not ask a question that you do not think is competent.
Mr. DICKINSON: I will rule it out. Will you take my ruling and take an exception?
Mr. ROBISON: Yes, but with no exception.

Q. Would you be willing to take his figures on what he would be willing to construct a building for as pretty near correct?

Objected to as incompetent.
Mr. ROBISON: He has put different figures on here to what Mr. Spitzley has.
Col. ATKINSON: It is not competent to ask one man if he will take another's figures.

Q. When were you down there last to the shop?

A. Wednesday of this week.
Q. Did you go down there then to purchase lumber or to look over the place?
A. I was going by that way, and I saw Mr. Backus and I went in.
Q. You went in to look the place through?
A. Yes, sir.
Q. Was that the first you observed this machinery particularly?
A. No, sir. I have frequently; not so much of late, but I used to frequently visit their mills.
Q. I understood you to say it would cost to put up those pulleys in the shop there in the shape they are in from $75 to $80 apiece?
A. Yes, those large sleeve pulleys.
2445 Q. That would be extra, putting them up in that shape, that much extra, do I understand you?
A. That would be that much extra than to have a loose pulley on a shaft.
Q. And what would the whole thing cost?
A. It depends upon the size of the pulley.
Q. Well, this that cost $75 to $80 extra?
A. The hangers increased the cost of the pulley; it is the hangers, it is the sleeve that slips through the shaft, so as to be taken off, the whole shaft, to take apart, which is very expensive.
Q. Would the size of the pulley make any difference in the cost of it?
A. Yes, sir.
Q. Any appreciable difference?
A. Yes, quite a difference. It takes a bigger hanger to hold a large 36-inch pulley which would weigh perhaps 150 to 200 pounds, than it would a six-inch one.
Q. He has got better machinery down there than you have in your place, I suppose?
A. Oh, yes.
Q. Does better work?
A. Well, he does very good work. The machinery is stronger and that is why you can do better work; the heavier the machinery the better work you can do, and the tension of the machine is tighter.
Q. Better molders?
A. Yes, I got one small sticker, runs by electric motor; I have a light machine and when you do heavy work it vibrates, does not do as smooth work as a heavy shaft, where it does not spring.
Col. ATKINSON: Intended for lighter work?
A. Yes, sir.
Q. No reputable builder buys any lumber of Backus now, I suppose?
2446 A. I don't know anything about it.
Q. Any fine lumber?
A. I don't know anything about it.
Q. Well, they cannot, can they?
A. I have not inquired of other builders.

Q. Well, they cannot do good work with his lumber?
A. Very difficult unless it is cleaned and swept.
Q. Swept, what for?
A. To get the soot off and the grit.
Col. ATKINSON: The cinders and soot from these engines?
A. You will have a piece of grit on top of a board and you pile another one on and it goes into the wood, especially into pine and you put a plane on that and it nicks your knife.
Q. You would not purchase any lumber of Backus for fine work now, would you?
A. I would not like to with that soot and grit upon it.
Q. It is on the whole of it?
A. It is on every board that I have seen there.
Q. Well, then it follows, does it not——
A. By the time they put one board on top of another, soot settles on it.
Q. No builder can build a good building with his lumber, can he?
A. He cannot do fine oil finish with black lumber.
Q. With Backus' lumber there cannot be good work made, can there, according to your testimony?
A. By taking and cleaning it off and using more trouble with it you could.
Q. It cannot be done as advantageously as it can with other lumber?
A. No, sir.
Q. He cannot do business in competition with other people, any lumber here, can he?
2447 A. I don't think he can.
Q. And has got to quit?
A. Well, I would want to.
Q. You have quit anyway to a great extent and gone into the real-estate business, haven't you?
A. Oh, I am doing some building business yet.
Q. Not very much?
A. No, sir; I haven't time to attend to it.

Redirect examination.

By Col. ATKINSON:

Q. Your attention, you say, of late years has been turned rather to real estate?
A. Yes; mostly. I am agent for three good capitalists of all their property, renting their land and selling and repairs for their buildings and building for them.
Q. That leads you, I suppose, to have a pretty thorough knowledge of rental values?
A. To quite an extent. I have several houses.
Q. But you carry on your shop still and do some work?
A. Yes; I am obliged to keep a few carpenters.
Q. So that you have not lost your knowledge of the trade at all?

A. Not very much. I keep in very good practice.
Q. Enough to be acquainted with prices?
A. Yes, sir.
Q. And you do the building for those real-estate plants?
A. I have built a number of houses. I built three brick houses for Mrs. Barnard alone within three years.
Q. Furnished all the wood-work?
A. All the material.
Q. Doing the entire business?
A. The entire thing.
2448 Q. Of course you have to keep well acquainted with the mill, then, and the material?
A. Yes; while other builders—I have to go into competition as well as the rest, and then I am appointed superintendent of the others.
Q. Where the contract is awarded to them, you have to see that the work is done right and the material furnished is good?
A. Yes, sir.
Q. I suppose when you said you were 50 years in Detroit you meant that you were born here?
A. No, sir; 52. I was two years old.

Recross-examination.

By Mr. BAKER:

Q. You say you rent a great deal of property? Did you ever rent a planing mill or box factory?
A. No, sir.
Q. Do you know of any that ever was rented?
A. I have not any knowledge of any.
Q. You never knew of any?
A. Of any mill being rented?
Q. Yes.
A. I didn't know of any particular one.
Col. ATKINSON: They are usually run by the owners.
A. Except when I rent one myself.
Q. So you could not give us any information as to what the Backus mill would rent for?
A. No, sir; I could not. I don't handle that class of property.

By Col. ATKINSON:

Q. What would be a fair return for real estate in the city of Detroit, what percentage on its value, according to your experience?
A. About 5 %.
2449 Q. Then real estate which returns a net 5%, is a pretty good investment?
A. Yes, I think it is pretty good. I generally rent so as to bring from 4 to 5%, net. That is, clear of all taxes.
Q. That, I think, is about the rule here, is it not, where property is rented?
A. Well, that is a rule that we go by.

Q. You speak of Mrs. Barnard. She is a daughter of the late Charles B. Moran and sister of John and William Moran?
A. Yes, sir.
Q. And has a large tract of land?
A. Yes, a large tract of land.
Q. Real estate that pays net 5% is considered good property?
A. Considered good enough.

By Mr. Foreman BAKER:

Q. You have bought hardwood lumber for oil finish of Backus before 1890 a good deal? That is, you have been dealing with them for twenty years?
A. Yes, sir.
Q. Did you buy from other parties as well as Backus & Co. during that time?
A. Well, I could say only a couple of cases, that I bought at other places.
Q. During the last two years, have you bought bills of hardwood from them?
A. Excepting in hardwood flooring.
Q. Nothing but that?
A. Yes, such as maple and oak flooring.
Q. For all your other hardwood for oil finish you have gone to other parties?
A. I have gone to mostly the Scranton Lumber Co., and recently I have got some pine lumber there, too, for oil finish.
2450 Mr. ROBISON: Where is the Scranton Lumber Co.?
A. They were on Franklin street formerly, between Dubois and Chene, but now they are at the foot of St. Aubin avenue and have a large hardwood yard and they handle pine lumber, a good quality of pine lumber; they don't handle any billed stuff, but they handle finishing lumber.

Mr. BAKER: While we are waiting, I might consume a little of the time in making a statement in regard to that Specht property down there. I have looked at the papers and know just what the figures are.
Mr. DICKINSON: Very well.

Mr. Baker took the witness-stand.

Mr. BAKER: It is merely to make accurate what I was answering about yesterday. The amount paid to Mrs. Specht for that triangular piece of property was $8,500, and the amount that the Michigan Central paid for it was $6,500, which left $2,000 for the right of way. I got the impression from this map that the frontage was 27 feet, but I find on looking at the deed that I deeded 56 feet to them. In looking at the deed I find also that there was an alley alongside of this property of 12 feet that had not been conveyed. The Michigan Central had the lot right in the corner, a small lot, a flat-iron piece, and then there was a 12-foot alley, and then there was a lot which I bought of Mrs. Specht. The Michigan Central had a deed

of 17 feet and also had this triangular lot, but the 12-foot alley was there, and Mrs. Specht, who owned this lot, would have a right to have that kept open, so that in getting the deed from her I got a deed of the lot and also a deed of all her right in the alley of 12 feet, and then conveyed the whole thing to the Michigan Central.

Col. ATKINSON: So that although the deed is for a greater quantity than 27 feet, that is what it practically carried?

2451 A. No, sir. It carried more than that. It carried 27 feet and the 12-foot alley.

Mr. DICKINSON: The right to the alley?

A. Yes. She had a right to have that kept open, and whoever owned that alley would have a right to have that kept open. If it was closed, it might go one-half of it to the Michigan Central and one-half to the lot-owner, but either one would have the right to have it kept open. Then when the Michigan Central got this deed of these 17 feet there was a misdescription in some way, so that my deed covered that, and when I called their attention to all this situation they gave me $6,500 for it.

Juror SAFFORD: What became of Eleventh street, that used to be in there?

A. That comes down to that crossing east of that.

Q. Who got paid for that?

A. I don't know.

By Juror CLARK:

Q. Then there was an outlet from this small piece to the street?

A. This piece fronted on River street and there was an alley laid out right alongside of it. That property belonged to the Specht estate and it had been subdivided and platted in a variety of different ways and right on the corner was a small triangular lot and there was an alley, and then this lot which belonged to Victor Specht, and which he willed to his wife and upon getting the exact situation of it, showing the condition in regard to the alley and the mistake in their description, so that my deed had covered what they supposed they had bought, they gave me $6,500 for it.

By Col. ATKINSON:

Q. How many feet did you deed, do you say?

A. I actually deeded 56 feet.

2452 Q. And the lot itself that you bought of Mrs. Specht was 27 feet?

A. No, the lot originally was 44 feet.

Q. What had been taken off it?

A. They were supposed to have taken 17 feet off it as I remember it; 14 feet at one time and 3 at another.

Q. Who owned the 17 feet?

A. The Michigan Central.

Q. Was that included in your deed?

A. That was included in my deed, because in the deed to the Michigan Central there was a misdescription.

Q. So that you included the 17 feet belonging to the Michigan Central so as to correct the previous description?

A. Of course the Michigan Central had 17 feet or supposed they had 17 feet, but it was not correctly described.

Q. Isn't that the 17 feet that is occupied by Mr. Backus?

A. Well, I don't know whether it is occupied by Backus or not, it may be.

Q. How is it used?

A. There is a side track on it, I think.

Q. That side track is Backus' side track?

A. I am not sure whether that is the one or not. It may be, but I do not say whether it is or not.

Q. You only got a quitclaim deed?

A. I got a quitclaim deed and gave a quitclaim deed.

Q. So you would not remember who owned the property?

A. The actual property they got was 27 feet and the 12-foot alley, 39 feet.

Q. That is, they got the rights of the adjoining owner in that alley?

A. Yes, sir, and they got their description corrected on the other end.

2453 Q. You knew, I suppose, that Mrs. Specht had misdescribed the land in deeding it before?

A. When I came to look at the deed I could not tell whether it was really a mistake or not; that is, the descriptions overlapped each other and I took a quitclaim deed from her of the whole lot.

Q. You took a quitclaim? So then it put you in a position to correct the misdescription and deeded them this whole lot and also the rights in the adjoining alley?

A. Yes; that is, I got all their rights there, whatever they were.

By Mr. DICKINSON:

Q. Before you left you made a statement yesterday in the form of testimony that the clause in the Backus property as to 80 per cent. was not authorized under the Michigan standard policy?

A. That was a statement as counsel.

Q. It went in as rather your statement of fact. Now, I give you an opportunity to retract or withdraw that statement.

A. I will not do that on the stand one way or the other. As I said yesterday, when we come to that, that is a matter of argument.

Q. You know perfectly well, do you not, that the commissioner of insurance has prepared a standard form of policy?

A. I know the commissioner of insurance has prepared a standard form of policy.

Mr. ROBISON: Wait a moment. Do you want this to go down as testimony?

A. No.

Mr. ROBISON: I object to this as immaterial.

The COURT: It is a conversation between counsel that could go on as counsel.

2454 Mr. ROBISON: Mr. Dickinson is proceeding to cross-examine Mr. Baker now.

Mr. DICKINSON: It has passed into the form of testimony—in contradiction of the witness.

Mr. BAKER: I give no testimony as to the law, Mr. Dickinson. What I endeavored to do yesterday was to challenge the legality of that provision and leave it open.

Col. ATKINSON: We want to see if you do it now.

A. And I do it now as counsel in the case, challenge the validity of that provision.

Q. Would you challenge it if it was authorized by the commissioner of insurance?

A. That would depend on how it was done, where it is prepared, a standard policy, and if he has allowed certain changes——

Mr. DICKINSON: Well, we will argue it if we cannot do it on the witness-stand.

A. Certainly, that is what I said yesterday.

Col. ATKINSON: We could swear at the law, but seldom to it.

The COURT: It would be pretty hard to swear what the law is.

A. Of course, I just tried a case that involved the validity of a somewhat similar provision.

Col. ATKINSON: You have not got a decision yet?

A. Well, in one sense I have. Judge Hosmer agreed with me in regard to the validity of that provision. It was not exactly like this, but of the same nature.

Col. ATKINSON: That does not prove that your opinion is not wrong.

Mr. BAKER: I should want to look at it a little before I would take any stand in regard to it in this case.

Mr. ROBISON: You do not withdraw anything you said yesterday?

A. No, sir.

2455 After the jury had been dismissed, the court said:

I am asked by Mr. (juror) Baker as to whether there is any objection to a juror going down and looking over the matter for himself.

Mr. DICKINSON: We have none, certainly.

Mr. Juror BAKER: The only question was whether a juror could go down singly or whether you should insist that the jury should all go together.

Mr. F. A. BAKER: I have no objection to any juryman going down and looking over that property with this qualification, that I should object to their entering into conversation with people there or with the Backuses.

Mr. Juror BAKER: With anybody?

Mr. F. A. BAKER: With anybody, but if the jury want to go down there and look the premises over, all right, but I do not think it would be right to talk with anybody there on one side or the other.

Mr. DICKINSON: Agreed.

A JUROR: I would like to see the effect of those trains passing by there.

Mr. F. A. BAKER: I would suggest that later in the proceeding when we got the testimony in, perhaps it would be well enough for the jury to go down in a body again. When they were there they did not understand what the case was.

Mr. Juror BAKER: That is the point.

Mr. F. A. BAKER: We will arrange to go there again some time during the week, toward the close of it, so that you can look it all over with the testimony and in the meantime, any of you going by there and who want to go by and look at it, I have no objection to your doing it as long as you do not talk with the people there or with anybody about it.

Mr. DICKINSON: I would like it if Mr. Baker would not give any notice of any visits of the jury, if he will give us his
2456 word that he will not give any notice to the railroads. I want them to have the trains pass just ordinarily.

Mr. BAKER: I do not think the men down there running that railroad know there is such a case.

Mr. DICKINSON: We have had some experience before. Will you do that, give your word that you will not notify them.

The COURT: I will say this, that as far as the jurors going down there is concerned, that no one can tell in advance if they go there singly and when they are going to go as a body——

Mr. BAKER: I will ask the railroad company not to do anything in regard to it. They do not know there is such a case being tried unless they have seen it in the paper.

The COURT: As far as the jurors going down there is concerned, when we arrive at that stage I will send them right down there and nobody will know when they are going.

Mr. DICKINSON: That is all right. I will tell what they do, when they go by they make motions now, to write it down, to the men in the mill.

The case was then adjourned until 2 p. m. Monday, October 30th

OCTOBER 30, 1893—2 p. m.

ALFONSO DE MAN, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. Where do you live?
A. In Detroit.
Q. How long have you lived here?
A. Been here since 1871.
Q. What is your business?
A. I am in the sash and door factory and planing-mill busi
ness.
2457 Q. Where is your mill?
A. On Trumbull avenue.
Q. What kind of a mill have you?
A. I have a combined mill, you might say, as manufacturing

sash and doors in one part, the upper part, and the lower part exclusively applied to custom planing and so on.

Q. What is the size of your mill property there?

A. Well, the frontage is 150 feet and the main building I should say runs back about 55 feet.

Q. Have you railroad facilities in there?

A. No, sir, not any.

Q. You have been engaged in the planing-mill business and are familiar with it?

A. Yes, sir.

Q. Do you know the Backus mill?

A. I do.

Q. You have been in it?

A. Yes, sir.

Q. How often have you been in it?

A. Well, during the construction of it we got out the frames and any factory-work that was required. So I had occasion to go there frequently at that time. Since that time I have not been very often at it; of course I have been very busy.

Q. Have you been in there lately?

A. I have been there today.

Q. Been there within a week or ten days before?

A. Yes, sir.

Q. Will you please tell the jury if you have examined the machinery in the Backus mill, if you have looked at the machinery?

A. Yes, sir.

Q. And the shafting and all the equipments of the Backus mill?

2458 A. Yes, sir, I have examined it thoroughly.

Q. Will you please give the jury your opinion of the perfection of the mill, whether it is a good and first-class mill, and give us any comparisons you can as to the equipment and accuracy of the machinery?

A. Well, in my judgment it is the best mill I have seen anywhere, and I have seen a good many. Everything is put up in first-class style, without an exception, everything in it that I can see, and I have examined it now lately and it is as good as it can be made.

Q. The machines themselves you have examined?

A. Yes, sir.

Q. You found those in perfect condition?

A. Yes, all in good condition and perfect running order.

Q. Do you find the machinery with improvements for the accuracy of adjustment and for doing the fine work as good or better than any other mill you have seen?

A. Yes, I think it is in better shape, and there are some additional parts of the machinery there that I have never seen anywhere.

Q. That you have seen work and seen the advantage of?

A. Yes, sir.

Q. Are the machines you have examined at least as good as new?

A. I think so, in my opinion.

Q. What have you to say as to the improvements upon the machines and their connection and relation with the other parts of the mill, as to whether they are better now in the mill, with these adjustments you have referred to, than a new, raw machine would be bought and put in?

A. Well, I think that some of the machines, that those who have been using wood-working machines know that there are some parts that are sometimes too light and have to be remodeled a
2459 little, according to the work they have to do, and several parts of the machines there have been improved to that extent that they do the work fully up to what they are expected to.

Q. So that in that respect they are better than one put in new and raw?

A. Yes, I think so.

Q. Now, what have you to say in a mill of this kind as to the need for daylight?

A. Well, light, of course, is quite an advantage to see how the machine operates, you know. The man that takes away from the machine, as well as the man who works it has got to see to set his knives and adjust it, and the one that takes away has to follow the material up as it comes out and find out if anything is going wrong on a machine, so as to see that it keeps on working.

Q. Light is an essential?

A. I think so, yes, sir.

Q. What have you to say as to cleanliness being an essential, the presence of grit and soot upon the lumber?

A. That is a very, very important matter in planing.

Q. In this fine work of a mill of this kind, in doing the fancy work, will you state whether any mar or flaw upon the work will affect the market value?

A. Decidedly so, because if any grit is upon the lumber that is put through the machine of course it dulls the machine and the work becomes imperfect, you know, right away. Of course you cannot keep it, it is almost a matter of impossibility.

Q. It shows itself in the product at once?

A. Yes, sir.

Q. And to have it marketable is it necessary to keep the lumber, after it comes from the mill, in a cleanly condition, unmarked?

A. Yes, especially marks of soot and things of that kind.
2460 Now any ordinary dust, for instance sawdust, would not hurt anything in lumber, or any other dust, but soot and that kind of dust is very detrimental, the dust of smoke or soot.

Q. Have you observed the effect upon the Backus mill of the superstructure of this railroad on River street as to its effect on the light?

A. Yes, of course. I have been there today; I have been there once before, that is since the superstructure has been put up. This is the second time, today and the other time, and it has of course affected the light very materially on the lower floors especially.

Q. Did you see anything of cinders about there at any time

since you have been there since the superstructure has been put up?

A. Yes, I noticed cinders thrown all over the yard and all over between the buildings, picked up some today.

Q. Where did you pick them up today?

A. Some between the two buildings up almost to the chimney and then on a kind of a shaft next to the main building where the fans are, you know, and in that part there I picked some up and then I picked some up at the front door where they have their sawdust; that's the most—found them all over there lying on top of the fresh sawdust, cinders on top of it.

Q. You found there were cinders all about there?

A. Yes, sir.

Q. Have you got any you picked up?

A. I picked up some today. Mr. Backus came over to the mill and requested me to come over there and I picked up this just today noon. I picked up a few here that I have in the envelope.

Q. Did you pick those up yourself?

A. Yes, sir.

Package marked Exhibit De Man "1" and shown to the jury.

2461 Q. Could you see the soot and cinders on the finished lumber?

A. Yes, sir.

Q. Out in the process of transferring?

A. Yes, sir; there are trucks next to the machine operating right along and lumber being piled up on them and the cinders lay right on that.

Q. From your knowledge of the planing-mill business, and from your observation of this mill and of its extent and situation, what do you say as to whether in your opinion the business of the planing mill and fine work, such as their machines are capable of doing there, can be successfully carried on with this superstructure there and the trains running by, with the soot as you have seen it and the smoke from the engine, the distribution of soot and cinders upon the lumber and so on?

A. I think it is very detrimental in every respect, and I do not see how in the world they can do any good work in the shape it is in there now.

Q. In your business and in this planing-mill business the competition is close?

A. Yes, sir.

Q. Care must be used to make good goods and as cheap as possible?

A. It is most essential and especially where it affects the cutting out of the cream of the coarse lumber, of course, making nice strips and nice moldings and like that, and it is just cut and deposited where this thing is coming down on top of it and it is destroying the good lumber really that they get out of their culls and that they make into boxes. It destroys partly the value of it.

Q. What effect on lumber has it for oil finish?

A. It destroys it entirely.

Q. This mill is equipped for doing the best inside work of any mill you ever saw, is it not?

2462 A. I think so.

Q. And the best?

A. Yes, sir.

Cross-examination.

By Mr. BAKER:

Q. How far are you from a railroad?

A. Well, it is quite a great distance. I am on Trumbull avenue and Cherry, and the nearest railroad I can think of now is the Michigan Central, and that is a great distance from us.

Q. Fully a mile away, is it not?

A. Yes, sir.

Q. Where do you get your lumber?

A. We get our lumber mostly from Twentieth street.

Q. From the railroad or from a boat?

A. Most of our lumber comes by rail.

Q. From where?

A. It comes from all over the State; a good deal from Bay City, and so on.

Q. Do you sell any by wholesale?

A. No, sir, retail.

Q. Entirely for custom-work?

A. That is all.

Q. Did you ever operate a mill alongside of a railroad?

A. I never did.

Q. You have no experience with a railroad, then?

A. No, sir.

Q. How long have you been in the business?

A. I built my mill in 1882, I think, and I was in the business for eight or ten years before.

Q. You have been in the business fifteen or twenty years?

A. Yes, sir.

Q. What kind of a dust-arrester do you use?

2463 A. Well, I have a dust-arrester of my own. I don't believe there is anything like it anywhere.

Q. Have you got the Backus dust-arrester?

A. I have not.

Q. The burlap dust-arrester?

A. No, sir.

Q. Have you got the Allington & Curtis or the Cyclone?

A. No, sir, it is a rig I got up myself. I don't know of anything anywhere near like it. There is no impediment to the escape of the air that is blown into it; that is, it comes back. It is blown right into the shavings-house, and from the shavings-house, at the upper part, there is a vent, and then it comes down with the shaft and down into the ground, so that the air gets out, only it comes out downwards.

Q. You do not use any burlap or metallic dust-arrester?
A. No, sir.
Q. It is just a straight vent right through?
A. Straight vent, and then it comes down alongside the building. It is a high building. It comes down that air shaft and that drops all the light stuff there might be right on the floor and then gets out.
Q. That is, down on the ground at the outside?
A. Yes, entirely on the outside.
Q. How many men do you employ?
A. Well, anywhere from 45 to 50. It varies, you know, up to 60 sometimes.
Q. In busy times you would have about 60?
A. Yes, I think so.

MILES C. HUYETT, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. What is your firm?
A. I am in the heating and ventilating business now.
2464 Q. Have you been in the lumber trade?
A. Yes, many years.
Q. How many years?
A. About 12 years.
Q. Whereabouts?
A. Most of the time in Detroit.
Q. What was the business that you were engaged in?
A. Dressing and shipping lumber, car trade.
Q. You did a planing business?
A. A planing-mill business.
Q. Molding?
A. Yes, sir.
Q. And what class of work did you do, fine inside work?
A. A high class of work.
Q. Where was your mill?
A. At what was known as the Lake Shore and Milwaukee junction.
Q. What was the name of the mill?
A. M. C. Huyett & Company.
Q. How long were you engaged in that business there?
A. Four years, from 1880 to 1884. I think I went out there in 1879.
Q. And you have been all your life familiar with the planing-mill business?
A. Directly and indirectly been connected with it for about 20 years.
Q. And you have lived in the city of Detroit how long?
A. 17 years.
Q. Are you familiar with the Backus plant?
A. Yes, sir.

Q. Do you know its situation there with reference to its railroad facilities?

A. I do.

Q. On the Michigan Central. Have you been inside the mill?

2465 A. I have.

Q. Did you know the mill prior to the erection of the union depot structure on River street?

A. I did.

Q. What have you to say as to the mill, its equipment, and as to its facilities for doing first-class work prior to the erection of the union depot railroad structure?

A. I considered it first-class.

Q. Can you give us any comparison as to its being equipped to do first-class work with other mills?

A. I should say there is nothing to equal it in Detroit or its near vicinity.

Q. One of the finest in this part of the country?

A. Yes, sir.

Q. You say it excels anything in Detroit or its near vicinity?

A. I do.

Q. In what respect?

A. In the number of the machines and the sizes of them and their ability to accomplish results and in the arrangement.

Q. They showed, you think, in the adjustment and in the additions, in the appliances, the hand of experienced men?

A. The planing machines are of the best quality that are made in the country. I had similar machines in my mill only Backus bought larger machines, which gave him a greater scope of work.

Q. And do you know anything of the class of work they did prior to the building of the superstructure?

A. First-class work was what they were rated.

Q. All inside fancy work and in hard and soft woods?

A. Well, I don't know whether they did any—or how much

2466 coarse work they did outside of their box work, but their fine lumber was worked the same as I worked, that is, moldings and interior finish.

Q. All interior finishes they did?

A. Practically all interior finishes.

Q. In hard and soft woods?

A. They did some hardwood-work, I know.

Q. Now, what have you to say as to the need of light in a mill of this kind, whether it is an essential?

A. It is an essential element.

Q. That is daylight?

A. Daylight.

Q. What have you to say as to freedom of impurities of smoke and dirt?

A. Smoke and cinders will damage lumber.

Q. Is it a part of the business of the employés of such a mill to keep things clean?

A. It is.

Q. And to keep the product clean after it comes out, this fine product?

A. Yes, sir.

Q. And are these essential to the successful management of the business?

A. They are.

Q. Why is light so necessary?

A. First for the adjustment of the machines, and second, to enable the operator to discern defects that may originate in the knives by which defective work may be turned out.

Q. And how about the observation of defective work as it comes out?

A. In a poor light it could not be observed.

Q. I suppose different thicknesses might come out in different pieces without its being observed until they came to be shipped?

2467 A. It would be very difficult in a poor light to keep the adjustments as they should be for good work.

Q. You know the whole plant of the Backuses', their lumber yard and mill and storehouse?

A. Yes, sir.

Q. Run as one plant. What have you to say as to the advantages of this plant, this planing mill with its connections, the lumber yard and the storehouse, with two ground floors and its railroad facilities by the Michigan Central, prior to the building of the viaduct over other sites for the business?

A. That is, taking in connection their water front and its storage?

Q. Everything as you know the situation.

A. It could not be improved in my judgment.

Q. And how as to its situation for retail trade with the growing city of Detroit?

A. In my judgment it is a good location.

Q. What have you to say as to the competition in this sort of business they do there, in the product of their mill, as to whether the margins are narrow in the markets?

A. They are very close, that is the uniform testimony.

Q. I suppose that to make a large plant of this kind successful or a large plant of any kind successful depends largely on the great volume of business, economy in the work, the use of everything that is worked up and turned to good advantage, is it not?

A. It all hinges on these elements.

Q. And the utmost care in making a good product that will take with the market?

A. That is right.

Q. Any flaw such as comes from a dull knife in spots, or from want of proper adjustment of the knives or tools in the machine, affect the market value of the product?

A. It does.

2468 Q. Materially?

A. Yes, sir.

Q. If there is a defect of this kind upon a piece of lumber, does it throw it out from first-class grade?

A. It does.

Q. Makes a cull of it, does it not?

A. That is where they usually place them.

Q. Worth about half?

A. The seller usually has to take what he can get; he is at the mercy of the buyer.

Q. If there is much of this sort of thing in the product, I suppose it takes off the profits and makes a failure of what might otherwise be a success?

A. Yes, sir.

Q. Spoils the lumber, does it not?

A. It does.

Q. Now, have you had any observation as to the effect of this elevated road in going by there, upon this plant?

A. I noticed that it was dark on the operating floor.

Q. Did you notice from what the darkness came?

A. From the south side. It was darker than when I was in—I never noticed that there was objectionably darkness there in my visits prior to the erection of the elevated system.

Q. Prior to the elevated system it had its front and light from the River Street side? Was very light and bright, was it not?

A. It was ample, in my judgment.

Q. Since the elevated road you have been there and seen the passing trains?

A. Yes, sir.

Q. Does that affect the light?

A. Yes, sir.

Q. It affects it so as to make it a disadvantageous place to carry on the business?

2469 A. In my judgment it does.

Q. What effect, if anything, have you seen from the smoke of passing trains?

A. I could see the effect on the lumber, finished lumber. The dressed lumber was marked so that the smoke and cinders depositing on it—it was damaged.

Q. I suppose this was the dressed lumber awaiting transfer?

A. Waiting for shipment.

Q. Did you look into the lumber to see whether this extended through to any extent?

A. Wherever it was exposed it was perceptible.

Q. What have you to say, considering the narrowness of margin and the sharpness of competition, as to this mill as it was before the erection of the superstructure and the mill as it is with the superstructure and passing trains, as you have observed it, as to whether the effect has been material and serious on the mill?

A. In my judgment it has.

Q. In the condition in which it is now, with the passing trains over that superstructure and the superstructure as it is, would it now be a desirable place for a planing mill to carry on this fine inner

wood-work? Do you think a planing-mill man would take it for such a business now?

A. I do not.

Q. You have no interest in this matter at all?

A. None whatever.

Q. Have no business relations with Mr. Backus?

A. No, sir.

Q. Simply called here because you are familiar with the planing-mill business as far as you know?

A. That is all.

2470 Q. Will you give the jury your opinion as to the depreciation of the value of the whole plant by reason of this superstructure there from what it was before? Do it by percentages.

A. Does that include the storage yard as well as the other?

Q. Upon the whole plant, the storage-room, the storehouse, the planing mill; taken as one plant for the business there carried on?

A. Well, I should put it at half or near it. May I explain that?

Q. Certainly.

A. When they commenced switching through that lower yard I was through it then. That, I think, was while I was in business; in fact, I know it. Mr. Backus called my attention to the deposits of cinders and smoke in his stacked lumber in the storage yard, and it was a damage to it to sell it in the rough and a damage to it if it went to the planing mill, and made an important element of damage, inasmuch as a cinder would be constantly dulling the knives, knicking them and making the expense of dressing more and the incidental chances of damages that much greater.

Q. That was in the lumber yard below there?

A. In the lumber yard below.

Q. Now, irrespective of that. I am speaking now of the superstructure and not of the railroad that runs through the lumber yard, but the superstructure running up River street as it does and running by the mill.

A. I would consider it a damage of about one-half.

Q. And it affects the whole plant?

A. Certainly.

Q. Then you think it depreciates the planing mill one-half itself?

A. For the purpose for which it was erected and used, yes, sir.

2471 Q. Now, if it depreciates it half, you mean it depreciates it for the purpose of manufacturing this fine work, such as it is occupied to manufacture?

A. That is my idea.

Q. How much depreciation there you think before it will become a losing concern, with a tendency to absolute failure and bankruptcy, in the present condition of trade, with the narrow margins and the competitions?

A. With the narrow margins, the sharp competition, the increased cost in insurance and the increased cost of manipulating the lumber owing to the smoke and the cinders and the trains, it would

be a difficult thing for them to make a new dollar come back for an old one put in; I doubt if they can do it.

Q. You would not undertake to buy that plant or take that plant and carry on a planing mill with the investment?

A. I would not take it if I had the money, under the circumstances.

Cross-examination.

By Mr. BAKER:

Q. Where was your mill situated?

A. At the Detroit & Milwaukee junction.

Q. On which track, the Detroit & Milwaukee or the Lake Shore?

A. On the Milwaukee track.

Q. And on the Lake Shore, too?

A. The Lake Shore was probably five hundred feet distant from the mill.

Q. It was in the V made by the two railroads?

A. Yes, sir.

Q. How far above Ferry street? You think it is where they stop there?

A. I am not certain.

Q. You know what we call the Lake Shore junction?

2472 A. Yes, sir.

Q. And the Peninsular car works are there?

A. The north line of the yard is Harper avenue, I think.

Q. Of whose yard?

A. Of what was my yard then?

Q. But what is there between you and the junction?

A. There are no streets down there until you come the Peninsular car works office.

Q. Which side of you is Murphy & Wasey?

A. North.

Q. They were farther north?

A. Yes, sir.

Q. So that the Peninsular car works were situated right at the junction and you were the next plant above?

A. Yes, I was the next plant above.

Q. And you fronted on the Milwaukee road? Was there a street between you and the Lake Shore?

A. No, sir; there was the right of way of the Wabash if I remember, which was 60 feet.

Q. From where?

A. From my yard to the Lake Shore.

Q. Then between you and the Lake Shore the Wabash had a right of way?

A. From my yard west there was 60 feet right of way for the Wabash and then west of the Wabash is the Lake Shore right of way which is very wide there with no tracks on the east side of the main tracks.

Q. Well, it is all right of way then, is it not, from your property through to Russell street, all railroad?

A. No, sir.

Q. What is there besides?

A. The Peninsular car works backs up in there and the Huyett & Smith Mfg. Co., two and a half acres.

Q. They were in front of you on Russell street?

2473 A. Between Russell street and the Lake Shore right of way.

Q. They were west of the Lake Shore and you were east?

A. I was east.

Q. And between the Lake Shore and the Wabash and the D. & M.?

A. Yes, sir.

Q. What did you locate in there for?

A. On account of its railroad—in the first place, because I had to move.

Q. Well, you had to move from where you were?

A. We owned that land when we went there. We did not expect to make it a permanent plant. We went there temporarily but by force of circumstances, and finding the advantages of railroad shipping, we stayed there.

Q. Did you need railroads in your business?

A. Yes, we did.

Q. You had an abundance of them there?

A. Yes, sir.

Q. Did you use them?

A. Yes, sir.

Q. Have side tracks into your yard?

A. I had one running in right in front of the mill.

Q. Where did your lumber come from?

A. Partly by water and partly by rail.

Q. How large a planing mill did you have? What was the size of the main building?

A. Well, I have forgotten the size of it now, on the ground.

Q. Well, about how much, 200 feet long?

A. It was nearly 200 feet from north to south and about 80 or 90 feet the other way.

Q. Right alongside of the D. & M. road?

A. Alongside of the D. & M. road; a one-story mill.

2474 Q. Did you have windows on that side?

A. I had light all along that side and skylights overhead.

Q. Did you have windows right along by the railroad?

A. I had doors there that I would open up or close at will, but no windows on the D. & M. side.

Q. Your building was only one story high?

A. One story high, with skylights.

Q. That floor was on the same grade with the railroad?

A. No, it was on a level or a little above the car floor.

Q. That is, your first floor was on a level with the car floors?

A. Or a little above, I think.

Q. So that a car on your siding there would be on a level with the floor?

A. The floors would be approximately on a level.

Q. Did you have a side track right alongside of the D. & M.?

A. Yes, sir.

Q. Between you and their main track?

A. Yes, sir.

Mr. DICKINSON: How far was the main track away?

A. I think there were two side tracks. My recollection is they had a side track and I had a side track between the main and the mill.

Q. They have only one main track there, have they?

A. Yes, that is all.

Mr. DICKINSON: How far was that?

Q. Did they have a side track on the other side?

A. No, sir.

Q. They had one main track and then you think there are two side tracks, one of which was yours?

A. Yes, sir.

Q. And on your property?

A. Yes, sir.

2475 Q. The other one was on the railroad property?

A. Yes, sir.

Q. The right of way of the D. & M. there is narrow, isn't it?

A. The ordinary width, I think, about 100 feet.

Q. You think it is 100 feet?

A. Yes, sir.

Q. You never measured it?

A. No, sir.

Q. How far from your mill was it over to the first rail of the main track in your judgment? I don't suppose you ever measured it?

A. No, sir, but approximately it would be about 25 feet, from 25 to 30 feet.

Q. How long did you carry on business there?

A. Four years.

Q. When did you quit?

A. '84 or '85, I have forgotten which.

Q. Anybody succeeded to that business?

A. I think it has been run as a shingle factory since, no general lumber business conducted there.

Q. It has not been run as a planing mill since 1884 or '85?

A. I understand most of the machinery was taken out.

Q. You sold it out?

A. Yes, sir.

Q. Where was your mill before that?

A. I did not have a planing mill before that, I had my work done, custom-work.

Q. That was your experience in the planing-mill business?

A. No, sir, not——

Q. What kind of a dust-arrester?

Mr. DICKINSON: Wait a minute, he says, No, sir, not——

A. I had been running a saw-mill, I had been in the gen-
2476 eral retail and wholesale business, having my planing done by a planing mill to which I would send the lumber and have it dressed.

Q. Those four years were the only years in which you ran a planing mill?

A. In which I was actively engaged in it.

Q. Did you have any dust-arrester in connection with your power-house?

A. No, sir.

Q. What business have you been in since then?

A. I have been in the heating and drying business.

Q. Out on the Michigan Central?

A. No, sir.

Q. Whereabouts?

A. The business is all over the United States.

Q. And you have no plant?

A. No, sir.

Q. What do you sell?

A. Sell the machinery for drying and heating.

Q. You sell dry kilns?

A. Yes, sir.

Q. Patent on the dry kilns?

A. There was, yes, sir.

Q. Now, you saw the big planing machines down there on the first floor or the basement floor of the Backus mill, didn't you?

A. Yes, sir.

Q. Which end do you need the most light at, the end you shove it in or the end you take it out?

A. The end you take it up; you got to have it at both.

Q. Did you notice that Backus had new windows on that end, the end where you take it out, that there is a blind wall there?

A. I understand that.

2477 Q. You don't think that would be a proper way to locate a machine anyhow, do you?

A. I would locate them just as he has them.

Q. If you had that property?

A. If I had that mill.

Q. You think you would need some light and you ought to have the most light at that end?

A. That is where you want the most light, but you could not handle the lumber advantageously.

Q. Not from River street?

A. Not from River street, and have the machines the other way.

Q. That is, he would have to put his lumber in if he wanted to reverse his machine and use the River Street front? He would have to deliver the lumber to the machines and carry it around and shove it back?

A. Yes, sir.

Q. He is at a disadvantage in not having any light on that side?
A. He is as it is now. As it was before, in my judgment, there was sufficient light.
Q. Were you in there before to notice the light particularly?
A. I was in there before frequently, before the superstructure.
Q. Do you swear that there was enough light there before this superstructure was built to run those machines properly?
A. In my judgment there was.
Q. Did you ever run a machine there?
A. I have been in there and have seen them running time and time again.
Q. You never run a machine there?
A. No, sir.
2478 Q. Or had anything to do with them except as you observed as you passed by?
A. As a planing-mill man I would have criticised it on that point, I think, if there had been insufficient light.
Q. There was light enough there, then, although that is a blind wall?
A. In my judgment there was light enough.
Q. You say now that there is not?
A. There is not.
Q. And it is all due to this elevated railroad?
A. That is a damage to the light.
Q. Does the superstructure itself damage the light?
A. It does to a certain extent.
Q. Or is it the passing of trains?
A. Both.
Q. Which is the most?
A. The passage of trains, of course, adds to the limitation of light.
Q. But in your judgment the superstructure, as it stands out there in the street, perceptibly decreases the light at the north end of those machines?
A. It decreases the light in the entire basement.
Q. There is not any spot in the place where it is as light as it was before?
A. No, sir.
Q. Do you know how many feet away that is?
A. Well, I should judge about thirty or forty feet.
Q. Fully forty feet, isn't it?
A. No, I think not.
Q. About how far is it?
A. About forty feet.
Q. Does it decrease the light in that basement about as that building decreases the light here?
A. More so.
Q. A great deal more?
2479 A. Yes, sir.
Q. You can hardly see in there?
A. It is pretty dark.

Q. Did you have any means of lighting your premises out there?
A. No, I didn't run nights.
Q. Had no artificial light?
A. Oh, I worked nights sometimes, and when I did I used a lantern with a reflector, something like a headlight, only a short time in the busy season, when I would run nights.
Q. That is all unless Mr. Robison wants to ask you some questions.

By Foreman BAKER:

Q. How largely would electric lights overcome this difficulty you speak of?
A. Well, that is a difficult question for me to answer satisfactorily. Of course you can overcome it, but as to the practicability of its use, I cannot answer, for I have had no experience with it. With the artificial lights that I used with reflectors I found the men could not do as good work and maintain as good adjustments as they could with natural light.

By Mr. ROBISON:

Q. Have you ever been in any of the big planing mills?
A. Been in a number of the largest planing mills in the country.
Q. Where?
A. Saginaw.
Q. When?
A. About the time I laid out my mill plant.
Q. When was that?
A. That was in '79 or '80.
Q. That was before the electric light came into operation?
2480 A. Yes, sir.
Q. Have you been in a big mill lately?
A. Yes, I have been in large mills South.
Q. Lately?
A. Yes, sir.
Q. Have you been in any planing mill of any size whatever within the last year that did not have an electric light plant?
A. No, sir.
Q. They all have that, don't they, except Backus?
A. No, sir, they don't.
Q. Oh, I understand you to say you had not been in one that did not have it?
A. I misapprehended your question.
Q. What mills have you been in in Saginaw or Bay City?
A. I have not been in any there in two or three years.
Q. Only those South?
A. South. My business has not taken me into the Saginaw valley.
Q. You do not know that they all have electric light plants there, every one of them?
A. I do not.
Q. Every one of them of any size whatever?
A. I do not.

Q. How does this mill of Backus' compare with those at Bay City?
A. Larger with but one exception.
Q. Larger than any in Bay City?
A. Except one.
Q. Which one is that?
A. That was burned down, but I guess it is being rebuilt, Germain.
Q. About how does this compare with Germain's?
2481 A. The Germain mill is much larger; he had in a sash, door and blind part which Backus has not.
Q. The box part of it is a good share of the Backus business?
A. It is a part of it; it is a part of others as well.
Q. Of Germain's?
A. Yes, sir.
Q. And that is a mere incidental with his, isn't it?
A. That is for the utilization of what otherwise would be waste lumber.
Q. That is what this business is here, isn't it? It is waste lumber that is used mostly?
A. The box part of it is.
Q. You do think that Germain's mill is rather bigger than Backus'?
A. It was. I don't know whether he is rebuilding on as large a scale.
Q. Do you know about how many men he employs up there?
A. I do not.
Q. Don't you know that he employs 800 men up there working?
A. I do not; I don't know how many men he employs.
Q. Do you know Eastman & Company up there at Saginaw?
A. No, sir. I know of them, but I have no personal acquaintance with them.
Q. You don't know anything about their mill?
A. I don't.
Q. You say there is only one up there that you know of which is bigger than Backus'?
A. That is true.
Q. Will you undertake to say that there is not a great many up there bigger than Backus'?
2482 Q. Will you undertake to say that there are not a great many bigger?
Q. Do you know Mershaw's?
A. Yes, sir.
Q. How does that compare with Backus'?
A. It is no such mill as Backus'.
Q. Isn't it three times as large?
A. If it is it has been built up within the last three years.
Q. Well, within the last two years?
A. Well, is it possible.
Q. You don't know anything about the dust-arrester business?
A. I know something about them.
Q. Do you sell them?
A. I did, but not now.

Q. You are out of that business?
A. Yes, sir.
Q. You quit the planing-mill business entirely?
A. Yes, entirely.
Q. How many years ago?
A. Eight or nine.

By Col. ATKINSON:

Q. Have you ever seen a planing mill run with electric lights?
A. No, sir; I have seen saw-mills run with electric lights.
Q. Have you had occasion to notice how the light acts with reference to shadows?
A. I have.
Q. The differences in its operation in that way from the all-pervading light of the day?
A. I have.
Q. How does it affect work of that kind?
A. It is objectionable.
2483 Q. I suppose the shadows are somewhat dense from electric lights?
A. The sharp contrast as between the shadow and the bright light and the eye rising on the bright light, which it must necessarily do, when you come to use it, then on what you want to use, temporarily it affects so that a person has not the command of sight that he would in daylight.
Q. They have not the accuracy or sharpness of vision?
A. Cannot have.
Q. It becomes somewhat painful also to the eye, does it not, the contrast between the dark and the light?
A. Yes, it does.
Q. The extremes. Now, we are trying to get at what the real damage to Backus & Sons is, and I suppose the question of the jurors and what I would like to know is, would it be possible or would it not for Backus to make up for the loss of the natural light by an electric light plant down there at any cost, and if so, about how much? Make it so as to put them in as good position as they were before to do the business?
A. He cannot equal the natural light at any cost for the work.
Q. So that you think at no cost, no matter how much they were willing to spend in it, could they put themselves in as good a position as they were before, with reference to light?
A. I should say no.
Q. And as I understand you also, this light is a very essential thing in that particular business?
A. It is.
Q. More than in some other lines of business?
A. Yes, sir.
Q. Is there any other way that they could overcome that that you know of?
2484 A. No, sir, I don't think there is. There may be, but——
Q. Have you had occasion to observe much the operation of different kinds of business with electric lights?

A. Nothing except where I have observed it sawing lumber.

Q. Are electric lights at all subject to go out, accidents to the machinery or anything of that kind?

A. They are.

Q. They have not become so fixed that they are absolutely reliable then?

A. They are not. In the adjustment of the parts of a planing machine, if it was electric light that was used, he would have to have it movable so that he could move it to keep it in the proper position to get the light where he would want it. That is one of the objectionable elements.

Q. That is rather difficult with electric lights, to have them movable?

A. That would be an expense.

Q. Mr. Baker has an idea that you can carry them around to the barns as lanterns. You can move them, I suppose, in the same way that this light here is moved. (Referring to hanging incandescent light in the court-room).

A. That would be the only way it could be made portable. Then it would have to be lengthened out.

Q. I suppose in work of that kind the men often require both hands in the work they are at without having to carry a light around?

A. They require both hands in the adjustment of the knives.

Q. Then would it be practicable to work with these kind of lights, except at a great disadvantage?

A. Not unless they had somebody to manipulate the light as directed.

Q. Then I suppose it would be necessary that the two
2485 wills would operate almost together, to make it convenient to have it in the right place always. I suppose in your lumber yard up there, bringing the lumber especially by railroad, you would have occasion to notice a good deal of cinders from the locomotives?

A. Decidedly.

Q. It is true that all locomotives usually on our roads here throw cinders and affect lumber in the way you speak of?

A. They do.

Q. That you say is a decided disadvantage even to rough lumber?

A. Yes, sir.

Q. Does the disadvantage increase or decrease as you refine the product?

A. The damage is more of course on the better grades than it is on the low grades because a part of the low grades is sold in the rough where general milling business is not done. I did not do any box-work, consequently there was a part of my rough lumber sold without planing.

Q. Box-work, as I understand it, is an introduction into planing mills largely to use a class of lumber that otherwise would be largely lost?

A. Yes, sir.

Q. Do you ever in box-work take out from the rough lumber nice clear pieces?

A. Yes, sir.

Q. So as to get some first-class stock for moldings and things of that kind, from a rather inferior grade of lumber?

A. Yes, sir.

Q. I suppose there is a profit in doing that, where you have the proper facilities for doing it?

A. Yes, sir.

2486 Q. Now, as a business man, having no interest in this, and with your experience, do you know of anything that Backus & Sons can do with this structure down there to restore their plant to as good a condition as it was before this was built, at any loss to themselves than the percentage that you have fixed?

A. I do not.

Q. That is the minimum as far as you can judge of it? Now, have you had any occasion to observe the falling of cinders from the railroad, and whether they go up very high from the locomotives or whether they fall soon after leaving the mouth of the smokestack?

A. They are falling from very little above the height of the smokestack and some of them will go up 30 or 40 feet.

Q. But the higher the engine would be, then the greater danger there would be of spoiling that material below; it is not so liable to rise into the windows if the road is low as it is to come down where the road is high, in other words, I don't know that I make myself clear there. Which would be the most injurious? A road down on the grade level with the lower floor there or one up where that is?

A. The one high up because its range would go further away.

Q. That is, throw the cinders further?

A. Further than it would if it was low down.

Q. You say the smoke is also an injury to the lumber?

A. Yes, where it comes in contact with the lumber.

Q. Through soot?

A. Yes, sir.

Q. I suppose all smoke from locomotives would carry some soot?

A. All does.

2487 Q. So that you have given us, then, as conservative an estimate as you can of the actual loss?

A. I have.

By Mr. BAKER:

Q. Did you ever see a planing mill that was operated in the night-time with electric lights?

A. I have not.

Q. You never had any experience in the use of electric light, have you, any more than ordinary observation?

A. That is all.

Q. And you never saw a planing mill with a movable electric

light that hung right over like that (referring to the electric light in court-room)?

A. No, sir.

Q. Don't you know, sir, that to go into the recesses of the machine or in any other place that an electric light is superior to anything known?

A. If you put it in there.

Q. That is, you can put an electric light at places where you could not put a lantern or any other artificial light, couldn't you?

A. You could put it down to a smaller place than you could a lantern.

Q. Don't you know that they perform internal surgical operations inside of men now that they have got an electric light to put in there to illuminate the parts of the body?

A. I know that.

Q. So that when you come right down to it, if you are in shape so that you can use it, it is one of the best lights known for such a purpose, and if you had a dark machine or a dark place in the machine you could illuminate it in that way better than you could in any other way, could you not, if you had to go in there for anything?

Col. ATKINSON: You cannot run a planing mill with a light that would illuminate a recess of that kind.

2488 Q. You say they cannot do it? But if light is so very important and there are some places of a machine where you got to have light, it could be done in that way, could it not?

Col. ATKINSON: But in the adjustment of a machine, you do not have to go in those internal places with the light.

Q. I do not say you do, but I say in any machine where you did?

A. Of course that would be dark in that kind of a machine.

Q. A planing machine is not very difficult to adjust, is it?

A. It is.

Q. Describe that.

A. The knives are movable on a cylinder and the cylinder is fixed in relation to the bed.

Q. How is it adjusted in there?

A. It is slotted so that it moves.

Q. What do you move it with, a crank?

A. No, sir.

Q. What then?

A. You got to take a wrench and tap it, got to be gauged.

Col. ATKINSON: You are on two different operations.

Q. You don't know very much about these modern machines, do you?

A. I had modern machines, and Mr. Backus had the same kind.

Mr. ROBISON: Mr. Backus said he did his with a crank.

Q. How did you do it, with a hammer?

A. Usually did it, a man would adjust his tightening nut and gauge the knife and then he would tap it with a wrench until he

got his adjustment to his guage and sometimes he would have to drive it back.

2489 Q. It would depend on the accuracy in tapping it?

Mr. DICKINSON: They use a crank to raise the cylinder, but they always adjust the knife by hand.

Q. Suppose you are running a machine and start in in the morning, how often do you have to adjust it during the day?

A. Every time you nick a knife.

Q. Every time you have to take your knives out to sharpen them?

A. Yes, sir.

Q. Do you have to do it any other time?

A. Every time you nick a knife, and you can sharpen the knife without taking it out. You may nick a knife, but not bad enough so that you can sharpen it with a file, but if it requires grinding you got to take it out.

Q. If you don't nick the knife you don't have to change it, do you?

A. No, sir.

Q. Well, it is rigid?

A. It is rigid.

Q. When you once adjust it you don't have to change it unless something of that kind occurs?

A. Change it if you change the thickness of the stuff.

Q. Certainly. Of course when you change the thickness you would have to readjust it?

A. Yes, sir.

Q. Whereabouts is this nut on the machine, on top or down underneath?

A. They are practically on top. The cylinder is three or four sided, usually a four-sided cylinder, and you can usually turn your cylinder, and if your roll—there is a number of those nuts on each knife that holds each knife, and you can turn it so as to always have them on the roll side.

Q. Does the roll run in a slot; that is, the bearings of the

2490 rolls, the axle of the rolls—that is movable up and down?

A. I don't know which rolls you refer to.

Q. Well, the cylinder that the knife is on?

A. That raises and lowers, yes, sir, with a crank usually.

Q. The same as a wheel on a plow with a slot in it? You can move it up and down?

A. There is a slot in it, yes, sir, that goes between the two standards.

Mr. ROBISON: He doesn't know anything about a plow.

Mr. BAKER: Well, I am trying to describe something that I understand; that is all.

ABSALOM BACKUS, JR., recalled on behalf of respondents.

Examined by Mr. DICKINSON:

Q. Where were you born and when?

A. Herkimer county, N. Y., on the 7th day of December, 1824. I am 69 years old.

Q. How long have you lived in Michigan?

A. Twenty-five years.

Q. What business have you been engaged in in Michigan?

A. Manufacturing lumber.

Q. You are the Absalom Backus, Jr., after whom is named the Absalom Backus, Jr., & Sons corporation?

A. Yes, sir.

Q. You were the founder of this business, the planing-mill business?

A. Yes, sir.

Q. When did you found it?

A. 1868, I think.

Q. Where did you start it?

2491 A. At the foot of Eleventh street, in the old Richardson match works, on the south side of the street.

Q. When did you transfer to the present site?

A. In the fall of 1871 and '2. We built the new mill on the present site.

Q. Will you state whether you yourself studied and gave personal attention to the acquirements of the trade of this milling business?

A. I had to learn it from its incipient start.

Q. From the ground up?

A. Yes, all the way up.

Q. You are yourself a practical sawyer?

A. Well, I have always been engaged in mechanics. I am a practical carpenter and joiner from away back, and I came to Michigan and established a manufacturing plant at Au Sable, making lumber, and then to create a market for that lumber I concocted the idea of starting a planing mill in Detroit where I would have a place for my supplies.

Q. Will you state whether your planing mill has been a success?

A. It has in the main.

Q. When did your boys come onto the stage to assist you in the planing-mill business?

A. I took my two sons into the company in 1877.

Q. Were they active in the business?

A. Always worked with me from the time they left their school.

Q. And you brought them up in this business, did you?

A. Yes, sir.

Q. I think you took this business through the panic and hard times of 1873 and the following year?

A. Yes, I got through in some way. My boys were not quite as old, they were not old enough to help me very much at that time.

2492 Q. But you carried it through without failure, paid all your debts and pulled through?

A. We got through and saved our plant.

Q. Will you state how many acres you got in the lumber yard below there?

A. I think there is about seven and a half acres.

Q. With your dock front?

A. Yes, and something like 400 feet front by a little over a thousand feet in depth.

Q. How much dock front or outside dock front have you?

A. A little less than 400 feet. It gives me with my slip 1,300 feet of dock front. The slip is 1,450 in depth by 35 feet.

Q. Do you include in this the 60 feet of dock front which the union depot company enjoined you from building?

A. Yes, sir.

Q. You have succeeded in removing that injunction so that you use your entire front?

Mr. BAKER: I object to that; that is hardly material to go into any controversy down there.

Col. ATKINSON: It bears on the value of this plant and the injury done to it.

Mr. BAKER: No, it does not.

Q. I want to bring to the attention of the witness his entire dock, his extended dock. You include in your dock front now of 1,300 feet the 60 feet which you have recently undertaken to build out?

A. Yes, sir.

Q. Now, how much is there in the storehouse property on Fort street?

A. 200 feet front by, I think, it is 238 feet.

Q. On a corner?

A. 200 feet front on Fort street and 138 in the rear.

2493 Q. Now, will you please state whether this property, the lumber yard, the planing mill and the storehouse property, has been accumulated by you out of this planing-mill business that you carried on at this plant?

A. It has all grown out of this business; I had no other business.

Q. And what is your own estimate of the value of the lumber-yard property, with your 1,300 feet dock front?

A. Well, it has not been offered for sale. I rent it for $12,000 a year, which would be 4 per cent. on $300,000. I would not think of selling it for any such price.

Q. That is the first property that is not occupied by railroads from Third street down to your property?

A. It is the first property?

Q. It is the nearest property to the city in the hands of private owners?

A. Yes, sir.

Q. And you own it in one body?

A. In one body, yes, sir.

Q. Is there as large a piece of property as this any place between Third street and the city limits on the water front that does not belong to the railroad?

A. I could not tell as to that.

Q. You don't know of any below there?

A. I don't know of any. This property has a paved street right through the center of it, Eighteenth-and-a-half street, running clear down to the water.

Q. I suppose we will except the Voigt property?

A. Yes, I don't know how large that is. I guess likely that is larger, that is down farther.

Q. You rent the lumber-yard property to the Backus Company for $12,000 a year?

A. To A. Backus, Jr., & Sons.

Q. And the mill you rent for how much?

A. $5,000 a year.

2494 Q. And the company own the structure and machinery?

A. Yes, sir.

Q. So that you rent the ground for $5,000?

A. Yes, sir.

Q. And the storehouse property you rent for $1,000 a year.

A. $1,000 a year, $18,000 for the whole of it.

Q. Will you please state whether these rents are charged up as a part of the expenses and paid from year to year?

A. That is the way it always has been done.

Q. Who pays the taxes on the property?

A. A. Backus, Jr., & Sons.

Q. That is on the real property?

A. Yes, that is in the lease.

Q. Can you approximate the cost and value of the mill property that is situated upon this site, the planing mill, including the building and all the structures, machinery and boilers and so on; everything upon the bare ground?

A. In our late investigations it appears that it is about $200,000. I have always placed it at $150,000 in my testimony.

Q. This mill property is unincumbered?

A. Unincumbered.

Q. And has been paid for out of the business?

A. Yes, sir.

Q. I think this property burned down in 1882?

A. It did.

Q. And on the valuation you were short about a hundred thousand dollars' insurance, were you not?

A. $105,000. That was supposed to be the total and absolute loss.

Q. You rebuilt the new mill then?

A. Yes, sir.

2495 Q. How long did it take you in your business there, after 1882, to make up this loss and equip your mill and pay for it? It was a total loss, I think, to yourself and the insurance company?

A. Yes, sir.
Q. You had how much insurance?
A. I think it was $38,000 and there was some $25,000 of lumber at the time that was burned, stock.
Q. That was a loss?
A. Yes, sir.
Q. $33,000 I understand your son to say of lumber in the mill?
A. Perhaps it may have been so.
Q. So that your total loss was about $100,000, of your own loss?
A. It was absolutely $105,000.
Q. How long did it take you to make up this loss and equip your mill and get on your feet again from the loss?
A. About six to seven years, in 1889 I think it was.
Q. Now, take your business as it is running, this planing mill, will you please tell the jury what it has netted per annum over and above of course the expenses and the rent and taxes, the net returns?
A. As I make it out, and this is not from the books, but from the amount of property paid out, it nets $27,777 a year, figuring for 16 years. Of course that is the net percentage.
Q. It has paid the rents over and above this?
A. That is, exclusive of all expenses.
Q. Has it paid any salaries to the active managers?
A. $3,000 apiece.
Q. It has paid them $9,000 in salaries?
A. $9,000 in salaries.
Q. That has been charged to expense account?
A. Yes, sir.
2496 Q. And this $27,000 is estimated exclusive of that, is it?
A. That is the amount of money that has been taken out of the business from time to time.
Q. Over and above the salaries and rents and all other expenses?
A. Yes, sir.
Q. Up to 1892, I suppose?
A. Yes, sir.
Q. Now, did you inherit any money or property?
A. Nothing.
Q. You commenced with your naked hands, did you?
A. Yes, sir.
Q. In what business did you commence?
A. I was a carpenter and joiner by necessity. I commenced when I was 11 years old.
Q. And have been at it ever since?
A. Yes, sir, ever since. I worked building the telegraph two years. All the rest of my life has been engaged in business for myself.
Q. How did this come to be put into a corporation?
A. Well, I took my boys in as partners in 1877 and then we finally concluded we would form a stock company and we started off; I think my boys had a trifle more than half of the stock so

that they had the advantage of me. They could keep me straight and I suppose that was the reason.

Q. You were for improvements and they were for letting well enough alone, is that it?

A. Well, my boys have always worked hard and I have, too; we have attended to our business and we have been temperate and industrious and as prudent as we knew how to be.

Q. I suppose in your estimate of the cost of things, you do not include your own labor or the labor of your sons, do you?

2497 A. I think we never have.

Q. And yet you have been constantly and tirelessly at work all these years?

A. Well, each of us receives $3,000 salary.

Q. I know, but how much of the boys' and of your time has been put into the building, setting up of machines? You do not figure it, I mean, in the $200,000, the cost of the property?

A. I think not.

Q. The time of yourself and of your sons?

A. I think there was no account made of our time.

Q. And yet you have been constantly at work?

A. Well, we draw our salary of $3,000 a year.

Q. Yes, but that would not go into the cost of the building?

A. No, sir.

Q. I want to get at the cost of setting up your machines, where your time went in or the time you have spent in making improvements in the machines. Has that been charged to the cost?

A. I think not.

Q. And the making of this into a corporation was for the reason that you were advised that a partnership would dissolve the concern? And you wished to preserve it for your sons and family in case of your death?

A. As I understood it that was the proper way to arrange it so in case anything occurred the business would not have to be wound up.

Q. That is, in case of your death?

A. Yes, sir.

Q. It has been, has it not, the life-work of yourself and your sons?

A. Faithfully.

2498 Q. Now, tell the jury something of the care that has been given to keeping the machines perfect and to making the fine work and to improvements.

A. This plant is the growth of a great many years of patient and persevering toil and has grown out of the necessities as they arose years ago, back thirteen years ago. I conceived the idea that if I had a machine properly made I could do a great deal more work. I went to Boston and after considerable negotiations, S. A. Woods built me No. I machine; said at the time, Backus, that is a machine that I cannot sell, nobody else wants that machine. I said, All right, Woods, I want it, I have got business for it; I want it built and what will you build it for? He would build it for $2,200.

I finally closed a contract with him and he built me one machine, a thirty-inch double cylinder, dressing two sides at a time, broken roll—that is, a roll in two pieces, so that I could run in a thick board or a thin board and keep two boards going to the extent of thirty inches in width; then a pressure bar made in sections, so that let the piece be what it will, as it went into the machine it would hold it down, this pressure bar, some of the fingers would come up, and it would always hold the board down to the plate, the cast-iron plate or chilled-iron plate underneath. And it would carry the two boards continually without any interruption and they would both come out, so that they would come out two pieces. He built this machine and we set it to working. I immediately ordered another and he sent that. They ran successfully for about two years and then the mill burned down and I lost the machines. I wrote him immediately and he telegraphed me that he would come on immediately and see me. He came on here and I gave him an order for ten machines, seven of those large m chines, five of the large machines proper, and two large matchers n in all, we are running today of S. A. Woods' machines, I t k it is eleven, and count them the
2499 best there is in the marke. There may be some just as good, perhaps, but we have grown up with these machines, we showed him how to make them and we have rebuilt them time after time, some weak spot we would call his attention to and he has improved it, and today it is the outcome of the starting point that I gave him, and a year ago he said to me, Backus, I have sold fifty of those machines last year, the same identical machine that he said he would not ever sell any. It is very substantial and strong. We dress, I think, 60 feet a minute in length and twice that would be—well, you could dress 70 feet of lumber every minute. We calculate it is good for 50,000 feet a day, and on a wager it would run 80,000 feet a day, each one of those machines.

Q. How much is the total capacity or maximum capacity of your mill? With all the various machines, not alone planers and matching machines?

A. It would be safe to call it 300,000 feet a day of ten hours. We never have done it.

Q. When you commenced life as a carpenter and joiner, all this molding and planing was done by hand?

A. Always.

Q. And planing machines and planing mills have been a growth and you have grown up with it?

A. I have made many and many a door, hundreds of them by hand, sawed it out by hand and dressed it by hand, and I have paid six dollars a thousand for dressing, just surfacing lumber. I went at it and built a machine myself and made a success of it, and ran it a good many years.

Q. Where it was formerly all done by hand?

A. Yes, sir.

Q. Well, the planing-machine business and the molding-machine business, and all those we find in your equipment of the
2500 Backus mill, is the growth of improvement in the art and

labor saving in your own lifetime, since you were eleven years old, since you commenced as a carpenter and joiner?

A. It has all come out in my day.

Q. You have grown up with it, and watched it as it progressed, have you not?

A. I have. Such a thing as making a molding by machinery was not known at that time.

Q. Now, as to your other molding machines and other machinery in your mill, is it from your own knowledge the most perfect of its kind today anywhere?

A. We have made it as perfect as we knew how. We have spared no pains, we have given it great strength and constructed the various machines so as to give us the most work in the least time.

Q. What is the capacity for storage in your lumber yard and docks?

A. I think it is about 20,000,000.

Q. Your mill situated up on River street was selected to go with the lumber yard with reference with your business, was it not?

A. I got my eye on the piece and located there for the reason that I could have good facility for shipping by rail.

Q. Shipping your product by rail and receiving your raw material by water?

A. That is the two things together. I bought them in 1871 and '2, the real estate.

Q. And it is necessary for your mill to have a large assortment of lumber convenient to the mill?

A. It was. In our business it is necessary that we should have large room so that we can assort in widths and thicknesses as well as qualities. We do that in order to economize labor. We sort our lumber up to the half inch on the yard, seven inches and a half, eight inches, nine and nine and a half, and so on, so that
2501 when we get an order that calls for a box to be seven and a half inches high, we go to the seven and a half inch pile and we do not bring in eight or nine or ten inch; that would necessarily call for a great waste of lumber, but we economize.

Q. Mr. Baker constantly calls this a box factory down there. Will you state whether the making of boxes is anything else than to work up the material that cannot be used for anything else? Isn't it a saving contrivance, the making of boxes out of material to utilize as a part of the general plan all material?

A. Box shooks or boxes are usually made from a low grade of lumber, and our plan has been to utilize a low grade of lumber and refine it by ripping off one edge of a board, for instance, cutting a four-inch strip, or a six-inch strip, and in that way we raise the grade.

Q. You raise the grade of the raw material yourself, do you not?

A. Yes, sir.

Q. By trimming it?

A. Yes, sir.

Q. And then the other material may go into boxes?

A. Yes, sir.

Q. So that you utilize the box-manufacturing part in working up the refuse that would not be good for moldings or fine inside work? Is that so?

A. That is the way we have managed our business, we always used a low grade of lumber for the box.

Q. You make a higher grade of lumber out of a lower grade for the purpose of molding and so on, and you utilize the rest of the material in this way. You could not afford to do it any other way?

A. We could not do it out of this low grade.

Q. In that there is a profit and an advantage, isn't there?

2502 A. That is the way we have arranged it. We raise the grade by manufacturing this lumber. We buy that cull board and take a strip four inches wide or six inches and make it into clapboards or ceilings, or anything we want.

Q. Where have you found your market?

A. All over the Eastern and Middle States principally, some of the Western.

Q. You have been accustomed to sell your lumber in the East, your manufactured lumber?

A. Largely.

Q. Have you had any trade in Detroit?

A. We have quite a retail trade, a local trade.

Q. Did you have any trade at the mill on River street?

A. There was quite a large trade before they put this structure there.

Q. Exclusively on River street?

A. Yes, sir.

Q. That came there to you?

A. Yes, sir.

Q. How did that come?

A. There was a trade there. The people that traded there did not seem to know anything about our warehouse. Sawyer is the foreman at the warehouse, and Krombach is on River street. Krombach is a German and had a great many German friends, and those men came to give him their special trade, I suppose. We did a trade there that paid us all the way probably from two to four thousand dollars a year.

Q. Net?

A. Net, yes, sir. I mean the profits.

Q. That paid you about that, and how many feet of lumber was sold out there?

A. Well, I could not really tell you that. They came there and bought a little flooring or a little ceiling, and something for base-boards and for cornice, picked it out.

2503 Q. Came right there to the mill, and picked it out and bought it?

A. Yes, sir.

Q. It gave you a profit of from two to four thousand dollars a year?

A. I suppose it did, because our trade ran all the way from 25 to 30 thousand dollars a month.

Q. As high as $75,000 profit in a year it has run?

A. I do not mean that. I say we did a trade of from 25 to 30 thousand dollars a month.

Q. A retail trade?

A. Trade all around, this was a portion of it.

Q. What has become of that trade since the building of the superstructure, that Krombach trade or the foreman's trade at the mill?

A. I am advised that it has left us. I have not seen it myself, because I am not there, but I heard Mr. Krombach's testimony the other day that the trade has left him.

Q. Have you examined enough into the condition of the business, as you have gone along, to know that it had left since the building of the structure?

A. Yes, sir.

Q. You mean to say you only know from hearsay and inquiry because you did not attend to it personally?

A. I have no way to attend to it personally.

Q. But you know from the general run of the business that the trade has disappeared that paid you from two to four thousand dollars a year profit?

A. Yes, sir.

Q. Now, will you tell the jury whether the superstructure with the passage of these trains and so on, has affected your manufacturing interests there and how?

A. It is a most serious thing. It has ruined our lumber
2504 trade. The lumber trade has got to be given up. We cannot hold ourselves together. If we send lumber out, if we are not very careful about it, we have trouble with it, and I think it will eventually drive us away from the lumber trade entirely and we shall have to give our attention to something else. By lumber I mean the trade to the lumber yard, I do not mean box shooks. I have reference to the factory itself.

Q. That is the dressed lumber that you have dressed in your mill, the moldings and that sort of thing?

A. Yes, sir.

Q. And in that was a profit to your business?

A. That all helps. Of course there is quite a good many machines downstairs that are designed for that purpose.

Q. In what way have you been affected injuriously?

A. Well, I see that the insurance account has run right up. It scares me. I was looking it over and I have got my figures here, regardless of what Mr. Jones said, I have this all made up, and the way I have got it here, I find that it costs $5,215 a year more to insure than it did prior to this structure being there, and I have made it up in this way. This one covers $3,000 insurance on the power-house, and is raised 3½ per cent., from 4½ to 8 per cent., and it costs $105 additional to what it did before. $4,000 at 8 per cent. costs $320, and $10,000 at 8 per cent. costs $800. This is $17,000 on the power-house. Then there is $50,000 on the main mill over and

bove that we were in the habit of carrying, at 5½ per cent., making
2,625.

Q. That you were compelled to carry in addition. Formerly you
ere only compelled to carry $80,000?

A. Now we carry $130,000.

Q. The insurance companies required you to carry that increase?

A. They required that we shall carry 20 per cent. The
505 total is $5,215 additional insurance. Now, to produce that sum at 5 per cent., it is $104,300. That is so much for insur-
nce. Now, in order to get light as we have got to have it, if we
arry on this business, there will have to be an electric plant put in
here, and I estimate it as costing $3,000.

Q. Can you carry that on with an electric light?

A. I think we can put it in perhaps for $3,000. I do not think
ve can manipulate it for less than $1,000 a year, and I think that
s a conservative price.

Q. Have you seen the use of electricity in a mill yourself?

A. Well, I see it in general use all over the country.

Q. Do you think it can be efficiently used so as to do the business
s well as with daylight?

A. Well, I think it can be made effective, but it is a very search-
ng light and I do not know what the result will be on the eyes of
he men. It will be very trying on the eyes of the men that are
nanipulating it. This electric plant to manipulate it will cost
$1,000, it will take $20,000. You know that is for all time. They
ome here and take possession of this property of ours, and destroy
t, and I am merely showing what is going to be the result. It par-
lyzes me. I don't know what I am going to do. It looks to me
ust as if we were destroyed. This has been my life's work and I
have made a success of it, a magnificent success, it has got to be
dmitted by everybody that we are a thorough success, and now to
be destroyed, I have lost my ambition. I have not got half as much
ambition as my boys have, but I have got just as much determina-
tion, perhaps. I hang right on, I never give up. Now, this thing,
it is a terror to me and I am explaining it. Here is $104,000 it
costs, the interest on $104,000, to pay the insurance alone. The
electric light plant will take $20,000, for it costs a thousand
2506 dollars a year, and that makes $23,000 set aside for your electric light plant. Now, there is the loss of our business
on that street. It is gone. If we are making two thousand a year,
I will take the minimum, it is equivalent to $40,000. It is gone
forever and we cannot get it back. That total makes $169,300 that
it will cost to hold us as we were.

Q. Well, do you know whether you will be held as you were with
the electric light? Have you ever tried it?

A. No, sir, I did not. But I suppose we could probably get along
with it and accommodate ourselves to it.

Q. Is the light there so that it permanently and materially affects
the carrying on of your business, the passing of trains?

A. It is impossible, we cannot do it. We have put in a great

many gaslights. I think we have put on every machine now two, and yet we do it very imperfectly.

Q. In what way does the damage show itself?

A. Well, in the manipulation of the machinery. In setting the machinery, in keeping watch of the product, as it comes through. It is very important that the man, as this product comes through, should be so that he can see. If he does not happen to see an imperfection, perhaps we will run through three or four boards before we can find it out.

Q. What effect does the soot and cinders have upon the property, upon the product?

A. It causes us a great deal of trouble, it dulls our knives and when we are doing nice work, we have to stop and file up this knife or sharpen it, and that takes time.

Q. How is it in the course of transhipment to your storehouse?

2507 A. Well, if you wait until it is loaded on the wagon and goes out and it becomes dirty, of course that damages it.

Q. Has this affected your trade at all, this soot and dirt upon the lumber?

A. I have been informed from a good many sources that people would not trade with us because of this difficulty. A man that we used to sell a great deal of lumber to—what was his name, I forget?

Q. Henry Backus will be upon the stand.

A. He used to trade with us and he said his work required oil finish.

Q. Do you know yourself that it does affect it?

A. Yes, very materially, no equivocation, it is absolutely so. You cannot get around it. The fact that that lumber is mussed up and dirty calls for extra labor to make it good, and when it goes out of our hands somebody else has to dress it and they will all object to it.

Q. What is the condition of competition in the business now?

A. Very close.

Q. It always is close, isn't it?

A. It has always been very close since I have been in the business.

Q. I think you have survived of all the number of planing mills that were born in this city?

A. We have been since 1871 in this place.

Q. Will you please tell the jury whether it is essential that the product of the mill for inside work must be free from imperfections of all kinds in order to compete in the trade?

A. Our trade is what we call a jobbing trade; we sell to lumbermen largely and when a car-load goes to the East, to Boston or Philadelphia, or some place, we are at their mercy. If there is anything wrong, we have to accept the best terms we can. We cannot quarrel with them. If they say we got to take off $5 a

2508 thousand, we have to submit to it.

Q. Suppose you send out matched stuff that is uneven;

three-eighths-inch lumber is the order given, we will say, and lumber goes that is not of the same thickness?

A. If we sell seven-sixteenths and we send three-eighths, they write to us that there is a car-load of lumber subject to our order.

Q. Not only upon that but on that special grade of lumber, it impairs your trade and your repute and the good will of the business?

A. We lose the trade practically. There are a great many men when anything of this kind occurs, who will drop you and never say anything about it.

Q. What has been the practical effect upon your trade since the building of the superstructure? Has that been any different, in the volume of your trade, imperfections and complaints; has there been any falling off of your trade since the superstructure went up and trains commenced to run?

A. We have had to almost give up the lumber trade entirely.

Q. Is there any doubt about that?

A. Not any doubt.

Q. What do you embrace in the term lumber trade?

A. Well, flooring and molding, nice finish, casings, car siding, car roofing, and general house-building lumber for finishing.

Q. For oil finish?

A. Yes, sir.

Q. What does your trade now consist of, if there has been any change in the character of your business since this superstructure went up, please state what it is?

2509 A. Well, it has gradually reverted more particularly to our shook trade. We have given our attention to that because that paid the best of anything.

Q. It was formerly merely working up of the lowest grades?

A. No, sir; we never made our boxes that way. We always made our lumber out of large stock and we refined the lumber, as I have explained, by its taking a strip off the edge and that went into molding or flooring or clapboards or something of that kind.

Mr. Foreman BAKER:

Q. And the rest was used for boxes?

A. The rest was used for boxes; yes, sir.

Mr. DICKINSON:

Q. I suppose in the lumber yard the lumber is assorted, is it not, into high and lower grades?

A. We have to make grades according to the accepted methods in the trade, clear, second clear, selects, fine common, and then commons.

Q. And then as the lower grade of lumber comes up, as you have before stated, if there is any good pieces that could be used in the higher grade lumber, it was used, taken up?

A. We raised it in that way by ripping it.

Q. That is, you would make a great deal of high-grade lumber out of low grade that you make the boxes of?

A. Yes, sir.

Q. Then the lower grades you use for boxes?

A. Went into boxes and box shooks.

Q. You aimed to buy all lumber that would have good strips on it?

A. Always aimed to get as rich culls as we can.

Q. How far is the main track of the Michigan Central, over which their trunk lines pass, from the mill on the front corner, if you please?

2510 A. From the northeast corner of the mill it is about 80 feet. I had occasion to investigate that two years ago.

Q. Now, on the southeast corner, on the front?

A. It must be 400 feet.

Q. At the nearest point it is 80 feet away?

A. I think so; yes, sir.

Q. In what woods are your machines equipped to work?

A. All kinds of hard wood and soft wood.

Q. All inner finishes, either hard or soft wood?

A. Yes, sir.

Q. From the coarsest to the finest?

A. Yes, sir.

Q. Will you state to the jury whether, in your experience, and in the present condition of competition, it is or is not necessary to depend upon a large volume of business to make money?

W. We know that to be a fact.

Q. You cannot make money on a circumscribed trade, or a limited trade?

A. No, sir.

Q. You have been obliged to increase the volume of your business and make your margins very narrow to compete?

A. The larger your trade, of course, the better your margins will be. Your expenses are about the same; you got your engineer and your foreman and your book-keeper.

Q. How is it in business, in successful business, prior to the superstructure being built, of your depending for the larger part of your profits upon the fancy inside work in fine lumber?

A. Well, we used to make moldings for pictures by the car-load, and wainscoting, ceilings, and moldings that are sold by the in chin a retail way.

2511 Q. Have you tried, so that you know whether the men are able to accomplish what they did formerly in wainscoting, and fine trade?

A. I know it cannot be done. We have to have more help in the mill to manipulate this work. Even the ordinary work requires more men.

Q. But in this finer work?

A. This finer work we could not do it unless we have better light. We would have to rig up with electric light in some way before we will be able to do that work again.

Q. You do not attempt it now?

A. No, sir; it cannot be done unless you get good light.

Q. Is there any doubt of that?
A. Not a particle.
Q. You have been obliged to give it up?
A. We have.
Q. Since this superstructure?
A. Yes, sir.
Q. Is there any other reason?
A. There may be a reason. We have not had as much trade in that line and we know very well we cannot do it as well as we used to. It is so dark there that in order to see how to do it we have to get in some extra light.
Q. You made stair railing there, didn't you?
A. We did.
Q. Do you make any now?
A. No, sir.
Q. Casings?
A. Casings we make now.
Q. You made what is called the oil-finish lumber for oil finish, pilaster finish?
A. We did, of course. If we have an order for it. But we got to be very particular about it. I would not have it understood that we give up anything, we do everything that comes, we do
2512 the best we can. We never hesitate to do any job that is offered us, but we cannot do it with that economy that we used to do it.

Cross-examination.

By Mr. BAKER:

Q. When did you commence to buy property down there?
A. 1871.
Q. What piece did you buy when you first started?
A. I bought Darmstetter's.
Q. How many feet front did he have on River street?
A. Well, I cannot tell you.
Q. How much money did you pay him?
A. $14,000, and a thousand dollars to parties to get them off. That cost me $15,000, that lot of Darmstetter's.
Q. Now, of whom did you buy next?
Col. ATKINSON: Was this piece made up of smaller pieces before he bought it?
Mr. BAKER: Yes. Did you buy some of Coveyeau?
A. Yes, and I bought some of somebody else. Oh, you go on and tell the story and I will swear to it.
Q. You bought some of Coveyeau and some of Specht?
A. Yes, sir.
Q. Mrs. Specht?
A. No, sir.
Q. Now, your recollection probably was a little better about those things in 1891, when you were sworn before?

A. That is right, there is no equivocation, I am going to tell it just as it is and I can remember it.

Q. We are not raising any question about that. Do you remember that it is the fact or do you remember testifying that you bought the entire real estate that you own down there for about $35,000?

A. Something like that.

Mr. Foreman BAKER: That is the mill property?

2513 A. Yes, that is in 1871 or '2.

Q. You didn't get it all at once?

A. No, sir.

Q. Do you know how many purchases you made?

A. Four pieces; and we bought the piece of Specht that the Michigan Central owns.

Q. You deeded that to the Michigan Central?

A. Yes, sir; I only count four pieces.

Q. Now, your mill burned down in 1882, I think?

A. Yes, sir.

Q. At that time did you try to buy Mrs. Steadly's 65 feet that forms the jog there on your property?

A. Yes, sir.

Q. Did you not offer her $8,000 for it?

A. I think that was the price we offered her.

Q. Did she not offer to sell it to you for $9,000?

A. She did.

Q. And you refused to buy it?

A. Yes, sir; we concluded we could get along without it.

Q. That runs back about halfway, doesn't it?

Mr. DICKINSON: That is after you burned out?

A. Yes, sir. That runs back 150 feet.

Q. And she had a frontage of 65 feet?

A. 65 or 66.

Q. And it ran back about halfway or a little more than halfway?

A. A little less, 150 feet.

Q. How far is it from the Fort Street line to the River Street line?

A. I think it is 318 feet.

Q. Do you know how long your line is on the Michigan Central?

A. Well, it must be considerably more than 318 feet, it
2514 goes clear down. It commenced with the street and goes around, crooked; it must be 325 feet.

Q. Yes, and it may be nearer 400 feet.

A. 325 or 30 feet.

Q. Now, the Michigan Central railroad was there when you bought?

A. Yes, sir.

Q. You bought because it was there?

A. Yes, sir.

Q. And you bought the strip of land that your side track runs on and then deeded that to the Michigan Central?

A. That is our No. 3 track.

Q. Now, you have got a storage shed, haven't you, that runs right

along the Michigan Central line, that is built on this retaining wall, there?

A. Yes, sir.

Q. There is a shed upon each side of the side track?

A. That is down near Woodbridge street.

Q. But up by Fort street it is on the line of the Michigan Central?

A. Yes, sir.

Q. And further down there is a slip that you use and you have a shed on each side of it?

A. Yes, sir.

Q. An open shed, isn't it?

A. There are two sheds there.

Q. That is, there is no roof over the freight cars when they stand on the siding, is there?

A. There is no roof there where the car is.

Q. It is a sort of car slip on each side of the track; there is an open shed where you store lumber or anything you see fit?

A. Yes, sir.

2515 Q. Now, all the shipments that are made by rail from your place are made at that side track, aren't they?

A. On one of the three tracks.

Q. Are there three side tracks that go in there?

A. Yes, sir.

Q. Three side tracks you can use?

A. Yes, sir.

Q. Have you a shed next to all of them?

A. No. One track goes down next to the mill.

Q. This is close to the mill; there is a shed there, isn't there, that is up against the mill?

A. Next to the bank; one runs up from there to Fort street.

Q. Then there is an open space where the freight cars come in, and then there is another shed?

A. There is no shed over that; there is no shed over the No. 1 track.

Q. There is not any shed over any of the tracks?

A. No, sir.

Col. ATKINSON: I think they load on No. 1 directly from the mill.

A. Yes, this long shed is connected with the mill.

Q. Now, those slips are adjacent to sheds where you store the lumber that you are going to ship, or through which you handle the lumber that you are going to ship; isn't that true?

A. What are you talking about?

Q. I am talking about the Michigan Central side tracks there, to find out how you use those sheds.

A. We use those sheds to store our lumber in until we get a car-load ready.

Q. Put it out there until you get a car-load ready and send it off?

A. Yes, sir.

Q. That existed long before the union depot structure was proposed?

2516 A. Yes, sir.

Q. Just the same?

A. Yes, sir.

Q. With the Michigan Central running beside it?

A. With that track.

Q. Running diagonally along the property?

A. Yes, 400 feet away at the further end and 800 feet at this end.

Q. Certainly, but the space between the main mill and the Michigan Central main line is occupied by these side tracks and your sheds, is it not?

Mr. DICKINSON: A locomotive never goes in there.

Q. I am not talking about a locomotive; they have to back their cars in there.

A. Yes, they back cars in for us. I should think perhaps it would be better to have a map of it produced.

Q. I think you can describe sufficiently. What I want to find out is this: There are three side tracks you say you can use, and you have got sheds that are next to the tracks?

A. Between the tracks.

Q. Between the tracks you have covered sheds, haven't you, that have no sides on them, just a roof?

A. Yes, sir.

Q. You put your product in there, don't you?

A. Yes, sir.

Q. Before you put it in the cars?

A. Yes, sir.

Q. Or if you start in the mill with it, it goes through those sheds to go into the cars?

A. Yes, sir.

Q. That is what it was used for and what it was made for?

A. Yes, sir.

Q. Now, do you remember testifying on the former trial

2517 that that plant, machinery and all, cost you about $150,000?

A. I do.

Q. And that was true, was it not?

A. To the best of my knowledge at that time.

Q. To the best of your knowledge at this time?

A. At this time I know better. I know it has now cost us $200,000.

Q. You didn't know it then?

A. No, sir.

Q. You got onto that recently. That is through Henry's figures, I suppose?

A. Well, my figures and his.

Q. That included the machinery and everything?

A. Mill and machinery.

Q. You figure the main mill at $116,000, don't you?

A. That was what we called it; we had the bills to show, you know.

Q. You had the bills?

A. At that time you remember my testimony is that it had cost us, I believe, $150,000. You will find that in the book. I firmly believed it was so; but I know now better than I did then; I know it has cost us $50,000 more than that.

Q. You have figured that all out?

A. Yes, sir.

Q. Yourself?

A. Yes, sir.

Q. So that you know it positively?

A. Yes, sir.

Q. There is no question about it?

A. No, sir.

Q. Where are your figures?

2518 A. I have made it from time to time; I can explain any particular thing you want me to; I will give it to you.

Q. Is that the only explanation you have got to make, that you have figured it from time to time?

A. No, sir; but when you come to look it over and compute it, it will paralyze you.

Q. On certain bases it will, and on certain other bases it won't, of course.

A. When you come to look into it and figure up your molding knives, and you find there is $6,000 there, you will be scared. They are worth $1 or $1.10 an inch.

Q. Of course you got all the knives you ever had there?

A. Well, we are making them all the time.

Q. You got all you ever had?

A. No, sir.

Q. What do you do with a knife when it wears out?

A. It very seldom wears out.

Q. You keep it there to inventory, don't you?

A. I suppose so.

Q. It does not ever wear out?

A. They are used to alter over; we can make members of certain molders using the same knife.

Q. In this increased estimate that you are getting up for this trial, you include every knife that is in there—that ever was there?

A. All that are good.

Q. There are no bad ones there, nothing bad in the Backus institution?

A. No, sir.

Q. Nothing of that kind?

Col. ATKINSON: Except the smoke and dust.

Q. How many knives are there there now?

A. Well, I could not tell you; I don't know.

Q. Fifteen or twenty thousand?

2519 A. Oh, no; it is not necessary to have as many as that.

Q. How many—about as thick as plowshares around a arm?

A. They are solid steel—about three-eighths of an inch thick, and they are made at a great expense.
Q. Yes, they are made at a great expense.
A. There are cupboards to hold them.
Q. What do they cost an inch?
A. I think it is $1 or $1.10.
Q. You don't remember which one?
A. $1.10.
Q. That is, a planing knife that is ten inches long costs something like $20?
A. I am not talking about a planing knife, I am talking about a molder.
Q. Take the knife of a planer, a 30-inch planer, how much an inch do those knives cost?
A. I could not tell you. really; they do not cost so much as fine molding knives; I do not know; I cannot remember.
Q. Now, when did you make this lease?
A. You ought to know, you made the papers.
Q. When was it? I am not the witness.
A. When you were my attorney.
Q. I am not the witness now, and you are.
A. It must have been 1885; is it?
Q. '85 or '86?
A. Yes, I guess so.
Q. How long since you drew any rent on that lease?
A. It has been passed to my credit; I have drawn money when I wanted it.
Q. How long since you wanted any?
A. They have always paid me when I have asked them for it.
Q. You do not mean to testify that you are in receipt
2520 of $18,000 a year regular rent on that property, do you?
A. That has been passed to my credit every year.
Q. It is all to your credit yet, isn't it?
A. Oh, no.

Col. ATKINSON: What do you want him to do, spend it if he does not need it, or save it?

Q. Do you mean to say that you are receiving that right along as a stranger would?
A. Just the same.
Q. It is entered up on the books, and when you want a few hundred dollars I suppose you go and get it?
A. If I can get it.
Q. If you can! You are not in the business any longer, you have turned it over to your sons?
A. I have turned it all over to my sons.
Q. Who fixed that rent?
A. It was agreed among us at the time you made up those papers.
Q. Who made the bargain?
A. It was amicably agreed, all around.
Q. Well, who were the parties?

A. The three parties.

Q. It is an agreement all in the family, isn't it?

A. Yes, sir, no one else.

Q. Now, do you mean to tell this jury as a business man, an old experienced business man, that you can run any lumber yard and pay $12,000 a year rent?

A. We have.

Q. You have, but do you think a lumber yard can be carried on successfully and pay $12,000 a year rent?

A. I guess if we did a good business we could do it.

Q. You would have to have a very good business, wouldn't you?

A. With a good business it could be done.

Q. Usually they put lumber plants where the rent is
2521 cheap and where the land is cheap, don't they, as a general thing?

A. We do not all see these things alike. I located my business to suit my business and I think I made a success of it.

Q. Well, if they can pay such rent as that why don't they come up to Woodward avenue somewheres and have a lumber yard; is there any reason why they should not if they can stand such rents?

A. We would not have any occasion to do so. We don't want to start any more lumber yards.

Q. Do you mean to tell this jury that that dock property down there is worth $800,000?

A. No, sir.

Q. What is it worth?

A. At 4 per cent.——

Q. I don't ask you that question, that lease matter must stand on its own basis; but suppose you were to start out today to sell that property and you found somebody that wanted it, you don't think you could get $800,000 for it, do you?

A. No, sir.

Q. You know what the market value of property is, and I would like your judgment as to what that property is really worth, as vacant dock property?

Col. ATKINSON: I object to this. I don't understand that the railroad company wants that property, but they want Mr. Backus to put a valuation on it. I don't think it is fair in a lawsuit to try the question that is involved in another.

The COURT: Isn't that one of the real questions in this case, the question of the value of the property?

Mr. DICKINSON: He has not sworn that it is worth $800,000.

Mr. BAKER: Henry swore it is worth $800,000.

2522 Mr. DICKINSON: No, he didn't.

Q. What did he swear to?

A. $600,000.

Q. Do you want to testify—a business man of your experience, having lived here as long as you have—are you willing to testify that that property is worth $600,000?

A. It is worth what it will bring, I think.

Q. Now, I don't ask you that question.

A. I have given you my testimony that that property is rented on a basis of $300,000.

Q. But that is that family lease.

A. It is not for sale.

Q. Where one pocket washes the other. I am talking about business; I am talking about selling that property to somebody that wants it, and what it is worth.

A. I think anybody could buy it for $600,000.

Q. They could buy it for that?

A. Yes, sir.

Q. But suppose you wanted to sell it and was not forced to sell it, just simply wanted to sell it, and you found somebody that was not forced to buy it, just simply willing to buy, and that is what they say is the market value, what estimate would you put on it then?

A. I have got to take into consideration this great plant of ours.

Q. I am speaking independently of that for the purposes of this case; I want to know what that land is worth.

Mr. DICKINSON: You cannot speak independently of his business.

Q. I am not talking about your business because it is a great gold mine, but I am talking about other business. I want to get your judgment as to what it is worth.

A. In connection with the mill?

Q. No, sir, the saleable value of it.

2523 Col. ATKINSON: On the basis that you are there destroying the mill?

Q. No, sir, I am not asking Col. Atkinson questions, but I am asking you, Mr. Backus, and I want to get your honest judgment.

A. I don't know what your object is in getting me to say. You don't want to buy; if you want to buy I will treat with you.

Q. I have no doubt.

Col. ATKINSON: He really does want to buy, but not to say so.

Q. As cross-examination bearing upon your testimony in this case and the credit that is to be given to it, I would like to know your estimate of that property.

A. I have told you that it could be bought for $600,000.

Q. You don't want to answer that question, do you, Mr. Backus?

A. Is it necessary that I should?

Q. Not absolutely necessary; you do not want to answer it, do you?

A. I would like to accommodate you in anything that is proper.

Q. It is not to accommodate me. Now, one other question. What do you value that mill property at?

A. That mill property, if I could be let alone, is worth solid $300,000.

Q. The land is?

A. No, sir, I mean the mill and the land.

Q. That is $150,000 or $200,000 for the plant?

A. It is about $125,000 for the real estate, and it would make it $175,000 for the other—taking the whole thing at $300,000.

Q. Do you think that a planing mill can be carried on success-

fully on a piece of real estate that costs $125,000? It is too expensive for any such business.

2524 A. If you would let us alone we were doing very nicely.

Q. You were doing business, were you not, on what it cost you?

A. Yes, sir.

Q. There is some difference between $125,000 and $35,000?

A. Well, I have not looked at it—it has not been for sale, and was offered once, you remember $150,000 for that real estate.

Q. Who offered that?

A. Don't you know him?

Q. I do know him; Luther Beecher offered that. Did he have the money with him?

A. He was ready to buy it.

Q. Did anybody but Luther Beecher ever offer you $150,000 or $125,000 for it? What was it? I didn't catch the exact sum.

A. $150,000 he said he would pay us.

Q. What year did he offer you that?

A. Three years ago, was it not?

Q. That was when he was building his tunnel down there?

A. He wanted to buy it for the railroad companies; I suppose for the union depot company. I expect that was what it was for.

Q. Do you know in regard to that?

A. I know he and Mr. Joy were over——

Q. Do you know anything about it?

A. Only what I surmise.

Q. It is all surmise, isn't it?

A. Yes, sir.

Mr. Foreman BAKER: This was for the real estate alone?

2525 A. Yes, he says take off the buildings and I will give you $150,000 for it.

Mr. DICKINSON: You refused it, didn't you?

A. I did refuse it. That mill cost too much money and it was too valuable.

Q. That involved tearing it down?

A. Yes, sir.

Q. I suppose if it had been vacant at the time——

A. I would have let him have it quick.

Q. So that as a piece of real estate you don't value it at $125,000, do you?

A. I do.

Q. Suppose your mill would burn up tonight, and you are old and are getting out of the business, what would you value that real estate at then?

A. I would sell it for $100,000. I would, rather than to build up again.

Q. Do you think you could get that?

A. I don't think I could, with that railroad there. If the railroad was not there I could.

Q. If the railroad was not there you could get that?

A. I think so.

Q. Will you tell us what business there is on earth that could locate on that and exist with such a capitalization for the land?

A. There is a mill situated so that I have 350 feet of front on the railroad, I have got three tracks, 500 feet of tracks right there on that railroad, and I can load on any of these tracks; then there are two ground floors; you cannot find such a place, you might go the world over.

Q. I know you could find some very convenient places for business, but when you come down to values, you got to depend on a purchaser.

A. Yes, sir.

2526 Q. A planing-mill business could not stand any such capitalization?

A. It did stand it.

Q. Is that true?

A. Yes, it is true.

Q. You only gave $35,000 for it, so you say. Suppose you were obliterated today and you were going to start a planing mill; what I want to know, Mr. Backus, from you, is, as a practical man, whether you would start in with a piece of real estate that cost $100,000. And I would like to know if the business will stand that sort of a plant?

Col. ATKINSON: Suppose you let him answer that in the morning.

Mr. BAKER: I am perfectly willing if the court is.

Adjourned till next day, October 31, 1893.

OCTOBER 31ST, 1893—9.30 a. m.

ABSALOM BACKUS, JR., recalled for further cross-examination.

By Mr. BAKER:

Q. At the adjournment last evening I was asking you about the planing-mill business and whether if you were starting in to start a planing mill, to build a new planing mill, you would think it advisable as a business man to buy a piece of real estate that cost $100,000 or over for the location of the mill?

Objected to as incompetent and immaterial.

Mr. BAKER: I have this witness on cross-examination.

Col. ATKINSON: How can it be material? Now, your honor, I think that question is very misleading. These respondents have a plant located there; what are they to do with it? They are running a planing mill on it. Mr. Baker's idea that nobody, if

2527 they wanted a planing mill, would buy it, should not affect their situation. They bought it when it was cheaper.

Mr. BAKER: I should prefer to state my own ideas in regard to it.

Col. ATKINSON: It seems to me that whether anybody would invest that much in a planing-mill site is not material. I suppose the inference that Mr. Baker wants to draw is that it cannot be worth as much as that because nobody would invest that much in

a planing mill. Now, that would be a very illegitimate conclusion. I cannot see how it is material to the issue at all as to whether anybody would invest $100,000 in a planing mill, and I think it is misleading.

The COURT: I think I will admit the question.

Exception for respondents.

Q. The question is, suppose you were going into the planing-mill business, suppose you were burned out, or sold out, or got rid of your property and you were 40 years old and were going into business again, is this business of such a nature that you could afford to, or that it would be good business for you to buy a real-estate site for it that would cost $100,000 or more?

A. That business paid very largely up to 1882; it paid a percentage on a good deal more money than that.

Q. Will you please answer the question as to whether you would do that?

A. It would depend upon the location. I located there because it was very convenient for shipping.

Q. But would you locate now; would you pay $100,000 or more for a piece of real estate? Would any sane man purchase such a piece of real estate to locate a planing mill on now?

A. No, sir, I would not. Regardless of the real estate I would not put the mill there.

2528 Q. I want to ask you that question with reference to the value of the property and not with reference to its surroundings; would you buy any piece of property for a planing mill that would cost $100,000?

A. I have already paid that, Mr. Baker.

Q. We understand that, but I am asking you whether you would now in locating a planing mill in this city——

A. With the railroad in front of it?

Q. No, sir. I am not asking you anything about the railroad in front of it.

Col. ATKINSON: Do you mean without this structure?

Q. Without this structure, or without considering anything, would you put $100,000 into a plant?

A. No, sir, I don't think I would.

Q. Well, I supposed that was true and I supposed you would testify. Now, you figure out a very large damage here, and you start out with the item of insurance. Do you know how much insurance you carried before the union depot was built?

A. I think it was about $80,000.

Q. And you have increased that to $150,000?

A. $130,000. That is $50,000 more.

Q. This 80 per cent. clause in the policies of the companies came out about the same time, didn't it?

A. Well, I cannot tell you.

Q. When did you first have it in your policies?

A. I really could not tell you.

Q. You don't remember?

A. No, sir.
Q. It was stated here that it was a year ago last August?
A. Well, Mr. Jones was the proper authority.
Q. But you don't remember?
A. I do not.
Q. Now, has that 80 per cent. clause got anything to do with your taking $130,000 worth of insurance?
2529 A. What do I understand? We have to carry the 80 per cent. in addition. Then it doesn't cover it, it leaves us then exposed $69,000 yet, uninsured.
Q. Did you attend to that insurance yourself?
A. No, sir.
Q. Don't you know that that $130,000 is 80 per cent. of the supposed valuation of your property?
A. No, sir; I do not.
Q. Isn't it true that that $130,000 is supposed to be for the purposes of insurance, and unless it is challenged by the company in any way, 80 per cent. of the actual value of the property?
A. I suppose that is the usual way they look at it.
Mr. Foreman BAKER: That also includes the stock in the mill, that $130,000?
A. Yes, sir.
Col. ATKINSON: It includes $15,000 worth of lumber.
Mr. Foreman BAKER: Yes.
Q. That is $30,000 on the main building, isn't it?
A. Have you got the schedule there? I cannot tell.
Q. Yes; and $68,000 on the machinery and $15,000 on the stock, $7,000 on the power building and $10,000 on the engine and boilers, and so forth, according to the schedule.
A. I guess that was right.
Q. Now, has that 80 per cent. got anything to — with your taking this $130,000 of insurance?
A. We figure that that is eighty per cent. of the value. Then the 20 per cent. represents $26,000.
Q. If you did not take $130,000, your insurance would be reduced proportionately; that is the way you understand it?
A. This was figured before we had this inventory of machinery, or anything of that kind.
2530 Q. Of course that is the estimate that you and the companies made as the basis for the insurance?
A. On this basis it makes it that the insured property is $156,000; $130,000 and 20 per cent. more, that would make $156,000.
Q. Your policies are in all for $130,000?
A. Yes, sir.
Q. With this 80 per cent. clause inserted?
A. Yes, sir.
Q. Now, upon that $80,000 before this superstructure was built you paid 5½ per cent.?
A. Five and a quarter per cent. and four and a half.
Q. What was the four and a half on?
A. The power building.

Q. I am not talking about that. I am talking about the $80,000 on the main building. You paid five and a quarter?

A. Yes, sir.

Q. You still pay that?

A. Yes, with this 80 per cent. clause.

Q. Do you know how your old insurance of $80,000 was divided?

A. I don't.

Q. You don't know how much was on the power-house and shavings-house?

A. No, sir.

Q. Now, you have made some investigation of the electric light business, I suppose, with reference to your mill?

A. Nothing particularly.

Q. Where did you get your estimate that it would cost $3,000 to put in a plant?

A. It is my own idea about it, I have not investigated any. I know these things are pretty expensive; you got to have your engine and dynamo and we would have to have a great many lights.

2531 Q. You have very powerful engine and boilers there, haven't you?

A. Nothing big enough for that; we haven't got any power to spare.

Q. Well, what authority have you got for this $3,000 estimate?

A. My own judgment.

Q. And it is your own judgment that it would cost $1,000 a year?

A. I know it, sir.

Q. How do you know it?

A. Because you cannot make the power; you cannot generate the steam and give the care you ought to for one cent less than $1,000 a year. That is plain common sense. Those things cost money.

Q. Still you have no familiarity with the business, never put in a plant and apparently——

A. Oh, I have seen them a hundred times.

Q. You have seen them, but this is entirely guess-work on your part?

A. Well, guess-work is as good as any if you guess right.

Q. Have you any way of telling us how much your retail sales in Detroit have been at any time?

A. No, sir.

Q. Have you any way of telling what your aggregate sales have been?

A. No, sir.

Q. Now, what do you call this lumber trade that you say you have lost; that is just the simple handling of dressed lumber?

A. As I explained yesterday, the lumber trade goes to the dealers all over the country.

2532 Q. I know, but all there is to it, you bring it down in vessels to your wharf down there, and you haul it up and dress it and match it?

A. Some of it is dressed and matched and some of it is not. Usually we dress everything.

Q. Sometimes they buy lumber right out of your yard?

A. Not often. Most of the wholesale trade passes through the mill.

Q. Of course, you haul it up there, and I suppose you sell in a year a large amount of dressed flooring, flooring that is matched and all ready to lay?

A. We sell some.

Q. But all you have to do is to draw that up and dress it and match it? You got one machine that will do that, haven't you?

A. We got three or four machines.

Q. I say a machine that will do it all?

A. Three machines will do that.

Q. One machine will dress a board and match it at the same time?

A. Yes, sir.

Q. So you shove it through that machine and into those freight cars and away it goes? Isn't that the way?

A. We would haul the lumber up and run it through the machines and place it in the cars when we get a car.

Q. Suppose a man should come down there and buy of you 40,000 feet of flooring today, that is the process it would go through, would it not?

A. Flooring is a very small part of the business.

Q. I know it is a small part, but we can only get at your business in detail.

A. All right.

Q. And the flooring is a standard article that goes all over the United States, does it not?

A. Yes, sir.

Q. And it is just so with any molding; I suppose the
2533 moldings are of a variety of shapes, from the simplest to one that is complicated and expensive?

A. Molding is something that has got to be handled with great care, and you got to have your machinery adjusted.

Q. Suppose you make a bargain with some one down East somewhere for a certain quantity of molding, three or four car-loads. Do you ever do that?

A. No.

Q. How much?

A. Perhaps a half a car-load, possibly a car-load, but not often.

Q. Would you manufacture that when you delivered it or would you have it up in the storehouse?

A. We have to manufacture it from time to time. It would take two or three weeks to manufacture a car-load of molding.

Q. That is of assorted molding; do you ever have an order of one kind for a car-load?

A. No, sir.

Q. But you would go to work for the most part and manufacture it after you got the order?

A. That is our rule. We make nothing in stock.
Q. And you do not keep a large stock in your storehouse, do you? It is more the remnants of your business?
A. What do you call a large stock?
Q. I mean the bulk of the product of your mill does not go to the storehouse?
A. No, sir.
Q. As I understand your son's testimony, you would have some remnants, a little over from the order, and they would go up there to the storehouse until you could dispose of it. Isn't that true?
A. That is the way, but at the same time we dress a great
2534 deal of lumber that goes right to the warehouse directly.
Q. Where you dress it not under orders?
A. Yes, sir.
Q. Where you dress it and simply put it up there to store it?
A. Yes, sir.
Q. You do not store large quantities of lumber down there in the mill, do you?
A. No, sir.
Q. Are you the patentee of your dust-arrester, individually?
A. Yes, sir.
Q. Do you remember the date that your patent was issued to you?
A. I do not.
Q. Long before your mill burned up, in 1882.
A. I think it was in 1882, perhaps just before the mill burned up.
Q. You testified at the former trial of this case in June or July, 1891, didn't you?
A. Yes, sir.
Q. Did you testify on that trial that you did not think any of your dust-arresters had been put in in four years?
A. I cannot remember.
Q. Well, I will read the question: "With the exception of the Winona case, do you know of a man that has put this in for three years. A. I don't think any of mine have been put in in four years." Did you so testify?
A. If it is there I testified so, most assuredly.
Q. That was true, was it not?
A. Why, I calculate everything that I say is true, Mr. Baker.
Q. And you adhere to that testimony?
A. I don't know of anything to the contrary.
2535 Q. That is all I want to know. Four years back from 1891 would take it back to '87, wouldn't it?
A. It would seem so.
Q. And you patented in 1882, and commenced the sale of rights for it in 1882?
A. Why, our testimony is all the way through that way.
Q. So that you were in the business and conducted the business from 1882 to 1887?
A. It seems so.

Q. About how many did you sell altogether?
A. I could not tell you.
Q. Fifty or sixty?
A. Yes, I think so.
Q. Did D. M. Ferry & Company in town here have one of yours?
A. Yes, sir.
Q. They burnt down and built up again, didn't they?
A. Yes, sir.
Q. Did they put yours in then?
A. No, sir.
Q. They make their own seed boxes, don't they?
A. Yes, sir.
Q. The power-room, as you call it, is where the boiler and engine are?
A. Yes, sir.
Q. Is there a solid brick wall between that room and the shavings vault on the south?
A. The vault to the south is the sawdust-room. There is a solid brick wall running from the wall clear up to the roof.
Q. Isn't there a hole through it?
A. There is a door that is closed when we are not using it. It is a solid brick wall with a door that lets out into this place where we load the shavings when we sell them.
2536 Q. I know, but that is in the alley to the court, the door to it?
A. No, there has to be a door above to put out into the wagon through this brick wall.
Q. That is out in the court?
A. No, sir, it is inside, as we open the door. Then there is a chute down here right in this place where they back the wagon in, as you open your door and put the shavings in, which goes down into the wagon, and then the wagon goes out here (illustrating).
Q. What I want to get at is, whether that wall that separates that sawdust vault and the power-room is a solid wall or not?
A. It is a brick wall from the ground to the roof, with the exception of this one door.
Q. Where is that?
A. Right in the center of it, up on the second floor.
Q. It is in the engine-room?
A. No, sir.
Q. But it is not in the boiler-room?
A. No, sir.
Q. What do you use that door for?
A. That is where we shove the shavings down in, when we load them to sell, this wagon is on the lower floor and these shavings are on the second floor. We have to open the door and put the shavings in the wagon, and then the man draws them out and goes out with the shavings.
Q. The floor of the sawdust vault then——
A. That is on the ground.
Q. And from the boiler-room and engine-room there is no door

that opens into this vault, is there? It is on the next floor above, this door is?

A. Do you mean for the shavings?

Q. Yes.

2537 A. There is a large opening, seven feet by four feet, where the shavings go down to the fire-room.

Q. Where does that come from?

A. From this overhead.

Q. Does that come right from the pipe?

A. Comes from this large store-room, comes through this big place and falls down here and lets the shavings down as the fireman wants them.

Q. Are they drawn in front of the boilers there directly from this sawdust vault?

A. No, sir, from the shavings vault.

Q. Well that is from still farther away, isn't it?

A. No, indeed. The shavings vault is right square over this fire-room and the boilers and engine. The shavings vault is a long place, probably forty feet long.

Q. There is a long building there that is a shavings vault and sawdust vault and part of the engine-room. Now, is it true that a part of this shavings vault is right over the boiler-house?

A. And the engine.

Q. Right over that?

A. Yes, sir.

Q. And you draw it from that——

A. Right in the center of that place down into this place.

Q. This is entirely for shavings?

A. Yes, sir.

Q. Where are the sawdust vaults?

A. At the front end.

Q. The River Street end?

A. Yes, that comes clear to the ground.

Q. This wall that separates the engine from the sawdust vault is the solid wall that we have been talking about?

A. Yes, with a door in the center.

2538 Q. On one side of it is the shavings vault and on the other side is the sawdust vault?

A. That is right.

Q. And up on the second floor there you can go from one to the other?

A. No, they are not connected.

Q. That wall is solid then?

A. No, sir, the door—it is hooded over, as we open this door it opens into the shavings-room, and over there is the sawdust on the other side of the partition. When the door is closed the shavings-room is entirely separate from the sawdust, whether the door is open or not.

Q. Is there a pipe that goes through that wall?

A. No, sir.

Q. One of those blowpipes?

A. No, sir.

Q. What is right north of the shavings-room and boiler-house a little ways?

A. Our dry kilns.

Q. How far north?

A. Well, there is a dry kiln over the boilers. Then there comes in a room——

Q. Don't this shavings-room take all the room over the boiler?

A. No, there is a dry kiln there.

Q. That is in the main building, is it?

A. Yes, sir.

Q. That is covered by the roof of the main building?

A. Yes, sir.

Q. Then some feet away you have what?

A. A room there that has a large fan and a coil of four thousand feet for hot air.

Q. What do you do in there?

A. We blow the hot air into the four kilns there from that one.

2539 Q. You do not put any lumber in that to dry?

A. No, sir.

Q. How high is the second floor in your mill above the paved court?

A. In the main mill?

Q. Yes.

A. I think it is about 13 feet, 12 feet in the clear, and then the timbers which would be another foot.

Q. Isn't there a floor which is almost level, just a couple of feet——

A. The first floor is level.

Q. The first floor is in the basement?

A. Yes, that is on a level with the outside surroundings. You can back a wagon into that floor.

Q. In the first place, in starting on River street you have a basement there?

A. Yes, sir.

Q. Do you know how high that is between the joints?

A. Twelve feet between joints.

Q. Now the floor, I suppose, would be 13 feet?

A. Twelve inches for the timber and two inches for the floor, about 14 inches.

Q. That second floor and the paved court on the north side of your mill that you enter where you drive in there on Fort street, is on a grade, isn't it, on the level?

Q. On a level with the Fort street side, do you mean?

Q. Yes.

A. Yes.

Q. Then it is 13 feet——

A. Eleven feet now between joints. The first story is 12 feet and the second 11 feet.

Q. You have a storage shed over on the northeast side of that court, haven't you?

A. We have a shed there that we work, with machinery,
2540 that is a shop you might say; we have a planing machine and saws.

Q. You use it for storage or anything that comes convenient, I suppose, in your business?

A. Yes, sir.

Q. You cannot go from that shed into the main mill, can you, at the end of it?

A. There is a passageway there into the end of it.

Q. Into the elevators?

A. Yes, sir.

Q. So that you can bring up lumber or anything on those elevators and put it in that storehouse?

A. Yes, sir.

Q. You would have to go down in the elevators before you would get on a level with the sheds you use in connection with the Central, that is on the floor below?

A. Yes, sir.

Q. How many feet is it between your power-house and the main mill where the blowpipes come across there?

A. It is about 15 feet, I guess.

Q. There is not anything in there except those pipes?

A. In that space?

Q. Yes. I see your pipes come out and go up and then over. Anything else in there?

A. The chimney.

Q. The main stack?

A. The chimney, yes, sir.

Q. Is in that space?

A. Yes, sir.

Q. So that you have to go around it in order to get through there?

A. Yes, sir.

2541 Redirect examination.

By Col. ATKINSON:

Q. As I understand it, you leased your real estate to the company of which you are a stockholder with your sons?

A. Yes, sir.

Q. And those leases were arranged several years ago?

A. Yes, sir.

Q. Do you remember the exact date when the leases were arranged?

A. I do not, I think it was in 1885.

Q. Will you state whether those leases were arranged with any view to a possibility of such a road as has since been in front of your mill on River street?

A. No thought of it at that time.

Q. The old union depot was down on Twelfth street, at that time, was it not?

A. We supposed it was going to be on Twelfth street.

Q. What was called the union depot was down there, and the general understanding was it was to be there permanently?

A. It was so advertised.

Q. And plans of the depot that was to be built there published in the papers?

A. I think so, yes, sir.

Q. You were present, I suppose, at a number of the condemnation proceedings for the establishment of it down there?

A. Yes, sir.

Q. Do you remember that in all those the company took the ground that they were going to make a grand depot down at that point?

A. Yes, sir, at Twelfth street.

Q. There never was any intimation of such a building as this at the time these rents were fixed?

2542 A. No, sir.

Q. In fixing these rents will you state to the jury whether you had any other object than to arrange as between yourselves an equitable adjustment and rental?

A. No other object. It was arranged so that I was going to have a permanent fund that I could depend on.

Q. It was a provision practically for your old age?

A. Yes, sir.

Q. Have you other children besides these two boys?

A. None.

Q. Then I presume the bargain you drove with the boys was not a particularly close one?

A. We thought it was equitable.

Q. And liberal towards them. Now, in taking that rent you have only taken out what you needed, the rest you have left in the business?

A. That is the way we have always done it.

Q. Simply having it credited up to you?

A. It is passed to my credit. When I want it I get it.

Q. What other family have you besides the two boys?

A. A Wife.

Q. So that that provision stands there at your disposition as you may see fit, at any time?

A. Just as I want it.

Q. Are the boys married?

A. Yes, sir.

Q. They have families of their own?

A. Yes, sir.

Q. Now, the leases were drawn, were they, by Mr. Baker, at the time these arrangements were made?

A. Yes, Mr. Baker was the man who did this business for us.

Q. Mr. Baker was your attorney?

A. Yes, sir,

Q. And counsel at that time?

2543 A. Yes, sir.

Q. And had represented you, I think, in your other contests with the union depot company?

A. Yes, sir.

Q. Below there. Then it was not a mere form—the making of this lease?

A. No, sir.

Q. But what you considered right among yourselves?

A. It was right and substantial.

Q. Do you still believe that it was an equitable and reasonable arrangement?

A. I do.

Q. And that the distribution of the rents represented a fair return on the value of the property?

A. Yes, sir.

Q. And that was $1,000 on the warehouse, as I understand it?

A. Yes, sir.

Q. Which at 4 per cent. would represent $40,000. $5,000 on the mill, which would represent $125,000. That is on the mill site?

A. That is on the mill site.

Q. As I understand it all these rents are on the naked land, with the exception of the dock you have down there?

A. Yes, sir.

Q. And the 4 per cent. would be on $300,000, on the dock property—$12,000 a year?

A. $12,000 on the dock.

Q. How did the size of your lot there compare with the Hubbard & King lot which the company acquired down on the river?

A. Well, I don't know. This of ours is nearly 400 feet by 1,050.

Q. Do you remember the extent of the Hubbard & King piece?

2544 A. I don't know; I never knew.

Q. That was hardly as large as yours, was it?

A. I hardly think it was.

Q. Do you know what was paid for that?

A. I don't.

Q. Now, that was immediately above you, was it, the Hubbard & King site, or was there one piece intervening?

A. I think there was a piece between them and us.

Q. Do you know whether they had as great a depth between the river channel bank and River street as you have?

A. They did not, it is not as deep.

Q. Do you recollect about the difference?

A. Well, I should say it must be two or three hundred feet; two hundred feet, probably.

Q. Well, I suppose you look upon the prospective value of that large block of land there of yours as pretty high?

A. I do.

Q. If a new railroad came into the city that would be the first place they could acquire on the river below the other railroads?

A. Yes, sir.

Q. And in many ways it has a prospective value that other prop
erty might not have. Is it difficult or easy to get a block of tha
extent on the river front in Detroit now?

A. Not easy. I obtained this, I think, from nine different par
ties.

Q. You bought small pieces?

A. Yes, sir.

Q. And put them together?

A. Yes, sir.

Q. In your mill site, too, as I understand it, you acquired fro
different parties?

2545 A. Four parties.

Q. I suppose you bought your warehouse from one person

A. One.

Q. So that you picked up property from time to time so as to pu
it together and form this great mill plant?

A. Fourteen different lots.

Q. Was that easily done?

A. It took many years, from '71 on till '86, or something lik
that.

Q. You kept acquiring as you could?

A. Yes, sir.

Q. And I suppose had to agree upon a price with the owners?

A. Always, I didn't condemn one foot; we could not.

Q. What can you say as to whether all these acquisitions wer
made from time to time with a single end in view of establishin
this business?

A. That was my aim from the starting point. It required larg
storage.

Q. Had you an idea of establishing a permanent business tha
would run for years after?

A. That has been our aim always, making everything very sub
stantial and permanent.

Q. I think you told Mr. Dickinson that that was one reason fo
incorporating, so that the business should not be wound up by th
death of either of the parties?

A. That was the object of incorporating, so that in case of m
death there would be no stop, that everything could go right on.

Q. Or in case of one of the boys dying?

A. Yes, sir.

Q. Now, Mr. Baker tried to get you to put a price on this piece
land below the union depot. Has it ever been for sale since yo
bought it?

2546 A. It never has. It is part of our business and if w
should take that off it would cripple us. I think I told M
Baker that $600,000 would buy that lot, but that would leave ou
mill on our hands.

Q. Well, you would want a considerably larger sum for the l
on account of the incidental injury that selling it would be to you
mill and warehouse.

A. That is the idea exactly; that is why I hesitated to set a price last night.

Q. In other words, they were bought to be used all together, and you could not sell any one of them without selling all?

A. That is the point exactly.

Q. Now, you say that mill, in your judgment, is worth $200,000, the mill aside from the real estate?

A. It practically cost in good solid dollars about that amount.

Q. In the valuation you have given to the insurance company, as I understand your testimony, $130,000 has been estimated as 80 per cent. of the value of the mill?

A. $150,000; that is what we call the plant up to lately.

Q. $130,000 is your insurance?

A. Yes, sir.

Q. Then to get at the estimated value you would have to add to that one-quarter?

A. Have to add the 20 per cent. That would be a fifth.

Q. No, that is 80 per cent., and then you would add the other 20 per cent., which would be a quarter of 80 per cent. or a quarter of $130,000, which would make $32,000, and the total would be $162,000.

A. Maybe I made a mistake then. That is the plant anyway.

Q. $162,000 was the estimated value of the property insured?

A. Yes, sir.

2547 Q. That includes something, I think, on the stock, does it not?

A. That is calculated $15,000, I think.

Q. That would bring it down to $147,000?

A. Correct.

Q. Now, is there any property there which would not be covered by the insurance; do you know whether you have any insurance on the dry kiln?

A. I think not.

Q. Is there any of this insurance on the office?

A. I cannot really say, but I guess not.

Q. You have sewers, too, that are quite expensive, I suppose?

A. Yes, sir.

Q. The pipes to the river and the underground pipes and the retaining walls?

A. Yes, sir.

Q. All these things you do not calculate to insure at all?

A. No, sir, we do not make any insurance on any of those.

Q. Then your insurance is simply against fire and that part of your plant which would be likely to burn and upon which you could obtain insurance?

A. That is it.

Q. Some of it you cannot get insurance on at all, I suppose? You never have carried any insurance on your dry kilns? They stand by themselves, a brick wall around them?

A. They are by themselves. I don't know whether there is any insurance on them, but I think not.

Q. Not included in this $130,000?

A. No, sir.

2548 Q. When you rebuilt I suppose there were a good many things left from the old building that were utilized in rebuilding?

A. Great many that were not taken into account.

Q. These sewers, retaining walls, the underground pipe and all that kind of thing were utilized in the second building?

A. Yes, sir.

Q. And when you estimated the cost of the second building, do you add this or do you simply estimate what money was put into it?

A. They were not added, there was no account made of it.

Q. Was that actually the money paid in making the second building, and that would not represent its value?

A. No, sir.

Q. Now, I suppose in estimating for the insurance up there you were not anxious to carry $130,000 of insurance if you could help it, were you?

A. No, indeed.

Q. You only carried $80,000 until this 80 per cent. rule which forced you to enlarge it?

A. We only carried $80,000 until this exposure came up.

Q. This 80 per cent. rule requires you to do it, and you have to carry the $130,000 to get any?

A. We have to carry it now on account of the exposure, we have to insure eight-tenths as I understand.

Q. Then you consider it prudent, on account of the extra danger, to carry extra insurance as well as under the 80 per cent. rule which requires you to do it?

A. We consider it is imperative at least to carry $130,000, and that leaves the 20 per cent. to carry ourselves.

Q. You feel then yourself that the danger is much greater from fire there?

A. Very much greater.

2549 Q. So that you do not feel like taking as much risk as you did before?

A. No, sir, I advised that we insure the full amount, as much as we could get.

Q. Have you any special reasons for believing that you are in danger of fire there?

A. From the daily exposure as we see it we cannot come to any other conclusion.

Q. You have had a great deal to do with lumber up the lakes, also, haven't you?

A. Yes, sir.

Q. Have you had occasion to observe from year to year the danger from fire, of railroads passing?

A. Well we have. Every season brings us a history of terror and destruction that grows out of these fires.

Q. Are these forest fires that we read of attributable, to some extent, to the railroads running through them?

A. Most always, the railways set fires on the road, and right here the other day I was in Indiana, the week before last, and they had burned my fences for half a mile, and they have come to me and said we will fix this.

Q. Where is this?

A. In Miami county, Indiana.

Q. You have some property there?

A. Yes, just half a mile. I gave them the right to run through this property without any compensation, and they promised to keep me a fence, but they have made me a great deal of trouble, they kill my stock.

Q. What I want to call your attention to as sharply as possible, as a man accustomed to this lumber trade and the railroads running through the country, is the danger of fire; you have been a witness to them?

A. Constantly.

Q. So that you naturally feel that your risk down here is very much greater on account of this railroad?

2550 A. It cannot be otherwise.

Q. I suppose in making your estimate for insurance you were as conservative as possible so as to carry as little as you could help under the 80 per cent. clause?

A. We carried a difference between $130,000 and the actual value.

Q. You are practically your own insurers for that amount?

A. A certain amount, yes, sir.

Q. Have you ever heard any intimation from any one connected with the union depot company as to the increased danger of fire there?

A. I heard Mr. Joy tell us that he expected—we were quite liable to be burned up.

Q. Where was that?

A. That was at Lansing.

Q. That was while some legislation was pending there?

A. That was while Mr. Joy was arguing for an amendment to one of the laws, whereby he is made amenable for any damage that may occur by fire.

Q. He wanted that amended?

A. Yes, sir.

Q. The union depot company, I suppose at that time, would have been liable and he wanted some change made?

A. That is it exactly.

Q. Was it in a statement to a committee of the legislature?

A. Yes, before that committee.

Q. That Mr. Joy stated he was likely to burn you up?

A. That they had paid Backus for his place and he did not want it so that they would have to pay him again.

Q. In case it was burned up?

A. Yes, in case it was burned up.

Q. Did he say anything of the likelihood of its being burned?

2551 A. Well, he spoke of that, that that thing might occur now.

Q. It might occur any time?

A. It might occur any time.

Q. From what?

A. I suppose—he led us to infer from the passage of these trains.

Q. Do you remember his using the expression, carelessness of an engineer or anything of that kind might cause this property to be burned?

A. That was the general subject he was talking about, the passing of these trains, and he wanted to throw the responsibility onto the train that happened to do the mischief, the different railroads.

Q. The different railroads forming the union depot company?

A. He said he might have applications for other railroads to come in here and he says if they should come here and burn Backus up, we have got to pay him, and we have paid him once.

Q. Do you remember he said he had paid you?

A. He paid us once he said.

Q. Do you remember any expression about its being settled for all time, the right to pass there?

A. He spoke particularly of the making of the law, of the drawing of it by Mr. Meddaugh, that Mr. Meddaugh had embodied that clause in that law that made him amenable to damages that might occur, and he said, It is a bad law and it ought to be amended. And he says, For God's sake make this as it ought to be, and not leave us to pay for this property that we bought once before.

Q. You were present out there yourself?

A. Yes, sir.

Q. Do you remember making any reply to the statement

2552 that he had paid you for your property by showing a notice from Mr. Baker that the suit was open again?

A. Yes, sir.

Q. What was Mr. Joy's reply to that?

A. That he had not authorized any opening of the case.

Q. He considered it settled then for all time?

A. Well, there is the statement to the jury that he gave.

Q. His statement to the committee of the legislature you mean by the jury?

A. Yes, sir.

Q. That was a public hearing, was it, before a committee of the legislature?

A. Yes, sir.

Q. Do you know whether the law was amended or not?

A. I think that the jury tabled his application.

Q. That is the committee?

A. The committee, yes, sir.

Q. You have been kept so much in court by this company that every body of men you see looks like a jury to you. Now you say

the rates on your main building before this structure were 5½ per cent., and they have continued to be so on the main building?

A. Five and a quarter I think it was.

Q. And the change that has been made then by the companies, so far as your main building is concerned, is in requiring the 80 per cent. clause to be complied with?

A. They told me if it was not for this structure along there they should remove that clause, and that would have been the same as to reduce it.

Q. That would reduce the rate if they did not insist on the clause?

A. Yes, sir.

Q. Mr. Jones has already given us the reasons for that. You were unable to give Mr. Baker the extent of your retail trade on River street?

2553 A. Yes, sir.

Q. You don't keep the books, I suppose?

A. No, sir.

Q. And have not for some years given attention to the details of the business?

A. All I know about it is general observation.

Q. You know that you had a large retail trade?

A. Yes, sir.

Q. And you know that you haven't that now?

A. It seems that is the condition of things.

Q. And I suppose you know in a general way that it was profitable to you to have it?

A. Yes, sir.

Q. And that you have sustained a loss by losing it?

A. Our trade used to be quite considerable from that point.

Q. And you considered it a good trade?

A. Yes, always.

Q. At least a useful trade in your business?

A. Yes, sir.

Q. As you answered Mr. Dickinson, you received lumber of different grades down in your yard on the river?

A. Yes, sir.

Q. That is assorted there carefully in accordance with the business?

A. Yes, sir.

Q. The higher grades of lumber are taken to your mill and dressed and shipped off in what I should call the lumber trade, to different parts of the country?

A. Yes, that is correct.

Q. The lower grades are taken up and made into boxes, and from the lower grades you save such strips as you can to raise the grade?

A. We always strip off what we can to make it into moldings or casings.

2554 Q. For instance, if you have a board 12 inches wide and one edge of it is knotty or faulty, but there are six inches of good lumber on the other side, you take those six inches off and save them for something better than boxes?

A. Exactly.

Q. And in making your purchase of stock you aim to buy lumber that will have that kind of thing?

A. That is our aim.

Q. One of your sources of profit, then, is in the assortment and saving of good parts of board that are on the whole affected?

A. Yes, sir.

Q. That is practically where the profit is in your business?

A. Yes, sir.

Q. If you did not do that you would not make anything on this lumber?

A. Yes, sir.

Q. That is where the profit is made out of the assortment and skill used in saving the better part of the boards?

A. There would be a very small profit in the box department alone, it is so close, and it is followed by men that are novices, that practically they run to the wall a great many of them, before they know it.

Q. Now, in addition to boxes, you make bottoms for stoves and things of that kind by covering the wood with zinc?

A. Oh, yes, that comes in the same category.

Q. And in that, if I remember right, when looking through the mill, when the jury looked at it, you cut those pieces just as thin as possible so as to get as many as you can out of the board?

A. To go into detail, we take an inch and a quarter board and resaw it and then rip that again.

2555 Q. So that out of an inch and a quarter you get four pieces?

A. Yes, sir.

Q. Do you know whether or not you get more than your competitors in business, one board more?

A. Well, we have been in the habit for years of making two seven-sixteenths boards out of an inch; that is, with the eighth of an inch wide, we take the sawing and the two dressings, which is practically better than most of our competitors do.

Q. Now, this lumber trade is the dressed lumber of the better grades that you send to the different parts of the country, flooring and stuff of that kind?

A. That is it exactly. That is usually a more desirable grade of lumber and a more expensive grade.

Q. Moldings are something that are cut as ordered usually?

A. Perhaps you get a quarter of a car. Molding is something that goes into the money very fast.

Q. Now, is it necessary, or at least would it be desirable, in your lumber and molding trade, to be able to store your lumber down near the mill until you would have the quantity that you desired to ship, a car-load, for instance?

A. Could not do it.

Q. I say would it be desirable?

A. It would not.

Q. Where do you put it when you are preparing for a car-load or more, the lumber?

A. We set that out in the shed, but it would become dusty and dirty if we did that.

Q. Is that one of the difficulties now?

A. That is the extreme difficulty.

Q. In storing the molding—you say for half a car of mold-
2556 ing you will take two or three weeks to make them, you could put them out there, but in the meantime they would become covered with this dust?

A. We would not try to put the mouldings out; have to keep them inside and run over them, I suppose.

Q. Have you storage room inside?

A. No, sir; not to spare.

Q. So that it is a very great inconvenience to you to keep them inside?

A. Impracticable.

Q. You are compelled to do so on account of this structure?

A. We would either have to do that or draw them to the warehouse and fetch them back.

Q. Mr. Baker asked you if you stored large quantities of lumber at the mill. Have you any facilities for doing so?

A. No, sir, only in these sheds. These sheds are used for rough lumber quite extensively.

Q. Can you put dressed lumber there now safely?

A. No, the shed that is next to this large retaining wall——

Q. What are those sheds made for?

A. They are to store the lumber while we are shipping it. The one east of the mill and the one north of the mill is used for storing box shooks.

Q. Then they cannot be used at present to advantage for the very thing for which they were built on account of this dust?

A. No, sir. Well, we pile our rough lumber in there.

Q. But your dressed lumber in shipping you cannot store there?

A. That we keep next to the mill outside ready for the car when it comes in. There is one thing I wish to mention, the fact that we attempted to move our location when we burned years ago.
2557 It was represented to us that the Michigan Central wanted to buy our property and would do it and there was a location we could get to very great advantage up on the river, so we went and investigated, and located fifty acres below the fort, discussed it *pro* and *con.*, and looked over the practicability of the thing, but concluded it was policy for us to remain where we were because we were central and near home and we had this property which gave us two ground floors and it was convenient and adjacent to our dock property and then we decided to rebuild.

Q. Now, I suppose in deciding upon the location as it then stood, your only object was to secure an eligible site and make money?

A. For a substantial trade that would stay by us.

Q. You had no idea of spiting anybody in going there with a lumber mill?

A. Nothing of the kind. Our trade had been very profitable up to 1882.

Q. Up to 1882, as I understand you, the percentage paid on that land——

A. Was very large.

Q. Was more than on a hundred thousand dollars' worth?

A. A good deal more.

Q. It ran up I think sometimes to $70,000 a year profit?

A. There were two years it went over $70,000.

Q. That was the net profit?

A. Yes, sir.

Q. Do you know how much money you have been able to take out of the business since that time up to the building of this structure. I believe you gave the amount, $27,000 and something a year for over 16 years.

A. I find I made an error in my computations. I should have divided by 13 instead of 16, which would have made it $34,000 a year.

2558 Q. That plant has yielded?

A. Yes, sir.

Q. Now, before we leave the insurance question entirely, I think Mr. Jones said that after the railroad ran through your yard below, the rate of your insurance was increased?

A. Very extensively. I think it was about double or more. It was more than double, because instead of giving us a blanket policy, they divided the yard into four sections and we only got it covered on that section and if this section burned the others would contribute to pay a portion.

Q. So that the other sections would practically insure with him of the section that suffered?

A. Yes; this extra insurance has practically absorbed and consumed, without attorney fees, all the money we ever got from the railroad company.

Mr. DICKINSON: You make the jury all look at me?

A. Oh, yes, but Mr. Baker ran the thing through.

Q. Mr. Baker worked for you until after the union depot company employed him?

A. That is it.

Recross-examination.

By Mr. ROBISON:

Q. All you want, if things will stop as they are now and let the lawyers go, all you ask for is just to pay the insurance. That is about all you want, is it not, and that is all you expect?

No answer.

Q. Isn't that so? You say the rest of it goes to the lawyers anyway?

Col. ATKINSON: No, he has changed lawyers.

Mr. ROBISON: I know, but he is asking for bigger damages than he used to since he has changed lawyers.

2559 Col. ATKINSON: He wants something for himself now.

Q. When did you lease this property to Backus & Sons?

A. I think it was leased in 1877 and then it was renewed in 1885.
Q. For how long do these leases run?
A. The 1885 lease for thirty years.
Q. A good thing, a lease for $12,000 a year.
Col. ATKINSON: It was leased for the life of the corporation?
A. Yes, sir.
Q. You leased it to the corporation for the whole thirty years for $12,000 a year?
A. No, sir, for $18,000 a year.
Q. $12,000 for the property down below and $5,000 for the mill, and $1,000 for the Fort Street property; that is $17,000. Where is the other thousand, where does that come in?
A. You did not study arithmetic.
Q. Oh, I am a thousand dollars out. But then a thousand dollars does not count for much in this controversy. You say you don't draw all that out?
A. I draw out what I want.
Q. About how much do you draw out?
A. When I have occasion to I draw out some. They have never failed to pay me when I wanted it.
Q. Well, they could not help doing that. They make $36,000 a year profit off it. There is lots of it to draw from. About how much of it did you draw out?
A. I have been in the habit of drawing my salary, and that is $3,000 a year.
Q. Then there is $18,000 more coming? How much of that did you draw out?
A. Well, when I had occasion to use it I have drawn it out. I have made other investments from time to time.
2560 Q. You have not drawn anywhere near all of it out every year, have you?
A. No, sir.
Q. Have you drawn a third of it out?
A. Oh, yes, a good deal more than that.
Q. The first lease was made in 1877?
A. 1877, I think.
Q. Now, then, can you not give us some sort of an idea of how much you have drawn out?
Col. ATKINSON: Do you think it is at all material? Suppose he left it all in the business, would it affect this question in any way?
Mr. ROBISON: Well, it affects his testimony somewhat, it seems to me, and I want to see how much money there is invested in there; 16 years at $18,000 a year—there must be a pile of his money in there yet. If it isn't a competent question, all right; but I think it is.
Col. ATKINSON: I do not see how that can affect anything. I would like the judgment of the jury on that.
Mr. ROBISON: Well, we are not taking the judgment of the jury on law questions. You cannot tell how much you have drawn out?
A. I could not tell.

Q. Have you drawn half of it out?
A. Yes, sir.
Q. More than that?
A. Yes, sir.
Q. Two-thirds?
A. You better let me up now. I don't know.
Q. There is a big lot of it that the Beckus Company owes A. Backus yet, isn't there?
A. Some.
Q. And you don't know how much?
A. I could not tell you how much.
2561 Q. This $34,000—I thought it figured out $36,000 yesterday, net profits?
Col. ATKINSON: $27,000, he said.
Q. Now, there was this $34,000 net profit for the last how many years?
A. 13 years.
Q. How much stock have you got in the concern?
A. Not a cent.
Q. When did you dispose of your stock?
A. I sold it in February, 1891.
Q. But you did have very nearly half. Then you are drawing none of these profits at all?
A. No, sir.
Q. You own none of the stock? That is all owned by your sons?
A. Not for the past year and a half.
Q. How much stock did you own in that?
A. A trifle less than half, 5,128 shares, I think.
Q. To whom did you sell it?
A. I sold it to different parties. I sold most of it to my two sons.
Q. What did you get for it?
A. I got the par value.
Q. How much was the stock?
A. $25 a share.
Q. How many shares were there altogether?
A. I may be mistaken. There were 12,000 shares, the amount of the whole capital, and I had 5,128.
Q. You sold yours for over $125,000?
A. Yes, sir.
Q. Did you get the cash for it?
A. No, sir.
Q. What did you take your pay in?
A. I hold notes.
Q. You have those yet?
2562 A. Yes, sir.
Q. You sold it at par?
A. Yes, sir.
Q. It was earning you about $15,000 a year, was it not, and had been for the last 13 or 14 years?
A. I had a little less than half.

Q. And you sold it for a little over $125,000?
A. I think it come to about that.
Q. Do you know what interest those notes are drawing?
A. Seven per cent., drawn with interest.
Mr. DICKINSON: It is only six.
A. Call it six or four, if you like.
Q. I know, but you cannot call it anything. What is it?
Col. ATKINSON: He says they are with interest.
Q. I know, but you don't know what rate?
A. I could not tell you.
Q. Do you mean you don't want to tell or you don't know?
A. I don't know.
Q. You got $125,000 of stock, sold to your two sons, that you don't know how much interest it is drawing? You were getting on your stock nearly $13,000 a year profits?
A. I never figured it up.
Q. There was $34,000 profit for the last 16 years?
—. ——.
A. That was before this railroad came in you were getting that?
A. Well, I sold out.
Q. You kind of hornswoggled the two boys?
A. They are more ambitious.
Q. You got your stock into seven per cent. notes quick after this railroad come in? That is not so at all, is it? You didn't try to beat them?
2563 A. I don't want to beat my boys.
Q. No, of course not. Now, this land you have rented down there for $12,000 a year, do you know of any one else you could rent to at that price?
A. My investments are made on general principles; the same as the union depot company's are. They have invested their money in the Third Street depot, and do you think that pays them a very big per cent.? But you could not buy it of them for six times what it has cost them, and it has cost them more than my plant did. Do you think you could buy a tract of land from the Michigan Central, right beside me, for $5,000 a foot? No, sir, you could not.
Q. When you get through this argument, if you will kindly answer my question——
Mr. DICKINSON: I think that is a proper answer.
Q. Do you know of any one else that you can rent that land to?
A. I am not looking for it. I expect to make money out of that in the advance of price. I made those purchases years ago because I thought it was a very desirable location and my business required it, and because I happened to draw trumps, and it will get better instead of worse. That location is desirable, and I have a right to hold it at any price I want to.
Q. That is true.
A. If people don't want to buy it, let them let it alone.
Q. Have you a price on it that you will sell it for now?
A. I mentioned yesterday that $600,000 would buy it.

Q. Would anything else buy it?
A. No, sir.
Q. Wouldn't you take $550,000 today, cash?
A. No, sir. I don't want money bad enough.
Q. Then you ain't getting much of a rent for it at that price?
2564 A. Well, I am going to get a million out of it by and by.
Q. How much would it have been worth if this railroad had not gone there?
A. Our institution would have been worth $500,000 more today.
Q. How much has it injured your mill property?
A. Practically destroyed it.
Q. Put it in dollars, how much would it be—$250,000?
A. No, sir, I would not shrink it as bad as that. But it has shrunk, it has damaged the mill property $150,000.
Q. How much the storehouse up there?
A. Well, I won't bring that into question. I could turn that into blacksmith shops or something.
Q. Then it has injured your property on this lumber yard $350,000. That must follow. You say it has injured your property $500,000 and $150,000 of it is on the mill. That leaves $350,000 on the lumber yard?
Col. ATKINSON: That is not exactly what he said.
Q. Well, what did you say?
Col. ATKINSON: Can't you recollect?
Mr. ROBISON: He said that this road had injured his property $500,000.
Col. ATKINSON: He said if this road had not come along his whole property would have been worth $500,000 today more than it is.
A. We have made it legitimately from our business. I remember very well that there were two years that we cleared over $70,000 a year and how many years of that, $70,000 a year, would it take to make up $500,000?
Q. What two years were those?
A. '80 and '81, I think.
Q. That is twelve years ago now?
Mr. DICKINSON: The railroad came through there soon after that.
2565 Q. Well, the railroad coming through your lumber yard down there did not hurt the mill any?
A. Why, most assuredly.
Q. How?
A. It destroys our business; it knocked us right down from $70,000 a year to $25,000 or $30,000.
Q. You got knocked down, of course, but how can you say that the railroad did it?
A. They destroyed my shop.
Q. Your lumber?
A. Yes, sir.
Q. You got pay for that?

A. Where?
Q. From the railroad.
A. Didn't I tell you a little while ago that the insurance and what we paid our attorneys together used it all up?
Q. Well, it is not fair to bring in what you paid Mr. Baker here.
A. Why, it is a fact, gentlemen.
Q. You think it injured your property down there $350,000?
A. It figures up $320,000.
Q. And you got $27,000, was it not?
A. Well, that was the injury on that lumber in that particular place.
Q. How much did you get for the railroad going through there?
A. $35,000.
Q. They took some of your land there, didn't they?
A. Yes, sir, sixty feet wide.
Q. Right straight through your whole piece?
A. Yes, cut me in two.
Col. ATKINSON: It took about 60 feet by 400, didn't they?
2566 A. Yes, sir.
Q. That is bigger than your mill, a good deal, isn't it?
A. What is bigger?
Q. There was more land taken out of your lumber yard than the whole size of your mill?
A. Oh, no.
Q. Your mill is how big—how many square feet? There are more square feet taken out of your lumber yard, are there not?
Mr. DICKINSON: In addition to that $35,000 for passing through your lumber yard, how much did they pay after that for injury to your lumber?
A. $27,000.
Q. Making $62,000.
Mr. ROBISON: That was for injuring your lumber, ruining your business? But that was not anywhere near one year's business that you were allowed in that?
A. That has all been absorbed.
Q. Well, I know, but we are trying to get at what this ought to be, and I thought that maybe this would be some guide. How much land did they take of you down there?
A. 60 feet wide by about 400 feet long. This mill is 238 feet by 318 feet practically.
Q. Well, it turns to wedge shape. Do you know how many square feet there are in your mill proper?
A. I never figured it up. It is 38½ feet by 150 feet and then about 68 feet a third on the center, it is pretty nearly 300 feet across.
Q. Couldn't you figure an average length and depth?
A. I have not gone into the merits of it. If you want to know practically it is about an acre and a half, I guess.
Q. How many square feet in an acre?
A. I don't know.
A JUROR: About 4,250.

2567 Q. Then there are about twice as many feet in the mill property than in that land down there?

A. I should judge so.

Q. But the land through your lumber yard is worth more?

A. I should not look at it in that light.

Q. You call it worth $2,000 a foot down there?

A. I never have.

Q. Perhaps I am mistaken. Well, $1,500, but you do not claim the value of your mill property is worth that much, do you?

Mr. DICKINSON: Aren't you getting too much arithmetic in this?

Q. I don't know but I am, and I guess I'll quit on it. You claim they did raise the rates of insurance on your mill?

A. Yes, sir.

Q. But the figures remain the same, the rate?

A. On a part of the mill they raised it three and a half per cent. on the power-house.

Q. On the mill I am talking about now?

A. On the mill it is the same, but they retained that 80 per cent., clause which would have been removed if it had not been for this.

Q. It might have and might not.

A. That was the testimony of Mr. Jones.

Q. Mr. Jones has been doing business for you quite a while, hasn't he?

A. Yes, sir.

Mr. DICKINSON: That does not make a perjurer and a liar of him if he has.

Q. I am not claiming any such thing as that at all, Mr. Dickinson; but of course we all know that men are prejudiced more
2568 or less and biased more or less without being perjurers and liars. Who fixed the values of that property down there? Mr. Jones and you, did you not?

A. We understand the values of the property better than anybody else.

Q. How much was it insured for before this railroad came along?

A. About $80,000, I think.

Q. You carried a good deal of the insurance then yourself?

Mr. DICKINSON: A good deal of the risk, you mean.

Q. A good deal of the risk?

A. Yes, we could afford to do it then.

Q. How many years ago did you begin business down there at this location, at this mill?

A. In 1872.

Q. You burned up when?

A. In 1882.

Q. You had two fires before that, had you not?

A. I think there were.

Q. Then that is three fires you had there in ten years, and one was a total loss, was it not?

A. Yes, sir.

Q. Three fires in ten years before this railroad came at all?

A. Yes. Our mill was constructed very differently. The exposure was right in the center of the mill. We changed that, and when we put our power-house outside we did away with it.

Mr. DICKINSON: You mean your power-house in the center of the mill?

A. We had the power in the center of the mill before; it was all around us. The shavings are what burned us up before.

Q. You think it is the railroad that is causing these fires in the northern countries, these great fires?

2569 A. The railroads are setting a great many fires. I have seen it frequently when I have been on the trains; seen the fire set.

Q. But you did not consider there was any particular danger from the Michigan Central road right there next to you?

A. No, sir. They are on the ground and there is nothing there that can set. There is no exposure there. My exposure is all on the west side of the mill, away from the Michigan Central.

Q. You have been in Saginaw and Bay City, the great lumbering district of this State?

A. Yes, sir.

Q. You have been along the line of the Flint & Pere Marquette?

A. Yes, sir.

Q. That is one of the roads that runs right into this depot?

A. Yes, sir.

Q. Have you been on their sidings?

A. Passed their sidings. I have seen their siding.

Q. Do you know that there are miles in those two cities where the railroads run right between the piles of lumber, piled as close as they can be, and escape the cars?

A. No, sir, I do not.

Q. Haven't you seen it?

A. No, sir. A mile is a good deal. You say miles?

Q. At least ten miles of railroad in Saginaw, running directly between piles of lumber, piled as close to the track as they can be, in Saginaw and Bay City.

A. I have never seen anything of the kind.

Q. Well, you would be surprised, then, if you knew that was so?

A. Well, of course I should. I know it is not so.

Q. Of course you are mistaken.

2570 Col. ATKINSON: You probably include the side tracks?

Q. Certainly. I am talking about side tracks, together with the main track.

A. They have side tracks running into the lumber yards and lumber on both sides.

Q. Do you know that there are at least ten miles in those two cities of solid lumber on both sides?

A. That is immense.

Q. Yes, and there are some mills up there that your mill would not make a good outhouse to, and don't you know that is so, and the lumber is piled up at least for ten miles?

Col. ATKINSON: Have you ever been in Saginaw?

Q. Yes, I have.

Col. ATKINSON: How in the world did you ever get around in there among the lumber piles?

Q. Well, I rode and I will show you by and by. Do you know that in twenty years there has never been a claim for damage from these railroads from the lumber they run through, not one claim for fire?

Objected to as immaterial.

Mr. ROBISON: It is material in this way.

Col. ATKINSON: Do you expect to introduce any evidence on that subject?

Mr. ROBISON: Yes.

Col. ATKINSON: Do you expect to introduce evidence that there has been no claim up there?

Mr. ROBISON: Yes, sir.

Col. ATKINSON: In this case?

Mr. ROBISON: Yes, sir.

Col. ATKINSON: I desire to object to the question as immaterial.

Mr. ROBISON: The witness will be here at noon. Mr. Backus has testified, if the court please, to the great danger that arises
2571 from railroads running through his inflammable material. I don't know whether your honor was in the court-room at the time or not, but he has said that all these great fires or a great many of these fires in the lumber district in the north have been occasioned by engines running through and setting fire, as they passed through it.

The WITNESS: I beg your pardon, but I want to contradict you. I have never said anything of the kind.

Mr. ROBISON: I wish the reporter would go back and read that. I think you are a little off. I think you did testify to that.

The COURT: Answer the question.

Exception for respondents.

A. I don't know of any claims. But I know of several fires that have occurred right along from my own knowledge.

Q. In Saginaw and Bay City I am speaking of just now.

A. They had a very expensive fire two years ago and it was reported came from the spark of a locomotive.

Q. Who reported that?

A. That was the general report. And that was the impression we all got that it was set on fire—one of their heavy fires, I cannot tell you the particulars of it.

Q. Of course they have had some immense fires up there. But you have never had one caused by a locomotive?

A. Yes, I have. I had a mill burn once.

Q. On this road?

A. No, sir; on the Rome & Watertown road.

Q. That is before you came here?

A. Yes, sir.

Q. Before you came to Detroit at all?

A. Yes, years ago. I saw a fire on the Alpena road that burned there, and I helped move the machinery out, and the trunks
2572 and things in it. That occurred from the fire of a locomotive, and as I told you a little while ago, the fire down there in Indiana burned my fences off for half a mile this fall.

Q. The railroad had to keep it fenced?

Col. ATKINSON: It is a common thing to see a fence burning along the railroad?

A. Yes, a very common thing.

Q. How many years has this road been running through your property down there where there is lumber piled alongside of it?

A. Ten years, I guess.

Q. Have any fires occurred down there?

A. I brought a small lumber yard into the court-room, if I remember right, a year or two ago and showed where the fires had burned into that lumber, burned holes.

Q. Have you had any fire down there?

Mr. DICKINSON: He has had to watch it all the time.

Col. ATKINSON: Mr. Robison wants to know if you had any actual fires in your yard since the railroad went there?

A. I think we had one.

Q. Did you get the insurance on it?

A. Yes, sir.

Q. Did the railroad pay you?

A. No, sir.

Q. You could not show that the railroad did it, could you?

A. I did not pretend to do so.

Q. You have had fires after the railroad—there is not any question about that—three of them?

A. We had a fire burn our barn last summer set by the railroad.

Q. Where was your barn?

A. At the foot of Eighteenth-and-a-half street, on the street right where this railroad crosses. The barn was burned and three
2573 horses and all our harness and some lumber.

Q. You are sure that the railroad set the fire?

A. We are sure of it, and we are going to prove it.

Q. When was that?

A. That was a year ago last August.

Q. You are waiting a good while before beginning at that.

A. No, sir, we have begun it.

Q. Oh, the suit is commenced?

A. Yes, sir.

Q. Against what road?

A. This union depot company and the Wabash. I saw fire catch directly from a train on the Bay City road when I was going from here to Bay City two or three years ago. The fire flew and struck in the grass and it ignited, and when the car that I was in got there, there was a fire nearly two feet over right off, right on the bank. It is a very common occurrence to set fires.

Q. Well, it is not very common in the city, is it?

A. Well, I don't know.

Q. You have got the most exposed lumber yard in the city, haven't you, so far as railroads are concerned? You have railroads over you and under you and all around you?

A. I guess we are pretty badly exposed.

Q. Your property is of a very inflammable nature, isn't it?

A. It is up there at the mill.

Q. And in your lumber yard also?

A. Not so much so. We keep the lumber piled up away from the track and we watch it. We have a watchman there day and night, all the time.

2574 Q. Yet, during all the years you have been here, with railroads running right around you, as close to you and as many trains as they do on the Michigan Central, you have not been set on fire by them?

A. By the Michigan Central, no sir.

Q. You don't know of any lumber yard or mill burned by railroads in this city?

A. Bridges were set on fire many times.

Q. That is very likely so; that is where the engine would run right along within six inches of the bridge?

A. Yes, sir.

Col. ATKINSON: Not six inches.

Q. A short distance, I will say; it may not be just six inches. There are thousands of cars of pure kindling wood piled up in these lumber yards?

A. I never saw it, and I guess you never saw it.

Q. Of slabs?

A. A thousand cars is a good deal. You say thousands of cars. You are a little extravagant in your expressions. You do not mean anything wrong, probably, but of course it is absurd.

Q. Of course I will admit that at present I am looking through magnifying glasses at these cars. There is a pile of it anyway, isn't there?

A. I wish you would confine your remarks, if you please——

Q. Do you know of engines setting fire to any of those of your own knowledge?

A. I have known engines to set fire in a great many places; and a fire will gradually increase and become an immense cyclone of flame, destroying everything ahead of it.

Q. You stated that you attempted to move your location when you burned out?

A. Yes, sir.

Q. Why?

2575 A. We were advised that we could get into another location and we looked upon it from various standpoints and concluded it was an impracticable thing. Here, as we are located, we can deliver six or seven or seven or eight loads, I think it is, a day of our boxes and probably five or six loads of lumber, and our neighbor, Mr. Thompson, delivers two loads a day. And this was just this side of Thompson where we were locating.

Q. You mean car-loads?

A. No, sir, wagon-loads. Our location I say is immense on that account, being central, and it gives the control of a large trade that we would not have if we were off a large ways.

Q. You built a large warehouse up there to accommodate this trade?

A. Yes, sir.

Q. Have you ever thought that the location of your warehouse on Fort street and your storage of your manufactured lumber there had something to do with that falling off of your retail trade down behind that mill?

A. Oh, no.

Q. That had not anything to do with it at all?

A. Nothing whatever to do with it.

Q. And yet you wonder now that you do not sell as much from the rear end of your mill when you are selling thousands of dollars' worth from the storehouse up on Fort street?

A. I don't wonder at it at all.

Q. And you lay it all to the railroad?

A. We lay it all to the railroad.

Q. You say you buy culls mostly?

A. Largely.

Q. Mostly, is it not, that is the lumber that you buy?

A. Well for our box department we buy a low grade of lumber.

2576 Q. It is what you call cull lumber and you saw out the best part of it to make moldings?

A. That is to accommodate that class of trade. We have to buy good lumber as well. We have to buy a great deal of good lumber.

Q. I understood in answer to Mr. Dickinson, that you aimed to buy a cheap grade or lumber and to use it as you can?

A. Yes, sir. But we buy some good lumber, the upper grades.

Q. Oh, certainly.

A. We buy it constantly.

Q. You are attending not particularly to this box business, are you?

A. That is what we have to depend on now, but there is not much profit in it; it is a very close business. We rip off these strips and there is really the practical economy of the thing to get something out of a low grade that will sell for a high price. These strips we take off and make casings and moldings and car siding and car roofing. A six-inch strip is perhaps worth more than the whole board would be.

Q. That you dress?

A. Yes, sir.

Q. You say you cannot store that lumber in these sheds any more?

A. I did not say anything of the kind.

Q. I mean after it is dressed you cannot store it in there?

A. No, sir.

Q. Why?

A. Because of this dirt.

Q. But no cinders came from these tracks over on the Michigan Central at all?

2577 A. No, sir; never had any trouble from that before in the world.

Q. Don't you think that it is a little remarkable that all these tracks run along there and no cinders come from the Michigan Central at all?

A. No, sir, it is not remarkable at all. Because the draft up under that bridge—it don't come over here, and those trains coming along there—the locomotive is close to the ground; she is not elevated, but your place is 25 feet above it, and it comes down onto us, and as the witnesses testified yesterday and every day they have been on there, that have been there at all, they see the cinders lying on the ground. It is a very simple thing for you to come down there.

Q. I have no doubt there are cinders there, but I have grave doubts about no cinders coming from the Michigan Central railroad.

A. I have been there ten years, and I never saw any cinders come from the locomotive on the Michigan Central track.

Q. Not when there is a heavy east wind?

A. No, sir. Our place is 16 feet high, covered with iron—20 feet—about 20 feet high; that is, from the ground up to the top, and then there is a gravel roof over it, and the locomotive of the Michigan Central is passing away from it all the time.

Q. That is sheet iron?

A. Yes, and then our exposure is on the other side of the mill.

Q. Haven't you made some sheds right next to the elevated road?

Col. ATKINSON: On the front, you mean?

Q. On the front around there; some sheds in your yard?

2578 A. There is a small shed, where we got some saws working, next to the road.

Q. There are some storing sheds next to it?

A. We are working there all the time. You go up there on the roof and you will find these cinders, great chunks of it, such as they showed you. You can pick it up and fill an envelope any time.

Q. Don't you store lumber under those sheds?

A. No, sir; not to store it, to manufacture it.

Q. But those sheds keep the cinders off it?

A. These cinders go right on it; you can come down there and see.

By Mr. BAKER:

Q. When was this hearing before the legislature out at Lansing?

A. Well, it was this past session.

Q. This last winter?

A. This last winter or spring.

Q. Mr. Joy was there and yourself?
A. Yes, sir.
Q. Mr. Joy made an argument before the committee?
A. Yes, sir.
Q. Did you?
A. Yes, sir.

By Mr. DICKINSON:

Q. Mr. Robison has asked you about your fire risk down in the lumber yard, and you stated the increased insurance put upon you. Will you state whether the insurance also requires you to keep a watchman night and day?
A. Yes; they do.
Q. Is it customary in a lumber yard to keep a watchman?
A. No, sir.
2579 Q. In addition then to the increased rates, the underwriters require you to keep a watchman all night and all day?
A. During the night, and during the day our men are there. The premises are never left alone; always some one there on the premises.
Q. Your own experience shows the necessity for that.
A. Yes, sir.
Q. So that you actually do that, and you keep a watch night and day at the mill, do you not?
A. Yes, sir.
Q. You have been asked about the other fires you had when you had your power-house located differently. Now, from your experience of the fires and a planing mill and a risk from fire, is the location of the power-house, as at present, shown by experience, to be the best possible to avoid the fire risk?
A. We spare no pains to make it fireproof.
Q. It is from your experience?
A. Yes, it is.

By Mr. ROBISON:

Q. You can locate that power-house five hundred feet away if you wish to?
Mr. DICKINSON: He has not got the room.
Q. You could almost put it over on your warehouse ground?
A. It would be an additional expense. That is why I tried to buy Mrs. Stedley's lot.
Q. Couldn't you put your power-house right over next to the Michigan Central, where there is no risk at all, and run your shavings over there?
A. You are dealing in sarcastic remarks.
Q. No, I am not. I am asking that as a matter of fact. If you cannot, and if it is not possible and practicable?
2580 A. It would be an impracticable thing for me because we are located, and we could not go on and build a new mill.
Q. There is no room over there where you could put a power-

house next to the Michigan Central on your land? There is no place for it?

A. No, sir.

Q. So far as running the shavings that distance, you could do it well enough, could you not?

A. Yes, sir.

Q. Run that five hundred feet?

A. Yes, easy.

Col. ATKINSON: Are you speaking of the Michigan Central side of his mill plant?

Mr. ROBISON: Yes.

By Mr. BAKER:

Q. When did Mr. Jones commence to insure for you, before your fire down there?

A. Yes, a great many years ago. He has carried insurance, I guess, pretty much all the time since we have been there.

Q. He has always been your principal insurance agent?

A. Largely, I guess.

Mr. DICKINSON: Have you succeeded in placing this extra ten thousand dollars you are going to place?

A. It seems to have been very difficult, it is not placed yet.

By Mr. Foreman BAKER:

Q. In figuring up your $34,000 net profits for the last 16 years——

A. 13 years.

Q. Yes, 13 years, do you deduct from your figures every time $18,000 of rent coming to you?

A. I do not take that into account at all. The way I arrive at my figures. We bought certain property, we built this mill,
2581 we know that this mill has cost so much and I figured in the mill at $200,000; then I have invested largely at the north and I have got a large mill up there and railroad and farm buildings, I have got a farm down in Indiana and I have made large improvements there, fenced it nicely and cleared it nicely. I bought it all out of this money. I put these all in, it is all paid for, $144,000 and I divided by 13, the number of years and it gives me about $34,000 a year.

Col. ATKINSON: That you have actually taken out?

A. That is the way I arrive at it; I kind of jump at it; of course there is nothing very definite about it.

Col. ATKINSON: That is from the profit of the mill you bought a piece of land for instance, like that at the foot of Eighteenth street?

A. And my sons each of them have built a good house.

Q. You put a certain price on that, and will give you so much profit?

Mr. DICKINSON: Just what he has paid out, he has said that distinctly.

Mr. Juror SAFFORD: Do you own on both sides of Eighteenth street?

A. Yes, sir.

Q. There is a brick blacksmith shop on the corner? *A.* That belongs to Mr. Jones, does it not, this insurance man?

A. I think it does.

By Mr. Foreman BAKER:

Q. With reference to this business on River street, I think it was yourself or some one else replied that that business was worth from two to four thousand dollars net profit a year?

A. Yes, the trade on River street being done at a fraction of the whole trade.

Q. You estimate it to be worth from two to four thousand dollars?

2582 A. From two to four thousand dollars.

Q. Mr. Krombach testified that some of that business was done now on Twelfth street. What is the reason that all of it cannot be done there?

A. Because he has to carry that lumber out on his men's backs, as I understood his testimony. His customers stop their teams on Twelfth street and they carry this lumber out to them.

Mr. DICKINSON: What is the distance?

A. Three or four hundred feet.

Q. Could not that business be done on the Fort Street front?

A. It could be done, but it would involve the expense of getting it up on the elevators.

Q. If it was a business of two to four thousand a year net profits, would it not pay to do it?

A. It probably would.

Q. Another question with reference to that very thing. The business now, you say, is practically destroyed. What becomes of that cull lumber?

A. Well, it is piled up there in the warehouse; it is there now in great quantities. It accumulates all the time. It is a thing of not very much value; it is defective stock and it cannot be shipped.

Q. I understand that.

A. We are selling it.

Q. As I understood it, people go down there and get it, small dealers pick out what they want of it and take it?

A. Yes, Mr. Krombach is a German, and his trade is among these Germans. They come there, and he has had quite a nice trade independent of our warehouse.

Q. Why don't they come to your warehouse just the same as they went to River street?

A. Mr. Krombach is not there; he is at the mill.

Q. You have some one at the warehouse?

2583 A. Yes, sir.

By Col. ATKINSON:

Q. Isn't it usual for men requiring that particular kind of trade to come to the mill?

A. Yes, they come very often, every day.

Mr. DICKINSON:

Q. Whatever the rule or convenience is as to coming to Fort street, or to the warehouse, is it the fact that the people that did come there on River street come there no longer?

A. That is the fact; they do not come down there.

Q. Well, whether it is a matter of whim or a matter of taste, the business is lost, is it not?

A. It affects our trade quite materially.

Q. It takes that retail trade that Krombach had?

A. Yes, sir.

By Mr. F. A. BAKER:

Q. Did you say that Mr. Jones owns that blacksmith shop down there?

A. I am told he does.

Q. Mr. Jones testified for you in all your cases, didn't he?

A. I cannot tell you, really.

Q. Didn't he testify on your first condemnation case down there when they went through the yard?

A. He may have.

Col. ATKINSON: No, he was on the jury.

Q. Oh, he was on the jury in that case, was he?

A. Yes, he was on the jury.

Q. Outside of that case, didn't he testify in all your subsequent cases? Wasn't he a witness for you right through?

A. He has been in two cases.

Q. In this case when they tried it both times, and also
2584 in the case that involved the injury to the lumber down there?

A. I think he was.

Q. Now, when they condemned the right of way on that sixty feet they only condemned it for the passage of trains, and not for switching?

A. Yes, sir.

Q. And what you recovered for was because they switched in there for a number of years?

A. They injured our stock.

Q. Because of the switching?

A. Yes, because of the switching.

By Col. ATKINSON:

Q. I want to ask you in regard to this Fort Street front. There are two lines of street cars, I think, on Fort street, or two tracks?

A. Two tracks, yes, sir.

Q. Electric cars?

A. Yes, sir.

Q. How much space have you on Fort street for doing this kind of business?

A. I think the front is 68 feet.

Q. It would be very small in comparison to the front you had on River street for the standing of teams or anything of that kind?

A. No teams could stand there; they could drive into the yard.

Q. You would have to do that retail trade then in the court?

A. Yes, sir.

Q. Would that interfere with the conduct of your other business in there?

A. Well, we are always contracted; we had no room; we have a great many teams in there, a great many wagons of our own.

2585 Q. Now, have you tried yourself as hard as possible to still keep that retail trade? Do you think you could manage to do it and have the same profits out of that substantially as you had before, by doing it in the court or on Fort street?

A. No, sir, for this reason: Mr. Krombach has his particular acquaintances and his trade has been exclusively from this other front.

Q. Wouldn't he be on the same floor that Fort street would be?

A. No, sir, he is always below.

Q. Now, the storehouse has been running practically as long as the new mill, has it not, built about the same time?

A. The mill was built in 1882 and the storehouse in '85.

Q. And this retail business for some reason, whatever it may be, has not been built up at the storehouse?

A. No, sir.

Q. But was at the mill?

A. Was at the mill.

Q. You know that fact, although the reasons for it you may not be able to give us?

A. The reason is, Mr. Krombach has his particular acquaintances; he is a German.

Q. So that what you lost very largely is the trade that has been built up by Mr. Krombach?

A. That is what has left us particularly in relation to the retail trade.

Q. It cannot be done down there, and is not done?

A. It is not done.

By Mr. BAKER:

Q. Haven't you got an office at the store-room?

A. Yes, sir.

Q. And a salesman there?

2586 A. Yes, sir.

Q. So that if anybody was to buy anything all they have to do is to go there to the storehouse?

A. Yes, we always send them there.

Q. Do you use River street for your teams and wagons to stand in any?

A. We leave our loads in River street.

Q. What proportion of the traffic up and down that street goes over that viaduct for teams?

A. I could not tell you.

Q. Nearly all of it, doesn't it?

A. Probably most of it.

Q. That is, a man would rather drive up over there than go over the Michigan Central crossing?

A. Yes, sir.

Q. So that leaves that street free in front of you to be occupied by your teams and wagons about as much as you see fit, does it not?

A. Yes, sir.

Q. You would not interfere with anybody if you used it?

A. No, sir.

Q. Before that viaduct for teams was built there was a big traffic right across that crossing?

A. Not very much.

Q. Some of the heaviest teaming was done there?

A. Not much.

Q. Where did they go?

A. They went up Twelfth street and up on Fort across, they did not run the risk.

Q. So that the travel has greatly drifted up to Fort street?

A. The teams all went that way.

Q. Since the Michigan Central crossing became so much used?

2587 A. It was an imperative command of ours not to pass over the Michigan Central railroad with our teams.

Q. With the increased growth of the city and the business of the Michigan Central, that constantly grew, the more dangerous crossing, didn't it?

A. Yes, sir.

Q. And the result was that the traffic went up onto the bridge very largely, even before the union depot was thought of?

A. Yes, sir.

Q. And since then they can use River street and they use it up over this viaduct for teams?

A. Yes, sir.

Col. ATKINSON: So that by building that you have diverted what little teaming there was by your front?

Mr. BAKER: Yes, and we left it for him. It is practically an addition to his property.

Col. ATKINSON: Mr. Baker's idea is that there is some great advantage to you by being permitted to let your teams stand under this structure. Isn't there an ordinance against it?

A. That viaduct leaks.

Q. Not the viaduct, but the railroad structure, or perhaps you call that the viaduct?

A. I mean the railroad structure.

Redirect examination:

Q. You say it leaks? Under the plans that were adopted and under the ordinance, as I understand it, they were to put pans underneath the viaduct. Have they done anything of the kind?

A. Nothing of the kind.

Q. So that if you should let a team stand there it is liable to have the drippings from the engines come right down upon it?

2588 A. That is a truth. And at the same time teams will not stand there; they will take fright, they are alarmed, and a man has got to hang right onto them and hold them. Even our teams that are there all the time would not stand it. They have to have some constant attention.

Q. Is there any advantage to you—I would like to have you think this carefully, now—that is, is the damage done to you in any way compensated for by the building of this viaduct for teams on the other side of the street?

A. It is all a perfect nuisance to us. It obstructs our light, takes away our air. We cannot use this plant of ours. We have got to throw it up. We never will be able to carry on the lumber trade. This has been my life's work.

Q. You do not use that passageway for teams yourself?

A. Never have; no, sir.

Q. When it is used, it carries the teams by you each way instead of stopping in front of your mill?

A. Yes, sir.

Q. So that it never could be used for the purpose of trade in front of your mill?

A. No earthly use, sir.

Q. I suppose you have signs on your River Street front?

A. Who would see them now?

Q. You had them formerly?

A. Yes, we did have them.

Q. Your plans were to do business down there?

A. Yes, that was our ground floor, our main entrance to the mill. All the lumber came into the mill there; and our box department comes in from the other side.

Q. Have you, in making your estimates and in arranging your business, done everything you possibly could to lessen the injury done by this railroad?

A. We have.

2589 Q. And you consider then the estimates you made conservative?

A. They certainly are.

Q. You have not tried to stretch them or make them extravagant?

A. No, sir.

Q. But you feel your business has really suffered by bringing this structure there?

A. The fact that this road is put there in front of us ruins our business.

Q. Mr. Baker referred to your previous testimony in this case. This is the third trial, I think, of this case?

A. Yes, sir.

Q. So it is the third time you have had to come into court and go through this fight?

A. Yes, sir.

Q. In this particular case?

A. Yes, sir.

Q. I think there were two trials as to going through your yard?

A. Yes, sir, it took nine weeks of our time last year.

Q. Have you had any experience as to whether or not the damage was increased after the trials were over, whether the railroad companies keep their word; whether they do what they say they are going to do at the time the cases are tried?

A. I can explain it and tell how it is. They were going to use locomotives that burned anthracite coal; they were not going to throw fire or smoke, and they brought an engine here from Fort Wayne, No. 35, with an expert to figure it, to show that the locomotive could not smoke.

Mr. DICKINSON: Took the jury around on it?

A. Took us down to Delray and back, but she threw fire just the same, although they had an arrangement which threw steam
2590 onto the fire, which put it out to a certain extent, and they were going to have fifty or sixty trains in a day, and it figures up now there are 145 in twenty-four hours; 145 locomotives pass in twenty-four hours, and they throw fire and smoke.

Q. Are they using the kind of locomotives they showed the jury?

A. No, sir, they are using this bituminous coal; but they have shut off in front of our place, getting ready for this trial.

Q. Did they show the jury with what care they were going to pass your property in shutting off the fires?

A. Yes, they brought an expert here and he showed how it could be done.

Q. How has it been since that time?

A. They have run with their dampers open and thrown fire, and fire is dropping down onto the street; they throw cinders and smoke onto our place, the fire goes clear to the engine-room door, ninety feet away; it struck a man in the face and burned him and burned Mrs. Stedley.

Q. Have they run at all differently since this trial has been going on?

A. They profess to shut off?

Q. When your property was condemned on the lower piece, you answered Mr. Baker that they should not switch on it, as I understand, that that was the understanding?

A. Exactly.

Q. Did they, as soon as the condemnation was through with, commence to switch?

A. They commenced switching and continued it and I remonstrated.

Q. Although they positively agreed not to do that in the other condemnation?

A. After four years I sued them for damage and Mr. Baker conducted my case.

2591 Q. In this case, too, did not Mr. Joy and others representing this company, claim that these switches were not to be used for ordinary switching?

A. Exactly.
Q. On the first and second trial?
A. Yes, they did.
Q. After the structure was put there have they been used for switching?
A. They have been making up their trains right along right in front of us.
Q. So that I suppose you have no anticipation but what they will use this property in any way they see fit, after they get it?
A. That is what they sought to do and what they are going to do. When they get possession we can step down and out.
Q. These promises are only made pending the lawsuit to be broken when it is over?
A. Only made to be broken.
Q. "Apples to the eye and ashes to the taste." That is all.

By Mr. ROBISON:

Q. You are talking about this pile of cinders that is around there, and this stuff that is dropping down all over your yard, and burning the men's faces. Does any of it come from your institution?
A. No, sir, none of it.
Q. Here is this Exhibit "Griswold 7," cinders picked up on the afternoon of the 26th of September around the door of the main mill. Will you just look at those cinders and see if you say those came from those engines?

(Referring to screens in the court-room.)

Q. Look at that piece there. Isn't that a fine charcoal? (Taking piece out of envelope, Exhibit "Griswold 7.")
2592 A. It may be.

Mr. DICKINSON: That is the one he pointed out as the piece it had burned.

Q. Look at this one here. Isn't that a piece of pine charcoal?
A. Yes, sir.
Q. And these pieces, and those pieces?
A. Yes, I should judge it was alike.
Q. Keep them out by themselves. I want to see how much of this is charcoal. Isn't that pine charcoal, all of it?
A. Yes, sir.
Q. And that?
A. Yes, sir.
Q. And that?
A. Yes, sir.
Q. And these, and these pieces I am showing you are all charcoal, aren't they? Try it on a piece of paper and see if it won't mark black, or on your hand. Now, where do you suppose these came from? Do you suppose that one of those engines threw those out?
A. I expect they did.

Q. Do you know of any of those engines coming through there that burn pine?

A. I don't know anything about that, I know that they threw these out into our yard.

Q. Do you think that those locomotives that went over that viaduct threw that charcoal into your yard, or did it come down out of your smokestack?

A. I never saw any come out of our smokestack and I have been there for twenty years. For the past ten years we have a chimney that don't throw soot.

Mr. ROBISON: I would like to call the jury's attention to these right here and have them look at the cinders I am showing the witness and see if it is not pine charcoal instead of stuff that
2593 came down out of these locomotives. This is the stuff he picked up in front of the mill; these others go with it.

Mr. DICKINSON: While the jury are examining that, I will ask you, if when the engine is fired in the yard to start out, it is fired up with kindling?

A. That is the common way.

Mr. ROBISON: Do they fire them up to start out right in front of your place?

A. No, sir, they get fired up, and when they get out they throw these sparks in front of us.

Mr. Robison laughs.

Mr. DICKINSON: That is very amusing, isn't it?

Mr. ROBISON: Well, yes, I thought it was kind of funny that an engine fired up and saved those cinders until it got opposite Backus'. (To the witness:) Do you say that before that gets fired up enough to get steam up sufficient to go from the yards of this union depot company up there, that the kindling is not burned up yet?

A. It is in nice shape to be thrown out onto Backus' when it comes along there.

Q. You burn a lot of pine in your institution there, don't you?

A. I have told you a good many times I have never seen anything come out of my chimney. I have got the cleanest chimney in this city; the nearest perfection, the nearest perfect possible.

Mr. DICKINSON: You got a smoke-consumer?

A. I have got a furnace that burns that smoke.

Col. ATKINSON: What is the height of your smokestack?

A. I think it is 115 feet.

Q. A little higher than the locomotives?

A. Oh, yes, a good deal higher.

2594 Col. ATKINSON: Where did you get your charcoal, Rob?

Mr. ROBISON: I found it right here.

By Mr. Foreman BAKER:

Q. You speak about your horses being restive in front of your mill. What is the occasion of that?

A. It is the rumble of the cars overhead. They have not got used to it. If it was in the city of New York where all the teams had to go under this viaduct all the time they would get familiar with it.

Q. That is the point I had in view. Won't your teams, in the amount of carting you have to do, get used to that noise?

A. Well, they probably will after a while.

Q. It is a fact, isn't it, that just as soon as a horse understands that anything, a noise or anything else, is not going to interfere with him or hurt him any, that he pays no more attention to it?

A. Yes, but in the meantime while we are learning him some of us get killed.

Col. ATKINSON: And I suppose you are constantly changing horses?

A. Yes, sir.

By Mr. F. A. BAKER:

Q. You do not mean to testify there is any substantial interference with your draft-teams going up and down there, do you, from that noise there?

A. The teams will fetch their load in all right because they have somebody to attend to them.

Q. You do not mean to testify that your draft-teams, those heavy, logy horses, are especially afraid of that elevated road, do you?

A. They do notice it.

Q. What do they do?

A. If you leave them without a driver they would go off, get started.

2595 Q. Almost any team would do that.

A. I don't put any particular stress upon that, Mr. Baker. My teams will get familiar.

Q. You have had a good deal to do with horses in your lumber business, and once in awhile you get hold of a rattle-brained horse that you cannot do anything with?

A. We have got to become familiar with it.

Col. ATKINSON: Let him study law.

Q. It is rare, though, isn't it?

Mr. DICKINSON: There is no other place in the city of Detroit that the teams can become accustomed to this elevated road, is there?

A. That is all.

Q. So that if a horse goes down there once a week he will get frightened?

A. That is the trouble.

Q. As far as yours are concerned, they will become familiar with it, because they are constantly there?

A. Yes, they will become familiar with it.

By Mr. Foreman BAKER:

Q. This matter of your lease. Of the rent, you say that perhaps you drew out half that amount and left the rest upon the books. Does that balance stand as an indebtedness against the company?

A. It stands to my credit. When I draw any money it is charged to me, and this matter is credited to me. There is quite a large balance now to my credit.

Q. That stands as indebtedness against the company until it is paid?

A. Yes, and I am selling them lumber. Our company owes me quite a large bill. I am selling them quite a large amount of lumber. I sold them not a great while ago some twenty-five or thirty thousand dollars at one time.

2596 Q. That is all I wanted to know, as to whether it remained as a permanent indebtedness or if, in the course of the year, if you did not use it, it was brushed out?

A. Oh, no, it comes in just the same as if any of you gentlemen had it, it would be the same. I am treated just like a stranger—and I think they sock it to me sometimes a little more than they do a stranger.

Mr. F. A. BAKER:

Q. How much is the balance on the books now to your credit?

A. I could not tell you.

Mr. DICKINSON: We will show you exactly by the book-keeper.

By Mr. ROBISON:

Q. Is this $34,000 a year a net profit?

A. Mr. Robison, I don't give it in that way.

Col. ATKINSON: It is the money drawn out.

A. I simply showed what I have been doing. We built this mill; I completed that work up north and I fixed that over, put up new buildings and everything.

Q. Do you put all of that at cost?

A. Certainly at cost.

Q. Then it is a net profit?

A. It come out of that business.

Q. So much cash came out of the business?

A. Yes, sir.

Q. That does not include your $18,000 a year rent?

A. Oh, I would not say, I don't know that.

Col. ATKINSON: That is not taken into consideration?

A. No, sir, that is not taken into consideration. I give it in a general way, that the money must have been made somewhere or else it could not have been applied.

Col. ATKINSON: It is the old Scotch rule, that you cannot pay out any more money than you receive.

By Juror CLARK:

2597 Q. Do you think that an engine could be fired up at the round-house, at the Wabash round-house and then make steam enough to run in the depot and not throw the pine kindling that was used in the first place, out, until they began to work hard in drawing a train?

A. Well, it probably—it would be destroyed before it reached our place to a large extent. But a great many of these fires are perhaps kindled right here close by us in the yard.

Q. I don't think you understand what I am getting at. Wouldn't the pine cinders or charcoal remain in the flues until the engine began to work hard in pulling a train?

A. It is quite possible. I think it would. When they come up that heavy grade as they are pulling the train up their engine is about in front of us, and then they begin. They have put on the steam, and if they do, of course it is going to throw this coal, and if it happens to be a southwest wind it will throw it onto us. I was down there yesterday, and the ground is covered all around with these cinders.

By Mr. DICKINSON:

Q. How much less do you weigh since they began to harass you?

No answer.

Col. ATKINSON: I want to ask Mr. Backus a question that may be of some importance. The Michigan Central are using their side tracks across the road from you all the time, aren't they, on the south side of River street?

A. They are used for storing their cars.

Q. What I wanted to get at was whether, possibly, these cinders and some of the annoyance you experience could not be accounted for as coming from the Michigan Central on the south side of the street?

A. It could not be possible. These trains are made up at night there; back in on the side of their track, are where the teams
2598 come in. There are probably 15 or 20 cars, and when the engine comes along she is away down there. She shoves those cars away, and our mill is there. That engine never comes anywhere near it. She is 300 feet away from our mill.

Q. They are not in the habit of using engines in front of your mill, that would account for these cinders or dust?

A. No, sir. You could not possibly get an engine anywhere in sight of it. They are away at the end of the train. They take hold of these 15 or 20 cars, pull them out and shunt them in.

Q. I will ask you the general question, whether you can account for the annoyance you have attributed to this structure in any other way?

A. In no other way. There is no other cause or reason.

Recess till 2 p. m.

2.30 P. M.

HENRY N. BACKUS recalled for redirect examination.

By Mr. DICKINSON:

Q. Have you completed your inventory of the property the with the comparisons of the appraisals of Mr. Spitzley and Mr. Fi and Mr. Kramer?

A. Yes, sir.

Q. You have them there with you?

A. Yes, sir.

Q. In how many sheets have you it?

A. I have Mr. Spitzley's machinery account, marked sheet No. Mr. Kramer put up some of the machinery in the boiler and engi plant which I have put in this shape, and afterwards I have recapi ulated it to get it altogether.

Q. The paper I now hold marked sheet No. 1, is that an inve tory of the Backus machinery and tools?

2599 A. The part that Mr. Spitzley assumed to take?

Q. The part that Mr. Spitzley assumed to take.

A. Yes, sir.

Q. And you have upon the other side the amount of Mr. Spitzley appraisal of the same property upon this sheet?

A. Yes, sir.

Sheet No. 1 marked Exhibit "Backus A."

Q. The total footings in your inventory of the machinery part the property is $52,734.16?

A. That is correct. That is not all the machinery, but that is a the machinery in that list.

Q. That is all the machinery that Mr. Spitzley undertook t estimate?

A. Yes, sir.

Q. And for that same machinery the items from Mr. Spitzley' estimate are $16,891.90?

A. Yes, sir.

Q. Now, will you take sheet No. 2? That covers what?

A. Sheet No. 2 covers that what Mr. Kramer took—engines boilers, shafting, pulleys, elevators, etc.

Q. And you have taken the other side of Kramer's estimate haven't you?

A. Yes, sir.

Q. The Kramer estimate being $28,250, and your appraisal of th property is taken item by item, is it not?

A. Mine is taken item by item.

Q. Of the property actually in the mill?

A. Yes, sir.

Q. $57,703.80?

A. Yes, sir.

Second sheet marked Exhibit "Backus B."

Q. Of course there are a large number of omissions in the Spitzley's inventory?

2600 A. Yes, sir, and there are a few corrections in that as I will show you later, not in accordance with the statements I made the other day.

Q. You have taken them by actual items?

A. Yes, sir.

Q. Now, of the Finn estimate of the brick building, that is the next sheet?

A. Yes, sir.

Third sheet marked Exhibit "Backus C."

Q. The three sheets contain, do they not, Mr. Kramer's estimate of the engine and boiler house, the elevator-house, the store-room, the four dry kilns, the pavement in the yard, excavating, the office and factories, the picket fence, the other fence and sidewalk. Mr. Spitzley's estimate is $22,612.09, and Mr. Backus' appraisal is $54,485.42. Now, as to the estimate of the brick-work, of the mason-work, do you disagree at all with Mr. Finn's figures, with his estimate?

A. In a general way it is all right.

Q. But you take that in your inventory, do you not?

A. Yes, sir.

Q. So that the same estimate of Mr. Finn's on the mason-work and brick, $28,384.08, you take without change?

A. Yes, sir, that is among——

Q. The fourth sheet is the summary of your inventory, and of the Spitzley, Kramer, and Finn inventory?

A. Yes, sir, that is the recapitulation.

Q. This recapitulation shows the valuation of the mill and buildings, mason-work, machinery, power-house, and everything included, at $193,407.46, and the Spitzley-Kramer-Finn estimate total, $93,137.17. Upon the third sheet you have made a memorandum have you, of additional price of lumber of 1889 as against 1892?

A. No, sir.

Q. You have not estimated that?

2601 A. No, sir.

Q. Or the labor of yourself, your brother or your father?

A. No, sir, it is not included.

Paper marked Exhibit "Backus D."

Mr. DICKINSON: We offer these in evidence.

Q. What is your age?

A. 38.

Q. How long have you been engaged in this mill business?

A. I went in with my father when I was about 17 years of age.

Q. Been at it ever since?

A. Yes, sir.

Q. You have had much of the details of the mill now for how many years?

A. I have practically had charge of it almost from the time I went into it.

Q. You learned the machinery part of it, did you?

A. Yes, sir.

Q. So you are skilled and can do the work or any part of it, can't you?

A. I don't know of anything there I can't do.

Q. You have learned it practically from top to bottom?

A. I have. I have had to educate my men, and I have had to reconstruct and improve the machines, and use my ingenuity, and I have worked there diligently, putting in a great many hours.

Q. And have had no other business than this all your lifetime?

A. No active business.

Q. And about how much time have you devoted to it, how many hours per day?

A. You mean counting in the time I have put in the law?

2602 Q. No, I mean in the business itself.

A. Oh, I have put in from ten to twenty hours a day. I have worked all night sometimes, haven't gone home at all.

Q. So that your life has been devoted to this business in every detail?

A. Yes, sir, that was years ago, when I was getting the business upon its feet.

Q. And of late attending to the business for the last five or six years, how about the hours you have put in per day?

A. I have put in all my time. Sometimes I would go there before breakfast, and sometimes after breakfast, and remain there until noon, and then go to dinner and return, and remain there until night.

Q. When was this storehouse erected?

A. My recollection is 1883, right after we rebuilt the mill. I may be mistaken in the year, but that is about the time.

Q. So that the whole equipment after it started to run, the running of the lumber yard, with the storehouse, and with the mill——

A. Yes, sir, the three were built for one plant, for one purpose.

Q. Now, will you explain to the jury what you know—you are about the mill at all times, aren't you?

A. Ordinarily.

Q. You usually keep the men as long as you can; the skilled men have been with you for many years?

A. Yes, sir, the majority of our men have been with us from 15 to 25 years.

Q. Will you please tell the jury what you know of this retail trade, of which something has been said, prior to 1892?

A. You mean on River street?

2603 Q. Yes, sir, on River street.

A. I know as a matter of fact it has all left us. I stated that the other day.

Q. But what was it prior to that time?

A. We had a very nice retail trade there which took away a certain class of stock which is very hard to sell anywhere else. It was

largely the offal, we might say, of the mill. I don't mean the shavings, and sawdust, I mean the stock. For instance, if we were filling a car with wainscoting, if there were some pieces that had been stained with sap, or not turned at the edge, we could sell it there where we could not ship it and could not sell it in our warehouse. As a result, we have had to stock it up in our warehouse, and it is utterly unsalable there.

Q. Prior to the building of the superstructure, did the teams go down there to the mill, as a practice, for that trade?

A. Yes, sir, we had a very nice trade there.

Q. To whom would they apply for those goods?

A. Those were customers of our foreman, Mr. Kronbach, and friends of the men in the mill. It was that class.

Q. That invariably went to the mill?

A. Would not go anywhere else.

Q. Did that class of trade ever go to the storehouse?

A. No, sir, there has not been a single customer ever gone there since.

Q. Did they go to the storehouse before the building of this structure?

A. No, sir, it is a different class of trade entirely.

Q. And yet the storehouse has been running practically ever since the mill has been running, since the fire?

A. Yes, sir, that class of stock does not encourage the
2604 trade of our warehouse. We dislike very much to take it over there.

Q. But you have had to get it out of the way?

A. Yes, sir, or have it absolutely ruined.

Q. Was the trade sufficient to remove that class of goods from your mill prior to the building of this structure; was it sufficient in volume to relieve the mill of that class of goods without storing it?

A. We always got rid of it, and in addition to that, we sold through that a good deal of other stock.

Q. So that the customers who came to the mill was an entirely different class of trade from those who went to the warehouse?

A. Yes, sir. We had our advertising dodgers on our fence there; we had it painted on the fence to catch the people going by, and we caught a good deal of trade in that way.

Q. What did that trade amount to?

A. I heard father state here from $2,000 to $4,000 a year, and I should think that was a very conservative estimate.

Q. The gross amount of the trade?

A. Oh, I should think the trade there would amount to $15,000 or $18,000 or $20,000 a year. It is pretty hard to tell.

Q. Does that trade still exist?

A. No, sir, it is cut right off.

Q. It is gone?

A. Yes, sir. There has been one exception. One of Kronbach's customers came down and told him that he would buy some stock if he would back the lumber up to Twelfth street, he would take it then, but I don't think he has been there since.

Q. This class of lumber, what do you do with it now?

2605 A. We draw it over and stack it up in the warehouse.

Q. To get it away from the mill?

A. Yes, sir.

Q. Is it there now stacked up in the warehouse?

A. Yes, sir, and it is absolutely unsalable in that place.

Q. What is it made up of?

A. It is made of this ceiling, the car sidings, what we call rejected stock, that was the stock we sold down below. The long lumber we can sell more readily in the warehouse. If we shipped a car of ceiling we would always have a certain amount of that material left over, and that was the material that was accumulating on us down below.

Q. Have you examined to see whether any of that custom comes up to the warehouse?

A. I have asked Mr. B——, the foreman of the warehouse, and he has repeatedly told me he didn't get a particle of it from any of his customers. They naturally would not come that way, because they are customers of the foreman, Mr. Kronbach, and they would not have any special object in going to the warehouse.

Q. Now, in the practical running of the mill what class of work, give us some idea, briefly, of the class of work you did there with this fine machinery up to 1892.

A. It has always been our aim to court the better class of trade, such as moldings, facings, picture molding and fine finished work.

Q. Inside work?

A. Yes, sir, inside work and not altogether house-work, but picture-frame moldings and that class of material, and it has gotten to a point, and has been for some time, that I don't court the trade any longer. I just simply can't do it and I let up on it. I don't try to get it, don't solicit it.

Q. Why have you stopped?

2606 A. I can't make it. I can't work it to any degree of advantage at all.

Q. Why?

A. Because we can't get the light right. We can't get the members of the molding right, and if we should get a car out I know it would be thrown on our hands. We don't care to try the experiments any more.

Q. In what way is it affected?

A. In the picture-frame work you have got to have perfect work. Your members must be perfect. They must fit. We must have the very best light, and the very best tools and machinery. We have the tools and machinery, but we haven't got the light.

Q. You have to have the very finest adjustment of these tools, have you not?

A. Yes, sir.

Q. Accurate adjustment of the fine knives?

A. Yes, sir.

Q. And you have fine tools for making picture-frame molds and inside work of all kinds?

A. Yes, sir. Only the other day we were working on some ten-inch baseboards, and Mr. Kronbach said he would run out about thirty pieces, when he thought something was not right by the feeling, and he took a piece and went out and looked at it in the daylight and sure enough the edges were all split. The knives got out of trim, and he didn't notice it at first. And that happens quite frequently.

Q. Did you have a large trade in this sort of goods?

A. Yes, sir. That is where we looked for our profits.

Q. The box factory was to work up the odds and ends?

A. We have always aimed to select what we call a rich stock, stock that would run with good edges, no matter what the grade of the lumber was. In shipping we could use these good edges,
2607 that is worked up into this fancy material, and the refuse, the remainder of the board after we ripped off the good edge, goes into the box-work. Now we have to buy sufficient quantity of stock to make up, in order to work that up, the box lumber.

Q. Your aim was, when you did the finest of work there, to work up everything even down to your dust and utilize that?

A. We sell our sawdust and shavings and kindling wood and everything.

Q. So that every particle that came from your wood went into the hopper for sale?

A. Yes, sir.

Q. And what did you burn in your furnaces?

A. When we are running as we ought to, we run about half of our shavings, occasionally we burn sawdust.

Q. You don't burn pieces of wood at any time?

A. We burn our kindling wood sometimes, no hardwood.

Mr. ROBISON: The testimony was the other day that you ran in chunks——

A. No, sir, we never testified that we run in all of them, that was the kindling wood.

Mr. DICKINSON: Will you please state whether this effect has come upon you since the superstructure was erected and the railroad passed by you there with these trains?

A. You mean the disturbance to our business?

Q. Yes, sir.

A. Most assuredly it has.

Q. Has that been the cause of your giving up of the fine-work trade?

A. Nothing else has caused it. I should be very glad if I could handle it, to go back to it, because it is the most profitable part of our business. It don't fill up our mill. When I go to Bos-
2608 ton and New York and Philadelphia, I am offered this trade right along, but I know I cannot take it. We cannot do this fine work any more.

Q. Is competition sharp in that trade?

A. Not so sharp as it is in the coarser stock. It is sharp enough,

perhaps, but I had rather get out one car-load of the finer work than several car-loads of the coarser finish.

Q. What other causes besides the proximity of the elevated road are there to interfere with that business?

A. We can't pile any of our stock as we used to do before, as we always have done ever since we built the mill. We have three sheds. In the shed near the mill on the east side we always got out this stock by the car-load, and perhaps it would take a week before we got a car-load ready or until we got the order completed, and the interstate commerce, or rather the car service bill, as it now stands and has stood for several years, is a pretty severe thing on us, as it does not allow us to hold a car on the track but two days, or 48 hours. If it is on there an hour longer we have to pay our dollar a day car rental, and as a result, it necessitates our piling our stuff there and getting it all ready to ship, and then put it in the car. But I don't want any of it now. I could not pile it out there now, it would soon be ruined. It would be utterly impossible to do it on account of cinders and soot.

Q. Have you had any affected so that you had to reject for shipment your stock on account of the soot upon it or cinders upon it?

A. Oh, yes, sir, we have had to throw it right out, send it over to the warehouse with the rest.

Q. Have you a lot of that stock there with the marks upon it?

A. We have quit that long ago.

2609 Q. Have you any of it in the warehouse now that has been thrown out on that account?

A. I think so.

Q. Have you had any difficulty that did not exist before from the grit getting into the machines, in this fine work—the cinders?

A. We haven't for a number of years had any such experience as we have had latterly. We had something similar to it in the yard some years ago when we had our trouble there, but we now have this stuff get in the mill, and of course when the knives get nicked, it is all up with us on that.

Q. Have you had considerable trouble with that since the elevated road was built?

A. We have been seriously affected by it.

Q. In this pine lumber that comes clean from the yard?

A. Yes, sir. The way we have difficulty to handle our business at the dock is to bring our lumber from the dock as much as possible, bring it up and rip it and put it in the mill and even in the process of ripping it accumulates there; but our greatest trouble is not with the rough lumber; our greatest trouble is with the lumber after it has been worked and in the process of working.

Q. Then you are entirely satisfied, Mr. Backus, that you cannot carry on the fine work there to advantage or profit at all as you formerly did, and out of which you made the profit?

A. I don't think that man lives that can. I have been all my life at it and I must say frankly that I cannot now handle it. I don't see my way clear to do it. It does not give us any storage. We

cannot pile it outside any more, and we haven't room to pile it inside. It is an enigma to me.

Q. Were you ever troubled with cinders or soot prior to the building of the elevated road, upon your lumber?

2610 A. Not there; no, sir.

Q. About the mill?

A. No, sir, never. I have never seen a locomotive in the Michigan Central yard across the way in all my experience of twenty years or since the tracks were put in there.

Q. That is the yard below the Michigan Central crossing?

A. Yes, sir, that is the yard on the south side of River street, way over past the viaduct. There is a track there which goes through from the Michigan Central to Delray, which the Exposition trains went through on.

Q. How far over is that?

A. That must be 400 feet from the mill.

Q. That is over near the elevator there?

A. Yes, sir, close to the elevator, near the river; I think they come there at certain times, at noon or at night; they put one car through from the Michigan Central to the Wabash and they take the car out at Eighteenth street and it comes up the trestle to the depot.

Q. How do they get their cars in?

A. They start up above with their engines, perhaps with ten or fifteen cars, and hitch onto them and pull them out. The engine does not come in there. I never saw an engine in there in all my experience.

Q. And they never run through under full headway?

A. They could not. There is a bumper behind each track at Twelfth street, perhaps three or four hundred feet that side of us. Across the other side is the Wabash and they have reverse bumpers. A bumper here and one there.

Q. Were you not formerly troubled with cinders and smoke from trains running by on the north side?

2611 A. We are so arranged that we have never had any inconvenience from the Michigan Central in any form that I know of.

Q. And you have now between you and the Michigan Central yard the superstructure and the viaduct for teams, between the yard and the Michigan Central yard opposite?

A. Yes, sir.

Cross-examination.

By Mr. BAKER:

Q. As I understand, these sheets of paper you have submitted here show that your estimate is substantially $100,000 more than Spitzley's and Kramer's.

A. I don't know anything about it. I have not compared the two at all in that respect.

Q. Aren't these your figures?

A. Yes, sir, but I haven't noticed the difference. Practically, yes, over $90,000.

Q. You think Spitzley and Kramer are out of the way $97,000?

A. Yes, sir, I know it. I don't think it, I know it.

Q. And your estimate of the brick-work is just the same as Finn's?

A. Well, I will tell you. I am not a brick mason, and I was with Mr. Finn when he was down there most of the time——

Q. Just answer my question. Do you take, in making up your $193,407, Mr. Finn's estimate of the brick-work?

A. Yes, sir.

Q. So that there is a difference upon the wood-work and the machinery between your estimate and Mr. Kramer's and Mr. Spitzley's, of $97,000?

A. In that neighborhood; yes, sir. Let me take that paper a minute and I will clear myself upon that point. I don't wish to testify to anything that is not so. That is the way I make it, if my figures are correct, I mean to say, if I have figured it correctly.

2612 Q. You have it all added up there, haven't you?

A. Yes, sir, it is all added up.

Col. ATKINSON: Give me the total of Spitzley's and Kramer's and Finn's estimates, please.

A. Spitzley and Kramer and Finn's total estimate is $96,137.

Mr. BAKER: And Mr. Henry Backus' estimate for the same thing is $193,407.46?

A. I don't say that would build the mill.

Q. About how many thousand dollars did you leave out of that?

A. What do you mean?

Q. You say it would not build the mill; how many thousands of dollars did you leave out of that?

A. I meant to make that in a conservative way. I say in my opinion that would not build the mill.

Q. How much would it lack of it? $100,000?

A. I think you might safely add 10 per cent.

Mr. ROBISON: That would be $19,000.

Mr. BAKER: You would add $19,000 to that?

A. Yes, sir; after you take my time, my father's time and my brother's time——

Q. Did anything else get away from you?

A. No, that is——

Q. You would add $19,000 to that; that would make $212,000?

A. Well, from 5 to 10 per cent.

Q. Which will you have it, 5 or 10 per cent.?

A. I say from 5 to 10 per cent. I cannot state that. I have not allowed anything for my own time, or my father's time or my brother's time, and we were there and the firm paid our time as salary.

Q. Can you tell us how much of that is for higher prices than what the Spitzley inventory is?

2613 A. You would have to figure that out yourself, Mr. Baker; I cannot do it.

Q. You can figure it out from these sheets, can't you?

A. It would be a pretty hard thing to do. I am worked to death and I am not going to work any more.

Q. We will take a sample or two. Mr. Spitzley puts in four large planers, 30-inch planers, at $6,400, $1,600 apiece; you put those same planers in at $2,000 apiece?

A. Yes, sir.

Q. Can't you buy the planers for $1,600 in Boston?

A. I don't think so.

Q. Have you any reason to doubt that? What did you pay for them?

A. I can't tell you. I know the insurance company paid us in 1882 $2,200 apiece for them.

Q. Mr. Jones adjusted that for you?

A. No, sir; we had a disinterested party make the adjustment.

Q. He was the agent who represented the companies?

A. I cannot say as to that.

Q. Do you mean to tell us that you have made up this estimate and you don't know what one of those planers would cost today?

A. They can't be bought for less than $1,600.

Q. That is what I asked you, if they could not be bought for $1,600. You just testified they could not be bought for that?

A. I did not——

Q. What did you testify to?

A. I said the machines would cost more than $1,600.

Q. Do you know, Mr. Backus, what you can buy one of those machines for?

A. I have figured on $1,600——

Q. Answer my question. Do you know what you can buy one of those machines for?

2614 A. I don't think I do. I have not had occasion——

Q. Did you in making your estimate assume Mr. Spitzley was correct?

A. No, I assumed the price of the machine was $1,600.

Q. Do you know what the freight is on one of them from Boston?

A. About $65 or $75.

Q. And the balance of your estimate of the $400 is for taking it down to the shop and setting it up?

A. Exactly, and in addition to that the improvements we put upon it.

Mr. DICKINSON: The equipment?

Mr. ROBISON: He said improvement.

A. Yes, sir, and the improvements. There is a molding machine there. Those things run into money faster than you comprehend. If you were in our business you would soon find that.

Q. Take one of those big planing machines, what equipment have you got on it? You talk about equipment; what is there you have got on it?

A. We have made a very heavy foundation. We dug a very deep foundation.

Q. That is a part of your mason-work?

A. No, sir, not our mason-work. No stone about that at all, or brick.

Q. What is it?

A. Oak timber bolted together.

Q. How many feet of oak timber in that framework?

A. Oh, there would be six or eight cross-ties at the bottom, then they would be probably eight to ten feet long, and then there would be some other heavy oak timbers lengthwise again, and they would be all bolted together. It is not the expense of the lumber so much as it is the labor.

Q. Do you wish this jury to understand from your testi-
2615 mony that it would cost $325 to set up one of those machines after you got it here in Detroit?

A. Oh, no, not the setting up alone.

Q. You say $75 for freight. Of your $400 that leaves $325 just for taking one of those planing machines and setting it up down there. Do you wish to be understood that way?

A. No, sir.

Q. Where do you get that value?

A. There is the freight and the cartage and the setting up——

Q. You have figured the freight——

Mr. DICKINSON: Let him answer.

A. I started to say we pay freight or cartage, we have to unload that machine and dig out this trench, and put in these foundations, which is a big job. We put the machine in place, and we have to line it up——

Q. What do you have to pay a man to excavate there?

A. It cannot be put up for one cent less than the price I have named, and I would not take the contract to do it for that.

Q. You include the shafting in that, do you?

A. No, sir, I do not.

Q. What do you include in that? There are $325 not accounted for, and I would like to have you explain that.

A. You cannot do it short of the amount I have put on it.

Q. You ought to be able to tell us where that money comes in, where you would spend it. You certainly can build a very heavy timber foundation for $100 for one of those machines. You can buy a good deal of oak timber for $100. Now, how many cubic feet of timber would you have in there?

A. I don't know. They are pretty heavy.

Q. What size of timber are they?

2616 A. I think the top timbers are—I was noticing one the other night—about two and a half wide of oak.

Q. How deep are they?

A. They are about eight inches thick, very heavy timbers.

Q. And two feet wide?

A. About two feet wide.

Q. All one piece?
A. All one piece, that one I speak of.
Q. How big is that?
A. As near as I could state now, it would be about 24 inches wide and about eight inches thick.
Q. How long?
A. Sixteen feet long.
Q. What is that, the top bed-piece, or what do you use that for?
A. That is the top piece the machine sets on.
Q. That is what I say; the top bed-piece.
A. Yes, sir.
Q. You cannot tell us how many days' labor there would be on it or how much the timber would be?
A. No.
Q. That is just a rough estimate of yours?
A. No, sir, it is my judgment. I am willing to swear to it. I have sworn to it.
Q. You cannot give us the details further than you have, can you?
A. I have simply stated it would cost that much money.
Q. Did you ever keep track of the amount it would cost to take one of those machines and set it up?
A. It would surprise you.
Q. Did you ever do it when it was being actually done?
A. I have always had an opinion of it and I gauge myself
2617 according to that. You will find I am not far out of the way.
Mr. DICKINSON: Is that the thirty-inch machine that Mr. Backus ordered made first?
A. Yes, sir.
Mr. BAKER: Now, Mr. Kramer made an estimate on the building of $2,131?
A. Yes, sir.
Q. And your estimate on that is $4,997.65?
A. Correct.
Q. How do you make that difference?
A. I took 45 off; he took 50 off the latter, and I took 45 off, and 50 and 10 off the rubber.
Q. Did you call it the same amount?
A. No, sir.
Q. How much more did you make than he did?
A. I think I gave you the amount of feet in my testimony the other day.
Q. You don't remember now?
A. No. I had it all made up.
Col. ATKINSON: Are these the correct measurements of the buildings?
A. Yes, sir.
Mr. BAKER: You have a couple of matchers that Mr. Spitzley puts in at a thousand dollars apiece, and you put those in at $3,400 apiece?
A. Yes, sir.
Q. They are 14-inch, are they?

A. Yes, sir; 14-inch flooring machines and molders.
Q. What is that $700 for on each one?
A. He can't buy it for a thousand dollars, or I either.
Q. How long since you bought one of those?
A. Those machines are worth——
Q. Just answer my question. How long since you bought one.
2618 A. We have not bought one for about eight years.
Q. How much did you pay for it?
A. They cost us all of $1,400.
Q. Do you remember what you paid for them?
A. Yes, sir.
Q. How much was it?
A. You can't buy one of those machines——
Q. How much did you pay for those machines, if you can tell us?
A. We did not pay less than——
Q. I am not asking what you did not pay. I am asking you what you paid for them.
A. I don't know the exact figures. I know they can't be bought today——
Q. How do you know they can't be bought today?
A. Common sense tells me so.
Q. Is that all?
A. No, I know from my own judgment. He probably went to Mr. Foot, or Mr. Jenks, and asked him the price of a matcher, and he probably told him a thousand dollars. That is no criterion to go by. You will find they are worth every cent I have put them in at. I had Mr. De Mann down with me to the factory, and he went off to the factory and looked this over with me——
Q. Just answer the question, please. Mr. Spitzley has an estimate here on 70 rip and cut-off saws at $769. You say there are 30 of those, and they are worth $3,000?
A. Yes, sir.
Q. How much do those machines cost?
A. We got those ourselves. I got them up myself. Got up the mechanism, the tools and everything.
Q. Those are your own estimate of what they are worth?
A. It is a very conservative estimate on them, indeed. I
2619 don't think the machines could be replaced for that much money. $100 is too low for them, but that is what I put them in at.
Q. They are not anything you can buy in the market?
A. No, sir, we have not very many machines that you can buy in the market.
Q. Most of those machines down there you make yourselves?
A. Yes, sir; but not all of them. We have made a good many, and if I were to sell them I could sell them readily.
Q. Mr. Spitzley says this band-saw filer costs $75 in Buffalo; you put that in at $250?
A. Yes, sir.
Q. How big a machine is that?

A. It is a band-saw automatic filing machine.

Q. Cost $75 in Buffalo?

A. Yes, sir, on cars in Buffalo.

Q. Where do you get the rest of that expense? What is the freight from Buffalo up here?

A. Three or four or five dollars.

Q. Now, where is the rest of this $250?

A. The rest is in putting in this machine. In buying the machine, you don't get one-fourth of it. You will have to add pretty near four times as much to it. That is not a complete machine. We have to build the walls it runs on, the bracings, and the frame. We have got to counteract that down. We have to get the anvil and a plane and the frame and the bench for bracing our saws and filing them and hammering them. That includes the whole outfit for that department.

Q. So that the equipment and the frame costs a great deal more than the machine itself?

A. In that case a good deal more.

Q. You testified there was a rounding machine, which you use for turning, and you estimate that at $300. Is that just an ordinary lay?

2620 A. No, sir, that is a regular machine with feed-rollers. It is a very expensive and very intricate machine. A very complicated machine, and we have five or six extra heads with that, that cost me $25 a head.

Q. All it does is to turn a piece of wood round?

A. Yes, sir, it makes it round before it gets through with it.

Q. You estimate the boilers down there at $7,000?

A. $7,000.

Q. How many boilers have you got?

A. Four.

Q. What are the boilers themselves worth before they are set up?

A. They are worth about—that is, without the mud-drum or without the breeching they are worth in the neighborhood of six or seven hundred dollars apiece; that is, the iron boilers. We have since put in steel.

Q. And the balance is for setting them up?

A. The balance is for the setting of them up, and the fittings. There is a great deal that goes with them.

Q. And that costs a good deal more than the boiler itself does?

A. Oh, yes, more. I don't think I could replace it today for that.

Q. Did you effect this insurance with Mr. Jones?

A. No, sir.

Q. Who did?

A. I have nothing to do with the insurance. My brother did that.

Q. Newton?

A. Yes, sir.

Q. You don't look after that at all?

A. The only thing I know about the insurance is that we were

insured two or three years ago in these wildcat companie
2621 these mutual companies of Minnesota and Wisconsin, an
they all failed, and we found ourselves without any insu
ance, so made up our mind we did not want any more wildcat i
surance.

Q. When did you get good insurance?
A. We have had it ever since.
Q. When?
A. Two or three years ago.
Q. Did Jones get this wildcat insurance for you?
A. No, sir.
Q. What did you have when you burned up there in 1882?
A. We had good insurance at that time.
Q. But you quit Jones at one time?
A. We insured in these mutual companies at one time.
Q. You have had insurance all the time with Mr. Jones?
A. No, I think there was a time we didn't have any with Jone
Q. I suppose you took that mutual insurance because the rat
they charged was a good deal cheaper?
A. Yes, sir, that is it, and we found we had no security.
Q. It was cheap all around, at both ends of it?
A. Yes, sir, and both ends were cheats, too, I think.
Q. So you went back to Mr. Jones and he has placed it all since
A. No, sir, he has not handled it all himself.
Q. Who else has handled it for you?
A. Three or four parties.
Q. You have a great many companies, haven't you?
A. I believe so.
Q. How many policies have you got?
A. I could not tell you. It is out of my department.
Q. Your brother handles the finances and the insurance, I sup
pose?
2622 A. Yes, sir, ordinarily.

Cross-examination.

By Mr. ROBISON:

Q. What is the difference between you and Mr. Spitzley on th
estimate of the buildings alone?
A. If you will let me take that sheet of paper. We went throug
these and took them as accurately as we could. It is as near correc
as I could possibly make it. Mr. Spitzley's total of the building
was $22,612.09. Mine is $54,485.42. I say buildings, you under
stand that includes other things besides the buildings proper. It i
the total amount of this estimate. It is what Mr. Spitzley has lef
out, in addition to the difference in the estimate.
Q. Can you tell how much Spitzley left out?
A. He left out the sewers and the pavement of the yards——
Q. Can you tell how much he has left out?
A. No, sir.

Q. Mr. Spitzley said, did he not, he would put up that building for a certain amount of money?

A. No, sir, I don't remember his saying that. He may have said so, but I don't recall the circumstance.

Q. Did you estimate the amount that this building was worth, on the same matters or the same things he figured on?

A. No, sir, he has left out much of it.

Q. What did he leave out?

A. He left out the pavement of the yards——

Q. How much is that?

A. That is $1,800.

Q. Will it take you long to tell what he has left out?

A. No, it is not much of a job. These is excavating, $9,000. That is where we built the mill, where the tracks are and
2623 where the mill is. We remember distinctly what that cost us.

Q. That is included in your $54,000?

A. Yes, sir.

Q. Has any one else given any figures on the excavating?

A. No, sir, that is what it cost us.

Q. Did you pay $9,000 for digging down there?

A. Yes, sir; we recollect very well when we did it what it cost us, and it could not have been done for any less.

Q. Where did you dump that dirt?

A. We carried some of it in the Fort Street front, some of it in the docks. We made just as short hauls as we could make.

Mr. DICKINSON: You excavated about an acre of bank?

A. Yes, sir; we had to excavate the whole bank where the Fort Street end comes up in order to get the advantage of the two floors.

Mr. BAKER: There is a bluff there?

A. There was a very high bluff there, and also where the tracks are we excavated. And sewers, $1,000.

Mr. ROBISON: That was included in this other man's estimate?

A. No, sir, he states in his testimony he did not include it.

Q. Mr. Kramer says he did?

A. He says he didn't. He said it included the water pipe to the river.

Q. Well, a thousand dollars for sewer?

A. Yes, sir. Now, there is 80 feet of eight-foot picket fence and gates on the Fort Street property, $60; 176 feet of board fence on the west side, $70.40; 75 feet of sidewalk, $18.75. And then there is our office fixtures complete, $15,000.

2624 Q. That is something Mr. Spitzley puts in at $3,724.54?

A. Yes, sir.

Q. And you make it how much?

A. $15,000.

Q. For that little office down there?

A. That is not a little office. That is a nice one. That includes the fixtures and everything. It is finished as nicely as any building I know of.

Mr. BAKER: That don't include the brick-work?
A. That includes everything.

By Mr. ROBISON:

Q. Mr. Spitzley puts in the carpenter-work at what, in the office?
A. He puts that in at $2,700. He does not put in anything for lumber. I suppose he includes that in the carpenter-work. I think we paid Richmond & Harris, as fine carpenters as are in the city, or anywhere else, I think we paid them pretty near that amount for the carpenter-work, and we furnished our own material. He puts in the painting and glass at $384. And he charged us for one of those little things himself, in the office, over $250 for it himself, and he puts in the total paint and glass at $384.25. Decorating and painting, $300. We paid the man who did the decorating over $300 and we furnished all the material. There are four or five coats of lead upon it, and the ceilings are all decorated, which you have seen, undoubtedly, and he puts in a charge of $44 plumbing, and gas fixtures $207. I put in a new closet-room last year that cost me $140 besides the plumbing. And my gas fixtures have cost me more than he put in. Mr. Spitzley mistook the cornice on the office for wood. He thought it was wood; it is galvanized iron and cost me $350.
Q. About how much a foot is it?
A. Oh, I should judge $2.50 or $3.50 a foot.
Q. Is that what it cost?
2625 A. About what it cost. Marble mantel he puts in $75. We have two marble mantels, he only got one, and the two cost us about $400.
Q. How large is that office?
A. It is about 28 x 40, I think.
Q. How many stories high?
A. Two stories.
Q. 28 x 40, two stories high, and it cost you over $15,000?
A. Understand it is very expensive——
Q. It cost you $15,000, did it?
A. Yes, sir.
Q. Mr. Spitzley's estimate, at any rate, down there is $32,000 too small; you have it at $54,000 and he has got it $22,000?
A. I have not figured the difference.
Q. He makes a difference in the lumber?
A. He makes a difference in the lumber.
Q. Mr. Spitzley is a pretty good judge of lumber?
A. He is under certain conditions.
Q. He has got the lumber too low?
A. He has not got it correct or anything like it.
Q. And you think he has a fair price for the putting of the building up, the construction of it?
A. What do you mean?
Q. By days' work, do you think he has a fair price on it for that?
A. He has not put it in in that form.

Q. Do you think he has included in his estimate a fair price for labor?

A. In certain things he has. He says lumber and labor so much. I stated the other day that maple flooring could not be laid for $27. It is worth $38. Mr. Dupont will tell you it is worth $38.

Q. If Mr. Spitzley says he would lay it for that, then what
2626 would you say?

A. Well, he would not take the job for that when you come down to it.

Q. He said he would.

A. It would bankrupt him if he did. You will find my figures straight and square right straight through.

Q. I have no doubt about that, but I think you have swelled them. When you say that little office cost $15,000, I say it is swelled.

A. Have you ever been in it?

Q. No, not with a view of carefully examining——

A. Come down and I shall be pleased to show you through.

Q. This lumber you speak of that you used to sell out in front, this Kronbach contract that he had, you say that this lumber sold out on River street to customers of Kronbach, almost entirely?

A. No, it wasn't almost entirely. Mr. Kronbach had his customers which he drew by the fact that he was foreman there. If he had been foreman in some other mill he would have drawn them there.

Q. He is not a salesman?

A. Yes, sir, he is a foreman and salesman. That is his duty. It has been his duty to sell what he could.

Q. And the profit you used to get on his sales amounted to $2,000 a year?

A. I should say it would come to a good deal more than that, but it is all right enough.

Q. And you used to sell down there $20,000 worth a year?

A. Yes, sir, it is not only the loss of the profit, but the loss of the stock.

Q. How much was there sold down there, $20,000 worth a year?

A. I should think so.

2627 Q. Ten per cent. was about a fair profit on it, was it?

A. No, we made more than that on that kind of stuff. Our profit down there was more than that.

Q. How much?

A. It would be 20 per cent. anyway.

Q. That amounted to about $4,000 a year of loss down there on that one item?

A. Yes, sir.

Q. Because of this stock that has been taken away from this front end of the mill?

A. I think it has injured us all of that.

Q. Instead of selling it you have now to haul it and accumulate it in your warehouse?

A. I said we have to haul all we have left.

Q. What did you do with this material you used to manufacture, what do you do with it now?

A. We don't buy it any more and then we don't have to sell it.

Q. You neither manufacture now nor sell it?

A. No.

Q. So it is not accumulating in your warehouse?

A. No, it is not accumulating now.

Q. When did it stop?

A. Oh, six months ago. We found out we could not handle ourselves to any degree of advantage at all and we stopped.

Q. You stopped buying this material six months ago, and they stopped coming down there for the stuff six months ago?

A. No, one man was run away with twice and he would not come any more. They stopped——

Q. Who was that man?

A. I don't know his name. He is one of his principal customers down there.

Q. One of Krombach's?

2628 A. Yes, sir. Mr. Krombach was in the wagon with him one day himself when the horse run away. The next time it took him in a neighbor's yard and brought up against the fence there.

Q. You didn't see that yourself?

A. I get all these facts from my men. I will tell you what I did see a week ago last Saturday noon. I got down to the mill and a gentleman was waiting for me and he says, I came down here for some sawdust, and your foreman ain't there, and he says, I am in a hurry. Well, I says, I will go down with you, and I asked him if his horse was hitched, and he said, No, he did not have to hitch him he would stand anywhere. And when we got down there his horse had gone away, and the last I saw of him he was making tracks for his horse down River street. He got his team finally——

Q. He left his horse unhitched to go up to the office?

A. Yes, sir.

Q. And the horse went away?

A. I will give you the gentleman's name if you wish?

Q. He left his horse unhitched?

A. Yes, sir.

Q. And he run away?

A. He supposed his horse was all right.

Q. He run away?

A. Yes, sir.

Q. He was unhitched?

A. I don't know whether he was hitched or not. Those things are happening all the time. I know he felt pretty ugly over it.

Q. What scared the horse?

A. There was a train passed over, and that is why I asked him if his horse was hitched.

Q. Where were you when the train passed over?

2629 A. Just as we were coming down the steps the train passed over, and that is what made me ask him if his horse was

hitched. He said his horse was an old plug and would not run away, but he did run away.

Q. Did you call his attention to the ordinance against leaving a horse unhitched?

A. No, sir, that might not make any difference. The gentleman's name is Thomas Ryan. He lives at 112 Harrison avenue. It was 12.20 noon, Saturday, October 21st, 1893.

Q. What else have you got in that memorandum?

A. I took that down, that is all.

Q. Was there any damage done?

A. I don't know, sir, whether there was any damage done or not.

Q. You say you used to make fine inside work and can't now at all?

A. We don't try to.

Q. Why don't you try to?

A. We can't ship it. We haven't any place to keep our stock clean.

Q. Have you tried it?

A. Oh, yes, sir.

Q. I don't suppose the hard times has anything to do with your manufacturing down there?

A. It naturally would now have some effect. If you take that trestle down there and give me a chance, I will risk the times. I am perfectly competent, I understand my business, and I can make a pile of money, but I can't be hampered all the time with such things as they have got down there. No man can make a success of that business there.

Q. How much do you want to make?

A. I think I could make a good snug sum.

Q. Well, how much? In two years, you say, you have made $70,000?

2630 A. I could make as much more.

Q. Right along?

A. Yes, sir.

Q. How much have you made in the last year?

A. I could not tell you.

Q. Haven't you figured it up?

A. No, sir.

Q. Don't you think it would be an interesting thing to know how much you have lost during the last year since this railroad has been there?

A. I know perfectly well we haven't been doing a profitable business.

Q. You have been losing money?

A. Yes, sir.

Q. But you haven't taken pains to figure it up, you haven't taken pains to look at your books to see how much you have lost?

A. What could I tell you from my books, I should have to take an inventory and all that kind of business.

Q. Have you made any arrangement for going in any other kind of business?

A. No, sir, that is all the business that I know.

Mr. DICKINSON: Do you intend to drive him out of business?

Q. Not at all. Have you looked for any other site for your planing mill?

A. No, sir, not since the factory burned in 1882.

Q. And yet you have known all the while this business was being conducted by you at a loss?

A. No, I don't say that.

Q. I understood you to say that you have been losing money?

A. I say we can't make money now.

Q. This thing is going to stay in front of you. You have
2631 got your mind made up to that, and you know you cannot conduct this business at a profit. Have you looked anywhere for a site?

A. I am doing the best I can—I am all at sea.

Q. You are all at sea?

A. I will frankly say I am all at sea. I don't know what move to make. I am stuck.

Q. Why haven't you looked around to see if you can't find some other place?

A. What could I do? I think I would have to get you to do that for me.

Q. I think I could do it for you.

A. You could come down and run my business for me.

Q. Well, I think I could run that part of it.

A. I have got my money in that plant; my bread and butter is there, and if some man would come along and give me a million dollars or more I might step out.

Q. Here is what I am trying to get at; in fairness you think you are losing money; you have said that, do you believe that?

A. I know it.

Q. How long have you been losing money, and how long have you thought you have been losing money?

A. We knew we could not succeed when they came in there.

Q. Have you, since this thing has been put up there, looked around to locate your mill in some other place?

A. No, I have got my interest right there.

Q. And you want to continue to run it at a loss, do you?

A. I have no money to build a new mill with.

Q. And you want to continue running at a loss?

A. I am doing the best I can.

Q. But you have been doing the best you can and you have been losing money right along. How long are you going to continue losing money?

2632 A. When I find myself losing money on anything I have quit.

Q. Have you quit?

A. I have quit on a certain class of material. I am trying my best, doing everything that any human being could do, and I am

willing to work early and late and hard. I wish I could see my way out of it. I would be very glad to.

Q. I presume I am prejudiced, but I don't feel sorry a bit. I don't believe you are losing money that you think you are, especially as you have not investigated.

A. It is a pretty big thing to handle and unless it runs right, each department runs successfully, it will be a loss. It is a pretty big enterprise to run successfully.

Q. Did you ever do any building yourself except this mill?

A. No.

Q. You are not an expert builder?

A. Yes, I have built my house. Oh, I don't claim to be an expert builder.

Q. You would not compare yourself with Mr. Spitzley as a builder?

A. I presume I have not built as many buildings as he has.

Q. Have you one in a hundred that he has?

A. I don't know anything about Mr. Spitzley.

Q. You never have put up any large buildings except this mill?

A. I think Mr. Spitzley came down there in the first place with the intention of taking it pretty accurately, and he either got rattled, or something, I cannot tell what, for he missed a great deal of stuff. If he had taken a building of a quarter of that size he might have got it all.

2633 Q. You say you are so arranged down there that you have never been injured by the Michigan Central?

A. Yes, sir, that is right.

Q. How are you arranged?

A. We are away from the Michigan Central. We have side tracks of the Michigan Central, but the engines do not come in there.

Q. It runs along the corner of your yard?

A. Let me explain——

Q. No, maybe I can save time. Did you mean your location was such that the Michigan Central could not injure, or your buildings were so arranged?

A. No, our business and buildings are so arranged that the Michigan Central is out of the way of it.

Q. That is, they are located away from the track; is that what you mean?

A. Away from where we transact our business.

Q. And you could not change it down here now?

A. No, sir. Oh, heavens, no.

Redirect examination.

By Mr. ATKINSON:

Q. Now, Mr. Backus, I don't understand the difference between yourself and Spitzley to result entirely from a difference in valuation, but many things seem to have been omitted by Mr. Spitzley that you included in your estimate?

A. Yes, sir. The list shows it plainly, what has been omitted.

Q. Just run that over, if you have a list of the omissions?

A. I can run it over. I went through the omissions in the building the other day, you know, and I have this which I can give you as well to compare.

Q. What are those omissions now?

2634 A. He has omitted entirely one of those large machines 30-inch machines——

Q. Give the valuation as you proceed?

A. He has omitted one 30-inch machine, $2,000. He has omitted two extension-frame gang ripping sawing machines, $600. He has omitted eight of our improved matching machines, $2,000. He has omitted eight of our dumping or gluing tables or machines, $160. I put them in at $20 apiece. I can't possibly build them for that; I was looking them over the other day. He has omitted one joining machine, $150. He omitted two of our improved sanding wheels, $150. He has omitted one wood-cutting machine, $150. He has omitted 13 of our cross-cut ripping sawing machines, $1,300. For emery-grinding machines, $250. One improved swinging sawing machine, $250. He has omitted five Backus' shooking machines, $10. Sixty swivel truck boxes, $720. 120 factory trucks, $2,400. I put those trucks in at $100 apiece. It is a very low estimate. One blacksmith forge, $30. 28 small wagons or carts, $560. Two ground extensions and frames, $20. One pick-sharpening machine, $50. One large loading platform scale, $250. Mr. Spitzley claims he saw two, but we have but one. Two knife-balancing scales, $20; one panel-planing machine, $300; ten trussed-box trucks, $100; one lock-corner machine, $150; one rounding machine, $300; two dado or grooving machines, $200; one patent sand blast, $200; one filtering tank, $10; one wood-bundling machine, $30; two traveling-bed rip-sawing machines, $400; one sorting machine, $25; two trucks, $8; office fixtures, foreman's office, $100; twelve extra resaws, with the Backus teeth, $1,200; eighteen extra saw teeth, $120; extra cross-cut and rip-saws, $1,000; molding and planing knives, $2,745.16. That does not include any second-hand knives, ordinary knives that are not perfect. Iron and wood vices, $65; one heavy screw

2635 punch and table, $40; special and extra parts of machines, tools and appliances, $6,000.

Q. What does that item include?

A. It includes that list I read the other day.

Q. Have you the total of them there?

A. No.

Q. In some cases you value higher than he does, so that the difference would not show, the real difference between you?

A. No, sir.

Q. Have you the total of the omissions?

A. I have not a total of the omissions. I was going to remark he has put machines in here—well, take the siding and joining machine, he has put it in at $44 and I put it in at $500.

Q. Why do you do that?

A. Because it cost us that. It cost me $500. He had taken it as a rip-saw, evidently, and he goes to Mr. Jenks and gets a price on

it, and Jenks tells him about $44. I assume that to be the case. It is a mistake evidently. I don't think it is intentional on his part.

Q. Is there any question but what you can point out to the jury, if they go down there, every one of those articles you have put down there?

A. Oh, no; no question about that.

Q. It is simply a question of taking an inventory?

A. That is all; it is a very big job for any one man to do. It has taken me a month from the start until now to do the best I could do with it.

Q. In making an estimate of your mill for insurance purposes, had you ever made a careful inventory as you have got on this occasion, or did you simply make an estimate?

A. I never made an inventory at all.

Q. You made an estimate then?

2636 A. Yes, sir.

Q. And upon taking a careful inventory you find the money you have actually invested there is largely in excess of the estimate you made for the purposes of insurance?

A. We had no way of knowing—we probably did not have over a good half of the machines we have now.

Q. But you had some machinery?

A. We have been adding right along.

Q. You have been adding to your machinery right along?

A. Yes, sir.

Q. So that the actual cost, as near as you can estimate it, is the figure that you have given, $193,000?

A. It certainly could not be replaced for a dollar less.

Q. Have you, in giving any of those figures, exaggerated any of them?

A. I have not intended to, sir. I find in some cases I am much too low.

Q. The valuation you put upon your office strikes some of us as pretty high.

A. I cannot help it, Mr. Atkinson, the money is there. It is a hard thing to tell what is there because you cannot see it. You cannot tell how many joists are in there——

Q. Were there any pains taken to make it an extra building?

A. They were a whole year building that office.

Q. Have you a vault in that office?

A. We have a vault that cost us over a thousand dollars, and have all the appliances in that vault. We have iron brackets and we have a burglar-proof safe, and we have a vault door that cost us $450 from the Detroit Safe Company. We paid James Roach over a thousand dollars for finishing the inside wood-work. And there are about 75 or 80 lights of glass, of French imported plate glass——

2637 Q. Have you speaking tubes and things of that kind which you have included?

A. Yes, sir; I am supposed to include everything. Much of that

work has been done by our millmen that have not come in at these prices, but I have included everything.

Q. And you are ready to say upon your oath that altogether there are $15,000 actually invested there?

A. It could not be replaced today, I don't think, for $15,000, giving us what we have got there.

Juror BAKER: May I interject a question right there. I am a little puzzled to know just exactly how much bearing this particular thing has upon the issue at all. Supposing he should testify the counters of that office were plated with gold, and should estimate the expense accordingly. You see this matter of the expense of that office is purely a matter of just how much money a man might spend on it.

WITNESS: We have already spent it.

JUROR: Is it important for us to keep this in mind, in settling this question?

Col. ATKINSON: It would strike me, Mr. Baker, simply this way: Suppose you would conclude their business is so interfered with that they would have to move away to another location. Then they would practically lose the value of the office. It probably would not be worth as much for them to move away. In that respect it might become important. But the discrepancy between himself and Mr. Spitzley I wanted him to explain fully, because I didn't want him to appear to differ so much from Mr. Spitzley unless he gave his reasons why, and the valuation of the office struck me as high, and I thought I would ask him about it.

WITNESS: We built our office to encourage our Eastern trade. Gentlemen coming from the East into our office would com-
2638 pare the looks of it, compare the finish and the wood-work with other offices, and perhaps we would get an order out of it.

Mr. DICKINSON: That is the usual object in having a fine office?

A. Yes, sir.

Col. ATKINSON: I suppose you calculate to be there in business hours—in your office?

A. Yes, sir.

Q. And you took a pride in having offices that would make a good impression upon customers as they came in?

A. Yes, sir; and if I was going through it again I would do just the same thing again.

Q. And it was specially fitted for your business?

A. Yes, sir.

Juror BAKER: I would like to ask one question about the insurance upon this mill property. As it stands today it is $120,000?

A. $130,000.

Q. No, but $120,000 actually on it?

A. Yes, sir.

Q. Of that amount $15,000 is on the stock, that leaves $105,000 on the plant complete?

A. That is right.

Q. Now, taking you and your brother in the business, and own-

ing the business and running it, taking the situation for the lumber yard, the location of it as it has reference to your mill site; taking your warehouse with reference to that mill site as being an accommodation all around; supposing that mill should burn down tonight, inflicting a total loss or the same loss that it inflicted in 1882, and you secured your $105,000 *dollars* of insurance on the plant; now, taking the advantages that you have already with reference to your lumber yard and your warehouse, would you rebuild on that site?

2639 A. It is pretty hard to state; I don't think I would. I know I would not with that thing there.

Q. We assume that is to stay there?

A. Oh, no, sir; I would not rebuild.

Q. You would not rebuild?

A. Oh, no, of course not. I would try to get along some other way.

Q. You would go to a new site?

A. I would not know where to go. I would have to go out of business entirely.

Q. It would practically drive you out of business?

A. Yes, sir; that would cap the climax.

Q. I understood you to say that is positively the only site you can do business in?

A. No; I don't say that.

Mr. ROBISON: You say you would go out of business?

A. I would not know where to get another site.

Q. Would you look for one?

A. I am not in condition of health to build a new mill.

Q. Then you would not look for one?

A. That would depend. I would have to be burned up to see.

Q. But you are the same as burnt up now; you are doing business at a loss.

A. I would have to be burned up now to realize my position.

Q. You are worse than burnt up now, if you are running business at a loss there.

A. Well, we are not to blame for it.

EDWIN SAUNDERS, sworn on behalf of the petitioners.

Examined by Mr. BAKER:

Q. Where do you live?

2640 A. Saginaw.

Q. How long have you lived there?

A. 38 years.

Q. What is your occupation?

A. Assistant attorney and claim agent for the Flint & Pere Marquette Railroad Co.

Q. How long have you held that position?

A. I have been claim agent for 16 years.

Q. And before that time what were you?

A. Before that I was employed by the land department, but was

performing duties in the land department and law department five years.

Q. So that would make how many years you have been c nected, or you have been familiar with the claims against t company?

A. Well, I have been very familiar with them for 16 years, a any claims of any importance prior to that time for five years p vious, I would know of them.

Q. Now the Flint & Pere Marquette railroad runs from Bay C to Monroe and Detroit?

A. Yes, sir.

Q. And it has a belt line that runs around East Saginaw a Saginaw city?

A. Yes, sir.

Q. And a main line that runs from East Saginaw to Bay City?

A. Yes, sir.

Q. And you have a large number of side tracks that go to diff ent manufacturing plants up there?

A. In Saginaw and Bay City, yes, sir.

Q. Will you state the general situation of property up there wi reference to fire risks alongside of the track, whether a great ma of the tracks are built upon roadways made of sawdust and slab

A. Some are.

2641 Q. And at a great many points in the Saginaw valley is the refuse on each side of the track, of kindling wood a sawdust and fine and small pieces of pine wood that cover the ent ground on each side of the track in many places?

A. That is so in many places, yes, sir.

Q. And this belt line that runs around the city is specially d signed for the benefit of manufacturing institutions?

A. Yes, sir.

Q. There is a large number of planing mills on the line?

A. There are several.

Q. And a great many lumber yards?

A. Yes, sir, I say there are several; I won't say there are a gre many.

Q. Do you remember Mershan's planing mill right in the corn made by the main line of the Flint & Pere Marquette and the Mic igan Central and the Grand Trunk and the C. S. & N.?

A. Yes, sir, I have known of it for years.

Q. That is right in the corner made by the roads, is it not?

A. Yes, sir, near the corner.

Q. And then there is a large lumber yard and planing mill ne by owned by Mr. Wright, that is situated part way between Ea Saginaw, the north side of the river at East Saginaw?

A. Yes, sir; it is about midway between the business center what was East Saginaw, and Saginaw.

Q. With the main line of the Michigan Central running rig through it?

A. Yes, sir.

Q. That is their Jackson branch?

A. Yes, sir.

2642 Q. Will you state, in your connection with the claim department of the Flint & Pere Marquette road, how many, if any, claims have been presented against that company for setting fire up there in the Saginaw valley during the years you have been connected with it?

Objected to as incompetent and immaterial.

COURT: Don't answer that question.

Mr. BAKER: What I desire to show is, if the court please——

Col. ATKINSON: I object to statement of counsel——

Mr. BAKER: What I desire to show, although they run in the most——

Col. ATKINSON: Does the court rule that Mr. Baker can make an offer of this? It seems to me, your honor, this testimony is clearly incompetent. Whether or not claims have been made which have come to this gentleman's knowledge is entirely immaterial, and it cannot prove anything; it cannot assist this jury one particle in coming to a legitimate conclusion as to the injury done here. Now, the question is plain enough. It is not ambiguous at all. The only object Mr. Baker can have in making the offer is practically, in case your honor excludes the testimony, to get the advantage of it before the jury, although excluded. And that I understand to be improper practice.

COURT: I will sustain the objection.

Mr. BAKER: Note an exception.

Q. You have lived there all these years?

A. I have lived there thirty-eight years excepting while I was in the army fourteen months.

Q. You have lived in the valley of the Saginaws?

A. Yes, sir, both Saginaws, west side and east side.

Q. And you have been connected, as you have stated, with this railroad during all those years?

A. Yes, sir.

2643 Q. Will you state whether or not you have learned in all those years of a single instance where the Flint & Pere Marquette railroad has set fire to adjoining property?

Objected to as incompetent and immaterial.

COURT: That comes under the former ruling of the court and I shall sustain the objection.

Exception for petitioners.

Q. Have you personal knowledge, Mr. Saunders, of the extent to which extra-hazardous property alongside of the Flint & Pere Marquette railroad in the Saginaw valley is endangered by the fact that a railroad runs close to it?

Same objection, same ruling and exception.

Q. You have had several large fires there?

A. There have been fires there.

Q. Is there a single instance in the history of the Saginaw valley where it was claimed those fires were caused by the railroad?

Objected to as incompetent.
Objection sustained.
Exception for the petitioners.

Cross-examination.

By Col. ATKINSON:

Q. You are an attorney at law, Mr. Saunders?
A. I am.
Q. Your business is in the legal department of the company?
A. Yes, sir, some.
Q. You are also a claim agent, you say?
A. Yes, sir.
Q. That is, you go and settle claims as rapidly as you can?
A. I do settle everything I can.
2644 Q. Make the sufferers believe that your heart is with them and that you come as a benefactor, and that you get out as cheaply as you can for the railroad company?
A. I don't pay them any more than they ask, as a rule.
Q. They keep a claim agent on each of these roads, do they not?
A. I think they do.
Q. And they have things to settle up from time to time?
A. Certainly.
Q. And it is pretty nice work, is it not, settling these claims?
A. Well, I would not say it was.
Q. You have got to be pretty nearly all things to all men while you are doing it?
A. There are other employments that I would prefer, but I have got into that groove and I have stayed in it.
Q. You have a belt line on your road around Saginaw?
A. Yes, sir.
Q. And suppose you have a great many side tracks to those mills around there?
A. We have.
Q. When you told Mr. Baker that the road was in some places constructed on sawdust and shavings and slabs, you didn't mean that was a proper way to construct a road?
A. It is not the best way if you can get other material.
Q. It is done in cases of great necessity?
A. Yes, sir, in filling in swamp, and putting this material in temporarily.
Q. That is only used where you can get nothing else?
A. Where we can't get anything better.
Q. You must have seen a great many fires caused by the railroad along the track?
2645 A. Yes, sir, I have along the track.
Q. Often ridden over it when the ties are on fire, and when the woods on each side are on fire?

A. I have seen such things.

Q. And it seems like passing through a corner of the infernal regions?

A. Not as bad as that, I don't think. I have seen occasional fires along the side of the road.

Q. Then there are sparks flying from the locomotives that set fire to adjoining things?

A. Well, in my judgment there are very few sparks flying from locomotives, in the manner in which they are now constructed.

Q. What is it that sets these fires, friction or sparks?

A. I think there are more fires set by emptying the ash-pans than in any other way.

Q. That is done from locomotives?

A. Yes, sir.

Q. They empty their ash-pans and drop the live coals on the road?

A. They do in some places.

Q. In what other way do they get rid of their ashes?

A. That is the only way, of course. The way they are constructed now, they are made something like a window-blind with an attachment, and the engineer is running along the road, and he comes to a place he thinks favorable to dump his ashes, he pulls that lever attachment out, and it dumps the ashes.

Q. That may be done anywhere?

A. Yes, sir.

Q. And that is one of the greatest sources of fire there is?

A. I think so.

Q. The sparks are likely to go out, as a rule?

A. The sparks do not get outside, as a rule, on the engines
2646 on our road. I do not know so much about the engines on other roads. We have screens, the extension front, so that the sparks that get out do not set very many fires, in my judgment.

Q. They get choked up, don't they, these spark-arresters?

A. Not that I know of. They may, but I could not say as to that. I don't think they do. They will, of course, if you don't clean them out.

Q. I suppose, Mr. Saunders, that an engineer of a railroad company, in active service in running a locomotive, would know more about it a good deal than the company's lawyer?

A. Most assuredly.

Q. It is not a branch of our noble profession?

A. No, sir.

Q. And all you would be likely to know about it would be what somebody has told you?

A. What little I pick up talking with the men.

Q. You would be very apt in your opinion to take a favorable view to the railroad, would you?

A. Well, I think I can tell the truth as a witness without bias.

Q. And after how many years of railroad employment?

A. After twenty years, strange as it may seem, I think I can.

Q. But the bent of your mind during all that time has been on the railroad side of things?

A. I have been looking out for their interest; that is, for the interest of the Flint & Pere Marquette.

Q. And the Flint & Pere Marquette is one of the roads that runs by Backus' mill?

A. Yes, sir.

Q. And a member of the union depot company?

2647 A. I think so.

Q. So that in that way you are incidentally connected with this combination?

A. I have nothing to do with the management.

Q. What planing mills do you say there are on the line of your road?

A. There are a large number. I could designate a good many of them, and a good many of them I could not.

Q. This big mill you spoke of, how long has that been up?

A. The Mershan mill was constructed as a small plant I should say twenty years ago. It has grown to be one of the largest in the country.

Q. Is the Germain mill on your line?

A. It is on a spur on the belt line.

Q. What other mills up there on the main trunk line, is there any?

A. I don't now think of any of the large mills that are on our line. There are other mills on the docks, which would be the same thing, I suppose.

Q. Do you know anything of their interior construction?

A. I don't.

Q. You don't know where they get their light from?

A. I don't.

Q. Nor how their machines are situated with reference to the railroad company's interfering?

A. No, sir. I think I have looked into them, but I could not give any description of them.

Q. Do you know whether they have dust-rooms, and sawdust bins, and where they are situated with reference to the railroad?

A. There is one, I think it is called the Bay City Box Company—what do you mean, dust-separators?

2648 Q. No, bins where they sell their sawdust.

A. I don't know anything about that.

Q. You haven't noticed that as you rode along?

A. No, sir.

Q. They are probably not on the railroad, then, or you would have noticed them?

A. They extend up pretty close to the line of the right of way.

Q. That is, the mill?

A. Yes, sir.

Q. But I mean those bins for dust and shavings?

A. No, I don't know anything about them.

Q. Are those one-story buildings—comparatively small concerns?

A. They are comparatively small. I should say one of them was two stories, and I am inclined to think two of them are. I would not be positive about that.

Q. This mill of Mershan, is that on the main line?

A. It is a little way from the main line, I should say, the mill itself—it is in two or three portions—I should say it would average seventy-five feet from our main line. One portion of it comes within, I should say, fifty feet of the Michigan Central track and the Grand Trunk.

Q. Is that the trunk line or the belt line?

A. The main line.

Q. About seventy-five feet from him?

A. I should think so.

Q. Do you know how the machinery is located?

A. I don't know anything about it.

Q. Your road runs on a grade there?

A. No, sir, it runs on a level grade at that point.

Q. It is not an elevated road?

A. No, sir.

Q. And they have side tracks, I suppose, between your line?

2649 A. Yes, sir, we have side tracks running into the mills, into the lumber yards.

Q. You don't know whether they get their light from the opposite side or not?

A. I don't know anything about that.

Q. Now, Wright's mill, where is that situated?

A. It is about midway between the business center of what was East Saginaw and Saginaw.

Q. That was a spur, was it?

A. That is on a spur. The F. & P. M. has a spur running up to it, stopping in the yard, and the Grand Trunk has a spur running up and stopping in the yard, and the Michigan Central has its main line running down through the yard, and also has sidings.

Q. How far does it run from the mill?

A. The mill from the Michigan Central?

Q. Yes, sir.

A. I should say it was 250 feet from the planing mill.

Q. And on what you call a grade?

A. Level grade.

Q. That would not be at all like this one of Backus'?

A. No, sir.

Q. Have you anything on your line that is at all parallel to the situation down here at Backus'?

A. On account of the grade?

Q. Grade and everything.

A. I don't know that I have.

Q. Nothing that is at all parallel?

A. As far as that is concerned, no, sir.

Q. Do you know of any one where they switch immediately in front of the mill?

A. Yes, sir, a great many.

Q. I don't mean switches for the side tracks, but where the
2650 main switches for three or four railroads, such as exist down there in front of Backus' may be found, with 150 trains or more a day, perhaps?

A. No, such business is not done up there at any point.

Q. Do you know of any where there is an upgrade in front of the mill, and where the road runs right by the edge of the property?

A. I don't know that I do. I think all the tracks in the Saginaw valley, so far as I know, are practically on a level.

Q. So that you bring us nothing from Saginaw that is at all parallel with the situation that we are considering here?

A. Not with reference to that, certainly.

Redirect examination.

By Mr. BAKER:

Q. Now, Mr. Saunders, you testified on cross-examination that out in the country fires have been set by the railroad?

A. Yes, sir.

Q. Now, is that true as to the city, and in these manufacturing plants?

A. So far as I know it is not true.

Q. And the explanation of it is that up in the open country the engineers are not as careful about emptying the fire-boxes as they are when they are near dangerous property?

A. Well, I assume that to be the explanation, but I don't know.

Mr. ATKINSON: Then it depends entirely upon the care of the engineer?

A. Yes, sir, largely.

Mr. BAKER: Can you tell us whether it is customary for an engineer, when he is near dangerous property, to dump his fire-box?

2651 Col. ATKINSON: Objected to. The witness is not proved to possess any knowledge.

COURT: You may state as to whether you know.

A. I do. I know what the instructions are.

Mr. BAKER: Do you know from observation what the practice is?

Objected to as incompetent.

COURT: I will admit the question.

Exception for the respondents.

Q. What is the practice as to dumping their fire-boxes, their ash-boxes, in the vicinity of dangerous property?

A. I never saw it done but once.

Q. In your entire experience?

A. Yes, sir.

Q. Where was that?

A. That was directly opposite the Mershan mill. I won't say directly opposite; it was west of, nearly opposite.

Q. When was that?

A. I should say it was at least ten years ago.

Q. Were you there going over the line and about the railroad continuously?

A. Well, I won't say that. I spend from one-third to one-half of my time on the road, and the rest of the time in the office.

Q. In view of your cross-examination I will repeat my question as to whether or not, in your entire experience, any instance has been brought to your attention where a fire has been caused on that dangerous property by the railroad? It seems to me they opened up the very subject which will permit me to ask the question.

Col. ATKINSON: That I object to.

Mr. BAKER: In addition to that I desire to show by him that in twenty-one years there has not a single fire taken place
2652 from such a cause. It seems to me, in view of the cross-examination, I have a right to ask that question.

Question excluded.

Exception for the petitione

(Then adjourned to 9.30 ne day.)

NOVEMBER 1, 1893—9.30 a. m.

Mr. Foreman BAKER: I would like to ask Mr. Henry Backus a few more questions.

HENRY BACKUS recalled.

Examined by Mr. Foreman BAKER:

Q. It is a matter that gives me a great deal of trouble and I want to be sure I am correct. If I understand your testimony yesterday correctly, you stated that you had ceased to seek orders for the making of fine moldings.

A. We have ceased soliciting that class of trade, yes, sir.

Q. On account of the difficulty in turning out first-class work, acceptable work?

A. We have no place to store it; it is not only on that account, but we have no place to store it; and be we ever so careful, our men in the mill there, and it takes two or three days to get out a car-load of that stuff, when you get it outside——

Q. You have actually declined orders that were offered you in the Eastern markets?

A. I would not attempt to take them. I have been offered orders by parties in the East, in New York, there is no trouble about my getting orders, no question about that.

Q. About what percentage of your gross business was probably included in this fine molding?

2653 A. That class of trade was about a third of our trade.

Q. And about what percentage of your net profits would that be?

A. That would represent the larger portion of our profits; our other business is practically incidental to that.

Q. Then is it the fact that in the declination of this business of fine molding you are thrown back, largely at least, upon the business of box-making, and other coarser work?

A. It forces us into that.

Q. Now, on another point. I take it that if the union depot company would agree to place you in another site and move you there, where you would get equal facilities with what you have now, without any expense to you, you would have no further controversy with them?

A. That would depend on how the site was and the surroundings.

Col. ATKINSON: The question is everything equal.

A. I don't know where they would find it.

Q. But if it were equally good, that would be the case.

A. I should be very glad to be located in some other place, of course; but we have everything there now, and if it were to be destroyed tonight, we will say, by fire from a locomotive, what would I do? It would destroy my business. There is the trouble in rebuilding. We have made our own patterns, we were our own engineers, our own architects, as I said yesterday. Mr. Spitzley perhaps has built some buildings, a great many more than I have, yet I know how to construct a factory perhaps just as well as he does; I presume I ought to know, and I know my father is equal to the emergency, he has built a great many buildings. I do not wish to be understood as casting any reflection on Mr. Spitzley in any way;
I take him to be an honorable, straightforward man, who
2654 does as well as he knows how, but he has merely got confused.

Q. Is it not possible then to get a location on Fort street upon the corner of a cross-street between your present site and your present lumber yard that would give you a frontage on Fort street and on a cross-street, that would give you ground-floor facilities fully equal to what you have now, double ground-floor facilities—isn't that entirely possible?

A. It might be possible in this respect, but we have built our enterprise there, with the surroundings and with our docks, and we have built a particular kind of structure, and now to go and change the thing in the least, of course we would have to learn our trade again.

Q. Well, it would strike me that would not be a very large difficulty.

A. It all takes time and represents money.

Q. At the same time it would be possible to locate upon Fort street upon a corner between your present site and your lumber yard and get a front on both streets that would give you fully as much ground-floor facilities.

A. As far as my interests go in the manufacturing, I should be very glad to have things different from what they are in, in some shape; that is all I can say. I am very much disturbed; I am worried to death from fire, I don't know what in the world to do; I went to Adrian the other day and I got out of the train, I saw a fire

and I went back; and I am even more disturbed this morning than I have been.

Q. It is disturbing to any man that is trying to do justice between you two parties here, because it is an extremely difficult question. Now, as a matter of course, it would be a question of money simply. Your father figures the value of his real-estate site at $125,000, and he figures that because of his rental of $5,000,
2655 on a basis of $125,000. Now, taking the same basis for figuring with regard to the cost of removal, would it not follow that you could remove or the railroad company could remove—whoever did it—at a cost of $850,000, and give you your net profit of $34,000 a year?

A. I don't know as I comprehend your question.

Q. I am getting at your basis of figuring. If it should cost you $850,000 to remove and get a place equally as good as what you have now?

Col. ATKINSON: I suppose you mean the three parts.

Q. No, $850,000 would buy a new plant equally as good as this and enable them to realize a net profit of $34,000 a year, and my idea is simply this, that it would not take anything like $850,000 or anything approaching it, and yet that is the same basis on which Mr. Backus figures the value of his real estate.

A. I think I would be the happiest man in the world if I could be differently situated from what I am now.

Q. I have no doubt of it.

A. From what I have seen. As far as moving our plant is concerned, of course our machines we have bought and they could be moved, but at a great expense, we would have to set them up again.

Q. But your total expense, if the railroad would put you in as good a position as you are now, your total expense would be the cost of the site, the cost of building and the cost of removing.

A. Of course I know nothing about the real estate, that is not in my department, we represent the building only, the business of the plant. There is no question about my ability to handle the business and make it a very nice thing.

Q. And as you testified yesterday, you think if the rail-
2656 road were out of the way and you were back again as you were before, you could make $70,000 a year, as you have done?

A. I don't question it at all. I am away in advance from what I was years ago.

Q. Then as a matter of course that figuring at 4 per cent. would figure the value of a new site at $1,800,000 almost.

A. Yes. I was going to state in our business we have a great deal of competition, and we have no trouble in competing in one sense, because we can do a little bit better work than anybody else; I like competition of that kind.

Q. That of course is the reason why——

A. We are known by our chips, we take special pains and we have to, we are the only institution in the country that I know of

that has machinery for cutting stuff off square. I have been told that by manufacturers in Bay City, and all over; they have come to me and said, Backus, how is it you can do such work without mistakes? I take a train and go to New York and Philadelphia and solicit my own business to a great extent, I have no trouble at all.

Juror SAFFORD: Did you make dock plank?

A. Yes, a great many of them.

Juror CLARK: Do you understand these figures that Mr. Baker has given?

A. I do not fully comprehend them now, sir.

Q. That is what I want to get at.

A. I do not comprehend it only in a general way.

Mr. DICKINSON: Would you have the means, with the means invested now in your mill and the lumber yard and your warehouse and the mill site, would you have the means to purchase any such property as has been stated by Mr. Baker?

A. No, sir.

2657 Q. Included in the earning capacity of the property you would include the ingenuity and experience of three men, would you not, aside from your workmen that have been with you for 15 or 20 years?

A. Yes, and I include in that a great deal of work that I could not do again. I must say that without me the institution could not be rebuilt, as I understand it, without my being there and engineering it, and I am not sufficiently strong to build another institution. I have spent all my life in that one, I have gotten it to perfection, and if it were to be destroyed tonight by fire, my patterns are all gone, my machinery is all gone, and I would have to spend months to replace it. It is a loss there practically, when we burn up.

Q. Mr. Robinson and the planing-mill men have said that the mill could not be removed without a loss, that the machinery itself, if taken out and taken out of its present adjustment with reference to the mill as it now stands, could not be taken out and be worth 50 per cent. of the value. Is that so?

A. Well, it would not be worth that, Mr. Dickinson. I will explain that. There are our lumber-carriers we will say, for instance, they could never be taken out and replaced in another building, they are built into the building piece by piece, they come up through the floor diagonally. The carriers, part of them, could be taken off, but they would not fit another one; when you come to change a thing, you change it all.

Mr. Foreman BAKER: Simply make new ones?

A. Yes, and to remove our boilers would be a difficult matter, to realize anything out of it. It is not the expense of the boilers, it is the cost of setting them up, and the fittings and packing and mechanical labor and millwright-work connected with it, and such things as that. The original cost is trifling.

2658 Q. Now, in this connection, speaking of your ability to buy another such, with the planing mill here as it stands

and its relation to your other property, as it stands, in view of the fact that it is in dispute so far that the property has depreciated, so that it would not sell for a planing mill, no one would buy it—is there any way you can see by which, with all your money invested in the plant you could acquire means, when you have a plant that is disqualified and spoiled according to all the planing-mill testimony, can you think of any means by which you could get the money to invest in another site, except from this depreciated planing-mill property?

A. I would not know where to look for it.

Q. You could not borrow it on your security, for a planing-mill man would not buy it?

A. No, sir; I could not borrow a dollar.

By Col. ATKINSON:

Q. The same question occurred to my mind as to Mr. Baker's inquiry, whether you could not get a site, say, somewhere between the bridge over the Central and Eighteenth street where your lumber yard is, on Fort street, giving you plenty of light on Fort street and a large frontage on Fort street, as you formerly had on River street. It occurred to me that possibly there would be a disadvantage in leaving the Central connection there. I don't know whether that would be important or not.

A. We have always had the very best service from the Michigan Central, and as the head yardman, Mr. Best, told me coming from Buffalo a short time ago, he said, Backus, all through this car famine—we had a terrible car famine about a year and a half ago—you were the only man on the line that I know of that had no trouble in getting cars, you have had cars where the others
2659 could not get them, for the simple reason you are where we break up our trains. We do our shipping over the Central.

Q. Would you have any railroad facilities if you went down Fort street anywhere between River street and Fort street?

A. No, sir, there is no railroad there, and no possibility of getting one there that I can see.

Q. There is no way even of getting a side track from the union depot company?

A. We could go the world through and never get such elegant railroad facilities as we have now.

Q. Even if they put a side track to you, it would have to cross River street?

A. Yes, sir. I consider our railroad facilities second to none in the country as far as quick convenience is concerned.

Q. Then it would be in that respect, a site anywhere between your storage-room and lumber yard—it would not be equal to the one you are forced to give up?

A. It is beyond my comprehension, I do not see how it could be done or made equal.

Q. This question occurred to me and I would like to ask you—I don't know whether any one else would put any value upon it,

would it be possible to reconstruct your mill on the present ground so as to give you light from other directions?

A. No, sir, it would not.

Q. That would overcome the difficulties?

A. No, sir, not as we are situated.

Q. You could not take your mill down and reconstruct it?

A. No, sir, I would not know how to do it. I did the best I could, I have built it twice.

Q. Of course that would still leave the street impeded as far as Woodbridge or River street is concerned.

2660 A. Yes, sir.

Q. Beyond that it would be possible, by taking the mill entirely down and reconstructing it with light on the other side?

A. That is beyond my comprehension. We are peculiarly situated, our mill proper is down below Fort street. Fort street is away up here and River street away down there.

Q. I suppose reconstruction, even on the same ground, would involve a very large sacrifice of the machinery?

A. Yes, if you could reconstruct it to a certain degree, it would take you years before you could get your hand in to know how to run it.

Q. That difficulty does not strike me as so great, but you would have to remove your machinery so that you would lose your foundations and so forth.

A. Yes. I would not consider such a move as that for a moment.

Recross-examination.

By Mr. BAKER:

Q. What year was it you made $70,000?

A. 1882.

Mr. DICKINSON: The year before the fire.

Q. Was it not 1881?

A. Well, along there some time, '81 or '82.

Q. What other year did you make $70,000?

A. I think it was '81 and '82 we did the best.

Q. The mill burned down in 1882?

A. Well, not till the winter, till the year was out.

Q. Can you tell what you have made each year since that?

A. No, sir, I have no way of doing that.

Q. You don't know anything about it?

2661 A. I know in a general way we have for a great many years made considerable money.

Q. It is a good while ago, '81 and '82, is ten years. Can you tell this jury what you have made any year since then, except a mere estimate?

A. No, sir, I could not.

Q. You have been in the Saginaw valley, haven't you?

A. Yes, sir.

Q. Do you know how any of the planing mills are located there?
A. Yes, sir.
Q. When you receive a cargo of lumber down there on the river, you load it onto wagons, do you not, and draw it to the different parts of the yard and pile it up?
A. On carts; the same thing.
Q. Well, carts or wagons. Then when you want it at the mill you load it onto wagons again and haul it up there?
A. Not in all cases.
Q. Not even if you want it at the mill?
A. Understand that some of this lumber as it is unloaded at the dock is hauled right from the dock to the mill.
Q. Did you ever see a planing mill or can you conceive of a planing mill where they take the lumber right out of the hold of a vessel, pile it onto a freight car and take it to a lumber yard right alongside of a planing mill?
A. Oh, that depends on a man's business and location.
Q. Well, it depends on his location, whether he has a convenient one or not, but that would not do you at all?
A. No, sir.
Q. Don't you know that the largest planing mill in the Saginaw valley, the Germain mill, is supplied with lumber in that way?
A. I know that the Germain Mill lumber is brought from
2662 wherever they can buy it; they are inland and I would not locate inland if you were to give me a plant, and without any water communication whatever. The lumber is brought down there, if it is brought by boats, and it is taken from the boats onto cars, and they pay the car switchage from there into their yard, and then the lumber is piled from the cars into the yard.
Col. ATKINSON: That mill is burned up too?
A. Yes, sir.
Q. Don't you know that the Germain mill is located in back of Saginaw, not on the water front at all?
A. I do.
Q. And it is one of the largest mills in the United States, isn't it?
A. Why, I should so consider it; yes, sir.
Q. And don't you know that their lumber yard is right alongside of their mill?
A. No, sir, I don't; it is back of the mill.
Q. Well, back of the mill.
A. Yes, sir.
Q. And that they have tracks that run to the docks, that the belt line of the Flint & Pere Marquette runs to the docks?
A. No, sir; they have a track, a very long track, that comes out here, a spur.
Q. Certainly, they have a railroad track?
A. They have a railroad track.
Q. Their lumber there comes on a railroad track?
A. Yes, sir.
Q. And don't you know that they buy lumber in the northern part of this State just as you do and land it in Saginaw and take it

on board of freight cars out of the hold of the vessel, and take it u to their yard?

A. Yes, and that makes more expense than my way.

Q. You say it does. Don't you know as a matter of fa
2663 that the railroad companies don't charge anything for hau ing their cars up there?

A. I don't know anything about it. I assume they must pa something. I assume that railroad companies cannot do busine for nothing.

Q. They carry the product from the mill.

A. I would be very glad to get a railroad to do my business fo nothing, if I could.

Q. What does the Michigan Central charge you for switching car out of your switch down there?

A. That goes as part of the through freight.

Q. They don't charge you anything for backing a car in there?

A. There is nothing they can get, it is only putting a car in, tha is all.

Q. The Michigan Central takes away your entire product?

A. Yes, sir.

Q. You never have inquired of them whether they would no haul the lumber there to be manufactured if they had the privileg of taking it all away when it was manufactured? You don't know what kind of an arrangement you could make with them?

A. We are not situated so that it could be done.

Q. Isn't the Germain mill two or three miles from the river?

A. Yes, sir.

Q. In the back part of the city?

A. It is not a criterion to our situation in any shape or form.

By Mr. DICKINSON:

Q. All the Central has to do with your cars is simply to shov them right onto the tracks?

A. They put in an empty car; and I will say another thing, we are not situated so that we could unload cars.

2664 By Mr. BAKER:

Q. I am not talking about your situation now, we will come to that later. I am talking about how a planing mill can be located. The Germain mill in Saginaw is in the back part of the city, is not surrounded by buildings at all, in an open field.

A. I could not trade Germain's position for mine up to the time of this trouble.

Q. His mill burned down this last season?

A. Yes, sir.

Q. Have you been there since he rebuilt it?

A. I didn't know it was rebuilt.

Q. He must be crazy when he rebuilt that mill there, according to your theory?

A. It depends on which side you take it. And I have heard you

state in court, Mr. Baker, a good many times with your hand raised that we had the finest mill in America.

Mr. ROBISON: Did you believe it?

A. I always said so.

Mr. ROBISON: He didn't swear to it?

Mr. BAKER: It took an argument from your lawyer to convince you of it.

A. Well, it strengthened me a good deal.

Mr. Foreman BAKER: I would like to inquire if the witness ever found a lawyer that would not be ready to furnish an opinion if he paid him for it?

A. I would not say that. Mr. Dickinson and Col. Atkinson are here.

Mr. ROBISON: If they were not here you would. But don't you know as a matter of fact that all the mills in Saginaw and Bay City have the lumber hauled from the dock for nothing?

A. They cannot help themselves, a man that locates himself inland——

2665 Q. Do you know whether, as a matter of fact, all the railroads in that lumbering district haul the lumber to the mills for nothing?

A. I am not familiar with that.

Col. ATKINSON: There is no proof that anything of this kind occurs.

Mr. ROBISON: I am after proof.

Col. ATKINSON: Do you intend to offer proof that the railroads in Saginaw do business for nothing?

Mr. ROBISON: We can.

Col. ATKINSON: Do you intend to offer any such proof? If not, it should not be assumed in the question.

Mr. BAKER: We have this witness on cross-examination.

Col. ATKINSON: If the counsel say that they intend to offer proof of this, that this service is done for nothing, I will withdraw the objection, but I do not think they ought to assume it and try to make us all assume that, without any proof of it.

The COURT: It strikes me that the examination of Mr. Backus has gone about far enough, Colonel.

Mr. BAKER: All I can say about our information is that the assistant manager of the Flint & Pere Marquette stated it to us to be the fact when we were in Saginaw.

Col. ATKINSON: I want an exception to any such statement.

The COURT: As far as the question that Mr. Robison puts is concerned, that was practically asked by Mr. Baker before.

Mr. ROBISON: He only asked as to the Germain mill.

The COURT: I think I will exclude it, Mr. Robison.

Mr. DICKINSON: I will inform Mr. (juror) Baker and the jury that Col. Atkinson, Judge Marston and myself were offered $5,000 for a favorable opinion in a will case, and we refused it because we could not do it conscientiously.

2666 The COURT: We are aware in the opinion of some m there is no honest lawyer.

Col. ATKINSON: Mr. (juror) Baker is only joking, he knows l of honest men.

Mr. DICKINSON: That opinion occurs to me.

The COURT: That is all, Mr. Backus, you may stand aside.

Mr. F. A. BAKER: I will ask Mr. Dickinson if they got any la yers to give such an opinion.

Mr. DICKINSON: I will not reflect on any of my brethren, becau lawyers might honestly differ, but as we three could not hones give the opinion as desired, we declined the retainer.

NEWTON D. BACKUS, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. You are in very bad health, I think?

A. Well, not very good.

Q. You are a son of Absalom Backus, Jr.?

A. Yes, sir.

Q. A man of family?

A. Yes, sir.

Q. What is your age?

A. Forty years.

Q. You are in charge of the office, are you not?

A. Yes, in charge of the office.

Q. Do you keep the books or superintend the keeping of t books?

A. I do not keep the books, we have a book-keeper. I superi tend the keeping of them.

Q. Will you please state whether the rents of $12,000 a year f the lumber yard, $5,000 for the mill site and $1,000 for the sto house have been regularly credited to Absalom Backus, Jr., sin this lease was given?

2667 A. They have.

Q. Have they been paid?

A. They have been paid as he wanted the money; for quite few months we paid him every month and then my brother and thought perhaps he was spending the money a little too fast something and we did not give it to him every month.

Q. Has it been credited regularly every year?

A. Every season.

Q. It has been credited to him every season right along?

A. That is it; yes, sir.

Q. Now, it has been credited every year—your fiscal year is th first of September?

A. Credited every month.

Q. Up to what time has it been credited regularly?

A. For last month and this month it has not been credited yet up to the first of September it has been credited.

Q. Has anything else been credited in that account?

A. Oh, yes, we have bought considerable lumber of him.

Q. At current rates?
A. Yes, sir.
Q. After having credited all his rents and lumber, what is his credit on the books?
A. We owe him something like $54,000.
Q. Of which how much is lumber?
A. About $14,000.
Q. So that there is about two years of rent undrawn?
A. Something like that; not less than two years. It may be a trifle more for lumber.
Q. It is about two years he has not drawn?
A. We got 62 cars this month or last September which is not credited.

2668 Cross-examination.

By Mr. ROBISON:

Q. He does not own anything in the mill at all now?
A. No, sir; he holds no stock.
Q. You and your brother own the whole of it?
A. Own the whole of it excepting two shares.
Q. Who owns those two?
A. M. T. Bickford owns two shares.
Q. He is one of your men down there?
A. Confidential clerk in the office. Not a man, a woman.
Q. The only interest Mr. Backus has in your place then is renting it to you?
A. Yes, sir.
Q. That is your father?
A. Yes, sir.
Q. This lease runs for 30 years?
A. Thirty years from the first of August, 1885; expires 1915.
Q. It is 23 years to run yet?
A. About 23; yes, sir.
Q. He is to get $18,000 a year?
A. Yes, sir.
Q. You haven't the leases here?
A. No, sir; I have not. Perhaps my brother may have them; I have not.
Q. Then to him personally it does not make much difference whether the road goes through here or not?
A. I presume it does; if we do not pay him the rent he would be out the rent; that is the way of it.
Q. But your corporation is liable for the rent; it does not make any difference whether the mill runs?
A. It would be doubtful whether he can collect. We are liable for the rent, certainly; we have to pay him the rent.
2669 Q. You have done a very profitable business ever since you have been there?
A. We have made money.

Q. So that there would be no trouble about his collecting the rent even if the mill should stop?

A. I don't know about that.

Q. You have made $70,000 for two years and $36,000 a year since; you must have that salted away somewhere where you can get at it.

A. We have the money invested in our plant down there.

Q. It is his plant.

A. It is not his plant; he owns the real estate only.

Q. He owns the building; all you own is the machinery?

A. We own the building and machinery, certainly; we built the building ourselves.

Q. Is there a provision in the lease that the building shall go to the company after the lease expires?

A. I don't remember just what the provisions are in the lease.

Q. He has drawn out his $18,000 every year except the last two years?

A. Yes, he gets his money. I suppose if he would want $2,000 this afternoon I would have to give it to him, or more.

Q. You said you shut down on him; you said he was spending too much money?

A. We thought it was not necessary for him to have it the first of each month; he might be getting into too many outside things.

Q. Your father is calculated to be able to run his own business?

A. Yes, sir.

Q. And as a matter of fact his boys, too, yet?

2670 A. Yes, sir.

Q. The glove is on the other hand, isn't it? If he said he wanted more than $18,000 you would probably have to give it to him?

A. No, because we got him in black and white on that; we don't have to pay any more on that.

Q. Well, you could not buy any lumber or do any business without his help?

A. Oh, yes; we can buy lumber every day without his help.

Mr. DICKINSON: Your credit is pretty good?

A. I can go to the bank today and get what money I want.

Q. He has not asked for any the last two years?

A. Oh, yes; I give him money every few days; he comes over and wants money to pay his house rent, and mother comes over and draws money on his account to pay her hired girl and grocery bill, and so on.

Col. ATKINSON: I don't understand that it is two years in a lump that is due him; you have paid him all his rent except what would make about two years' rent?

A. Yes, strung along from time to time; he gets money whenever he wants it.

ABSALOM BAKUS, JR., recalled on behalf of respondents.

Examined by Mr. DICKINSON:

Q. You had a fire down your way last night?
A. Yes, sir.
Q. What was it?
A. About six o'clock I was telephoned that they had had a fire at the Peninsular stove works. Well, I went right over and Mr. Dwyer called a man, their foreman, took a lantern and took me away
2671 up into the fourth story next to the railroad, and showed me where the fire had taken on the mansard roof right within twenty feet of this property, fifteen feet of this track, and about 20 feet high, on the outside. There was a strong south wind, and it blew these cinders and sparks right on this roof, these shingles, and it inflamed and finally got through in two or three places. He showed me where it was put out; they took their Babcock extinguisher.
Q. Did you see the places that were burned through?
A. Yes, sir.
Q. How many places were burned through inside the roof?
A. I noticed three holes that were burned through the roof. I asked him what that was, and he said, that is where we put some tin up to keep the water from coming down onto our goods. I went away and two hours afterward or three hours and a half this fire broke out; they thought they had it put out, either that or it was set afire a second time.
Q. Then there was a strong south wind?
A. Yes, sir.
Q. A pretty bad fire there, was it not?
A. I see by the paper about $45,000 loss.
Q. Now, is there any steam apparatus or furnace or anything in that molding-room?
A. Nothing; their furnace chimney is away on the north side, as much as 50 or 60 feet from there. There is no possible exposure, only as it comes from these railroad trains; the engine as it goes by, she has passed our place, where they profess to shut off, and then he begins to slow down and he puts his exhaust on, and it necessarily naturally throws fire very strongly.

Cross-examination.

By Mr. BAKER:

Q. You were down there looking at that?
2672 A. Yes, sir.
Q. That is, between the two fires?
A. Yes, sir.
Q. Now, the elevated superstructure that the trains run on is opposite what story there?
A. It is opposite to the second or third story.
Q. About on a level, isn't it, with the third story?
A. I should judge it would be.

Q. That is two floors up?
A. Yes, sir.
Q. When an engine goes by there the smokestack is about fifteen or twenty feet from this mansard roof?
A. Yes, about on a level with this mansard roof?
Q. So that when there is a stiff south wind it would blow the fire from the smokestack right against that roof?
A. Yes, sir.
Q. Right on a level with it?
A. Yes, pretty near.
Q. That was a shingle roof?
A. Yes, sir.
Q. And built up from the eaves like that (illustrating).
A. Yes, sir.
Q. What was on top?
A. I never was up there.
Q. You don't know what covered it. The fire was in the shingles?
A. Yes, burned right through between the roof broards.
Q. The sparks got in the shingles, the fire was under the shingles?
A. It was burned through. They told me that they went up there to get a barrel, and somebody saw it very opportunely and put it out, and they thought probably they had put it out; it was either set a second time or they didn't have it put out.
2673 Q. The probabilities are that it was not put out under the shingles there somewhere?
A. Probably.

GEORGE O. ALLEY, sworn on behalf of respondents.

Examined by Mr. DICKINSON:

Q. What is your business?
A. I have charge of the Peninsular stove works.
Q. You are foreman there?
A. Yes, sir.
Q. How long have you been there?
A. About 11 or 12 years.
Q. Have you observed the passage of trains over this trestle-work?
A. Yes, sir.
Q. Will you please tell the jury whether you observed that they throw fire?
A. Certainly; yes, sir.
Q. It is a common occurrence that they throw fire?
A. Yes, sir.
Q. How far over will they throw it?
A. That would depend on how strong the wind was.
Q. Just give the jury some idea if it is a south wind.
A. The south wind with the engine working hard would throw it over 50 or 60 or 70 feet there.
Q. You have seen them do that?

A. I have not measured it.
Q. You have seen it thrown?
A. Yes, sir.
Q. Have you seen many cinders around there thrown from these engines?
A. Yes, sir.
Q. How far do they extend?
2674 A. Well, it is hard to tell; the wind blows them along on the roof.
Q. Come over into the yard?
A. I could not say that.
Q. Well, there are great quantities of cinders?
A. Lots of cinders.
Q. Did you know of the fire last night?
A. Yes, sir.
Q. South wind blowing?
A. Yes, sir, and last night at the time of the fire.
Q. And the roof was set on fire between the roof and the roof boards?
A. In the shingles.
Q. In how many places?
A. Well, the first fire was about five o'clock or a quarter to five and the second fire was about a quarter after seven, started in another place, as near as I could judge.
Q. It didn't start in the same place.
A. No, sir, not as near as I can judge.
Q. Started on the roof boards?
A. I discovered it on the outside of the roof.
Q. Trains passing constantly, I suppose?
A. Mostly all the time; yes, sir.
Q. And this fire was a pretty bad one; burned out your nickel-plating room?
A. Burned the nickel-plating room and burned the entire roof off.
Q. Did you have any fire in that part of the building at all?
A. No, sir.
Q. Didn't have any furnace within how many feet?
A. The other end of the building.
Q. Any workmen up there?
A. No, sir; no occasion for anybody to be there.
Q. How did you happen to discover the fire?
2675 A. The foreman sent a man up to get a barrel and when he went up and went over towards the front part of the roof he came back saying that the place was afire and at that time it had commenced to go through the shingles, and had burned in between the roof boards.

Cross-examination.

By Mr. BAKER:

Q. This was the old Union Mills building?
A. No, sir.

Q. What—the glucose building?
A. It is the old Central Mills building.
Q. How long, according to your recollection, has that building been there?
A. I could not say; it has been there before I had anything to do with it.
Q. A great many years, hasn't it?
A. Been there some time; yes, sir.
Q. And the mansard part, that is, the incline, is composed of shingles?
A. Yes, sir.
Q. And ordinary roof boards underneath?
A. Yes, sir.
Q. And what is the top?
A. Tar roof.
Q. Gravel on it?
A. Yes, sir.
Q. About how high should you judge was this mansard roof, the part which is inclined, six or eight feet?
A. Nearly ten feet, between eight and ten feet.
Q. And a gutter at the foot of it?
A. There is a projection of about two feet.
Q. A cornice?
A. Yes, sir.
2676 Q. What was there at the upper edge of it, anything; a molding around there?
A. Just a molding around there.
Q. How long have you been down there?
A. About 11 or 12 years, since they were there.
Q. That flour mill was apparently an old building then, was it not?
A. It had been there a good many years I should judge.
Mr. Foreman BAKER: Wouldn't that roof be completely protected if instead of being shingled it was slated?
A. Well, it is a question.
Q. Well, it would be a great deal safer?
A. Probably would not be so apt to catch in the shingles.
Mr. DICKINSON: As I understand it, it caught under the roof boards.
A. It burned the shingles through first.
Mr. BAKER: Have to go through the shingles first so that you could see it on the inside.

Mr. DICKINSON: We rest.

Mr. GRISWOLD, recalled for further cross-examination.

By Mr. BAKER:

Q. I showed you a letter the other day that you identified. Can you tell me how many of these you sent out?
A. I should think perhaps ten or a dozen.

Q. You recollect the letter, don't you?
A. Yes, sir. (Showing letter to witness.) That is my signature.
Q. They were all substantially the same?
A. They were.

Mr. DICKINSON: Are you going to put it in?

2677 Mr. BAKER: Yes, as a part of the cross-examination. I will read it in evidence.

"DETROIT, MICH., *Sept. 18th*, 1893.

Mt. Vernon Car Mfg. Co., Mt. Vernon, Ill.

GENTLEMEN: I understand you have had some experience with dust-collectors. Will you please inform me what your experience has been, which is the best device and if there is any device made from which any dust cannot escape? I understand there is what is called the centrifugal dust-arrester, but which takes a great deal of power. With the device you are using are your premises perfectly free from dust and does the arrangement you have prevent any possible danger of fire getting into your dust-room from any source and how much extra horse-power does it require to run the same? Any suggestion or information you can give me on the subject will be appreciated. Thanking you in advance for the same, I am,

Very respectfully, D. R. GRISWOLD."

That is all with this witness.

GEORGE H. HOUSE, sworn on behalf of petitioner.

Examined by Mr. BAKER:

Q. What is your business and where do you reside?
A. Saginaw. Insurance business.
Q. How long have you been in the insurance business?
A. Nearly 30 years.
Q. Whereabouts have you been in the insurance business?
A. At Lansing and Saginaw.
Q. What position have you occupied in the insurance business what do you do and what have you done?

2678 A. Well, I have been local agent, special agent, State agen t and inspector for the Michigan bureau at present.

Q. What territory do you have charge of?
A. Territory extending from the D. & M. road to the straits o Mackinac, taking in about one-half of the State.
Q. The eastern half?
A. The eastern half from that southern line.
Q. So that you take in the entire Saginaw valley?
A. Yes, sir.
Q. Do you fix rates, prepare surveys in the same capacity that Mr. Chapman does here?
A. Yes, schedule buildings; make what is called an advisory rate.
Q. That is, a rate that is adopted by the companies?
A. An advisory rate.

Q. Of course there is nothing compulsory about those rates?
A. No, sir.
Q. It is for the convenience of the companies in having a proper survey made?
A. Yes, sir.
Q. Will you state how you fix the rates, the basis upon which you operate in fixing rates on planing mills?
A. Well, we have a basis rate which presupposes the very best constructed and equipped planing mill, and from that basis rate we charge them for various deficits.
Q. What is the rate for the best constructed and equipped planing mill?
A. Three and a half.

Objected to as not rebutting and immaterial.
The COURT: I will let the answer stand.
Exception for respondents.

Q. Will you state what this basis rate is?
A. Three and a half.
Q. That is for a planing-mill risk that is equipped and protected the best that is known to the art?
2679 A. Yes, sir, a brick planing mill and brick boilers, with very best equipments.
Q. What about dust-arresters?
A. Well, there is a charge for a lack of dust-arresters.
Q. But this basis rate of three and a half—is that fixed where they have improved dust-collectors?
A. Yes, sir.
Q. What kind are in general use?

Objected to as immaterial.
Objection overruled.
Exception for respondents.

A. In general use, that is, all I know about is the Allington & Curtis.
Q. That is a metallic arrester?
A. Yes, sir.
Q. Acting centrifugally?
A. Yes, sir.
Q. About how many of them are in use in the Saginaw valley?
A. Well, it would be difficult for me to tell how many are in use.
Q. I don't want the exact figures.
A. Well, I should say from 50 to 60, somewhere along there.
Q. What distinction do you make in fixing rates if a man has not got an improved dust-collector?
A. Well, they charge 50 cents on a hundred.
Q. A half per cent.?
A. Yes, sir.
Q. And the other things that would increase the risk on a planing mill would be other exposures?

A. Yes, sir.

Q. That is, if they had a frame power-house there would be an increased rate, and so on?

A. Yes, sir.

2680 Q. I suppose in the Saginaw valley there is a large amount of lumber that is piled alongside of the railroads and is exposed to hazard?

A. Yes, there are a great many yards.

Q. There are planing mills that are right alongside or near to the railroads?

A. Yes, sir.

Q. All over the valley?

A. Yes, sir.

Q. Will you state whether or not insurance companies, or in your business there as an inspector of rates, whether or not anything is added to a planing mill for railroad exposure?

Col. ATKINSON: I think what they do in Saginaw is immaterial, and I object to it on that ground.

Mr. BAKER: We don't think there is any point on the territory.

The COURT: Answer the question.

Exception for respondents.

Q. Whether you increase this basis rate of three and a half, whether there is ever anything added for railroad exposure?

A. We do not make a charge for railroad exposure.

Q. Why not?

A. Well, we do not consider since they burn coal that there is——

Col. ATKINSON: One moment. I object to that.

The COURT: As far as the reason is concerned, I don't think that is competent.

Mr. BAKER: It seems to me it is competent to find out the theory upon which they act.

The COURT: Well, you may answer the question.

Exception for respondents.

Q. State why you do not add something for railroad exposure?

2681 A. Because we do not consider it a hazard.

Q. At least, not enough to increase the rate?

A. Not enough to increase the rate.

Q. Now, I suppose you have noticed planing mills up there where these pipes were carried a long distance, where the dust was carried a long distance from the planing mill. About how many feet?

A. Yes, some of them two or three hundred feet.

Q. Some of them close by and some of them three or four hundred feet off.

A. Yes, there are such cases.

Q. It depends on how the man lays out his place and how much room he has got?

A. Yes, sir.

Cross-examination.

By Col. ATKINSON:

Q. What is it that is three or four hundred feet away?

A. What we call the shavings vault. Some of them are right against the mill or boilers and others are detached, and the shavings are blown into them.

Q. The shavings are carried that distance then?

A. Blown.

Q. How are they got into the fire afterward if they want to burn them?

A. Those are not burned as a usual thing, it is the surplus shavings that are carried that distance.

Q. If they should want them to burn they would bring them back in a wheelbarrow?

A. Without the boiler-house was with the shavings vault that distance away. We have such instances as that, four or five—I don't know—well, three or four hundred feet.

Mr. BAKER: Where they put the boiler-house away off by itself?

2682 A. Yes, the boiler-house and shavings vault together, some three or four hundred feet from the mill.

Q. What case have you got in your mind where the boiler-house is three or four hundred feet away from the mill?

A. I should say that Jonathan Boies' was, at the mouth of the river in Bay county. I don't pretend to give the distance, but I should say that.

Q. How is the power communicated to the mill, have they got a belt that long, or shafting?

A. No, sir, it is by steam, and the engine is in the planing mill.

Q. Then the steam passes through three or four hundred feet before it is applied to the engine?

A. Certainly.

Q. Is that a good plan to get power, do you think?

A. Well, that I don't know; Mr. Boies has adopted it, I don't know anything about it.

Q. You don't know how it works?

A. I don't know anything about that.

Q. There is a salt well there, isn't there?

A. He has a salt well, yes, sir.

Q. So that they apply the steam after they carry it a slight distance and use it again for the purpose of evaporating their salt or something of that kind?

A. I should presume they do, though I don't know anything about it.

Q. You really have not got the inside of that establishment in your mind very well, have you?

A. No, sir, not anything more than I know where their boiler-house is.

Q. You have seen the power-house and seen the mill, and you know they are a certain distance apart?

A. I have been all through it.

Q. Are you a judge of applying steam power, accustomed
2683 to doing that, so that you know how to get the most economical and advantageous results from it?

A. No, sir; it is not in my line of business.

Q. You would not be at present able to recommend people to have their power-house three or four hundred feet away from the place where the power was applied?

A. I know nothing about it at all; I simply tell the fact.

Q. How long did you say you had been in the insurance business?

A. Well, to be exact about it, it is 27 years.

Q. Are you in any way connected with any of the railroads?

A. Not at all.

Q. Doing any business for them?

A. Not at all.

Q. How came you to come and testify? Who got you?

A. Mr. F. A. Baker.

Q. An old classmate or something of Mr. Baker's?

A. No, sir.

Q. How did he happen to get you?

A. Well, I don't know how he happened to.

Q. How did you learn you were wanted here?

A. Mr. Baker sent word to me.

Q. Do you know why you were called from Saginaw?

A. I don't.

Q. Were you acquainted with Mr. Baker before?

A. I have known Mr. Baker for some years; ever since he was a member of the legislature; got acquainted with him at that time. I lived at Lansing then and I have met him as I have met a great many other gentlemen off and on.

Q. Were you in the legislature, too?

A. No, sir; I was a resident of Lansing at the time.

2684 Q. You were one of the men who was keeping his chickens shut up for the winter, I suppose?

A. Yes, sir.

Q. You have been acquainted with Mr. Baker ever since that time. Do you know of any other insurance man from Saginaw who is here?

A. I don't.

Q. Or from Bay City?

A. No, I don't.

Q. Now, you have charge of a large district of country, as I understand, and I suppose you have to travel over it from time to time?

A. Yes, sir.

Q. And you travel through those regions up there where the railroad runs almost through the forest. Have you ever seen any forest fires up there?

A. Yes, sir.

Q. Have you ever seen any that spread from the railroad track?

A. I have seen it around the railroad tracks.

Q. Did you have any theory as to how it originated?

A. I suppose that sometimes they catch from the railroads.

Q. So that railroads do sometimes set wood on fire.

A. I should presume they do.

Q. Yet they are not a hazard at all that is taken into account in insurance?

A. They are not with insurance. Will you allow me to explain that for a moment. Now, it would be in a forest fire for instance, you take lumber and locate it out in the forest, and it always rates higher on account of forest fires.

Q. Then you do calculate upon a risk?

A. On forest fires, yes, sir.

Q. You do not insure forests, do you?

2685 A. Not forests, but there is property in forests that is insured.

Q. You insure buildings out where there are woods near by?

A. Of course, you understand in that nothern country there are small mills, and more or less lumber scattered all through it.

Q. You insure the lumber and insure the buildings, I suppose?

A. Sometimes.

Q. Now, you take a place like Gaylord or Alger. Take the town of Alger, one of the thriving cities of the northern part of the State. You have been through there, I suppose?

A. I have been through there.

Q. Its suburbs are largely wooded as I remember?

A. It is principally woods there.

Q. In insuring buildings at Alger, would you take into account the possibility of fires from the forests around, being near the roads?

A. Yes, were I to rate a town of that kind. I never have rated it, but I should.

Q. What would be the danger from the forest?

A. Well, it is the forest fires.

Q. Now, is not one of the most prolific sources of forest fires the railroads?

A. That I don't know.

Q. But you would regard it as quite hazardous?

A. It may be hazardous; I should presume it is.

Q. Haven't you often seen the ties burn up from fire communicated from the railroad in that region, and the fences alongside where there are any fences?

A. I have seen the fences, but I don't remember of ever having seen any ties.

2686 Q. Suppose we come into the city. Have you any instance in Saginaw of where a railroad runs along at an elevation of 25 feet up to the rail from the ground, and where there are switches and switching being done at that particular point, and upgrade so that the engines have to struggle somewhat to make the rise—have you any instances of anything of that kind in Saginaw?

A. I don't remember of any instance where we have an elevated railroad. Our country is flat.

Q. Now, you don't mean to have us understand that a railroad running along in that situation would not be a menace as far as fire was concerned, with a building alongside?

A. You mean with the elevation?

Q. Yes.

A. Well, we have nothing of the kind——

Q. It would drop its sparks around and on this building, and there would be some danger, wouldn't there?

A. Well, there might be a danger there.

Q. Take for instance the case that is testified to here this morning, our Peninsular stove works. They had a mansard roof, a shingle roof, a strong south wind was blowing and a railroad was immediately south of them, and these sparks and cinders were blown over against the roof and caught in the shingles and burned through, causing a large loss. Now, that would be a hazard that prudent insurance companies would provide against, would it not?

A. I should think they would.

Q. You would not consider that an insurance man fixing rates on property situated like that and subject to that danger would be doing his duty by the company if he fixed the rates at the same figures as though the railroad was not there, would you?

A. Well, the schedules that we go upon make no charge at all for——

2687 Q. I am not asking you about your Saginaw schedules. You are a peculiar people, anyway, but would you consider that the best thing to do? You have no such case in Saginaw?

A. No, sir, we have no such case at Saginaw.

Q. If you had such a case, would you not consider that kind of property less desirable for an insurance company, and it ought to pay a higher rate if it was insured?

A. Well, it would depend something on the kind of property and what it was.

Q. Well, a man has a right to put there what he pleases. In this case there was a mansard roof that had been there so long that the witness cannot remember when it was put up; it was there before the railroad, and the mansard roof was burned by the railroad. Now, would not any insurance man that knew his business, looking at the situation, say that property should pay a higher rate on account of the proximity of this elevated road and the throwing of sparks?

A. Well, taking your statement as the case, I presume it would.

Q. You think in that case you would fix the rates higher?

A. I don't know that I should.

Q. You must have some special reason for not making a discrimination at Saginaw, haven't you?

A. No, sir; we use the same schedule that is used in the State at large; it is the Michigan schedule.

Q. You advise companies what rate to put on?

A. With the schedule that they furnish. They furnish the schedule.

Q. What kind of buildings do you fix these 3½% rates on?

A. We have but one in the Saginaw valley, and that is a planing-mill—I suppose you refer to it?

2688. Q. Yes. You have only that that rate prevails on?

A. Yes, sir.

Q. What mill is that?

A. Germain's new mill.

Q. How high is that?

A. One story.

Q. How far does the railroad run from it?

A. Well, his tracks that run into the yard run right beside it.

Q. Yes, but those are spur tracks?

A. Yes, he is out from the main line of the railroad, of course.

Q. It is not on a trunk line?

A. Not at all.

Q. Nowhere near a trunk line?

A. Not at all.

Q. It has no trains passing except those freight cars brought in for their own convenience?

A. None except their own.

Q. Where are they stopped, those cars, how far from the mill?

A. They pass right beside the mill.

Q. And have a bump, I suppose, to stop them near the mill?

A. They go clear through his yard.

Q. So that they run occasionally through there?

A. They simply come up from the river.

Q. Do they run engines past and into his yard?

A. Yes, sir.

Q. But only for their own convenience?

A. That is all.

Q. To get their own freight?

A. That is all.

Q. I suppose with their own men in charge?

A. No, sir; the railroad men.

2689 Q. The railroad company runs the engine in to take out the cars as they are loaded?

A. Yes, sir.

Q. Are you at all interested in dust-arresters?

A. Not in the least.

Q. The one usually used up there is one made there?

A. It is manufactured there.

Q. Are you acquainted with the relative merits of dust-arresters?

A. Well, I do not claim to be.

Q. There are a good many different ones around there?

A. I think there are but two kinds up there. I know of two kinds.

Q. In the Allington & Curtis the air goes around; it is what is called a centrifugal dust-arrester?

A. Yes, sir.

Q. In Grand Rapids, I believe, to maintain the distinction between the two cities, the air goes the other way?

No answer.

Q. Do you know what dust-arrester is used in Grand Rapids?

A. No, sir.

Q. Do you know anything about the merits of the Backus dust-arrester?

A. I do not.

Q. Do you know the Smith & Huyett dust-arrester?

A. There are two or three of those up there.

Q. We are trying to find out how much certain property in the city here is damaged. My clients are using the Backus dust-arrester. Would the rate of insurance be any less if we changed it for anything else that you know of?

A. I don't know what the Backus dust-arrester is and consequently could not say.

Q. So that we cannot get any lower rate on that ground without further information?

2690 A. I have no knowledge of it whatever.

Q. Would a mill four stories high with a railroad elevated running by it on a level with the second and third floors be more hazardous than a one-story building?

A. A four-story rates more than a one-story.

Q. How much more?

A. The rule is twenty-five cents for each floor above the first.

Q. So that you start with 3½ % and the next would be 3¾ the next floor, and the next 4¼?

A. Yes, sir.

Q. And so on?

A. Yes, sir.

Q. Now, this basic rate, as I understand it, is on the most perfectly equipped planing mill of one story, the 3½ rate?

A. Yes, sir.

Q. And for all divergencies from that you increase the rate according to circumstances?

A. Yes, we charge for the various defects.

Q. You add for open stairways, do you?

A. Well, it is not in the schedule, but it depends upon the construction of the mill and what they are doing. Sometimes I do.

Q. There is a close survey made so as to see what the exposures are. I don't care what they are, but anything that you think increases the exposure over a perfectly constructed planing mill is charged for?

A. Unless the exposure rates higher than the mill. We do not charge for mills. Just let me illustrate.

Q. I understand what you mean.

A. The highest rated risk on a plant in the center. It exposes the balance.

Q. Suppose the dust-room is 30 feet from the railroad

2691 track and liable to have cinders drop into it, would that increase the rate?

A. I never have charged for it; there is nothing in the schedule making the charge.

Q. No, but that would be an exceptional thing. Would you fix the policy the same as if the dust-room was not in any such nearness to the railroad?

A. Well, our dust-rooms there, you know, are perfectly close, as close as this room is, has to be.

Q. Well, but you have got to get your dust out somewhere. There is an opening, isn't there, to take the dust out?

A. No, sir, not with the Allington & Curtis.

Q. What do they do with the dust?

A. They separate it in the machine.

Q. What do they do with it?

A. They blow it into a separate place, or it drops in there.

Q. But they got to get it out when it is once in there?

A. They shovel it out if they want it. Usually it is blown right in under the boilers, with a self-feeder.

Q. Is it not an article of commerce with all those mills?

A. The shavings are after the dust has been taken out of them.

Q. Not the dust itself?

A. Not the dust itself. At least I never knew of its being used.

Q. It would be a rather dangerous thing, would it not, to have a dust-room near a railroad where these cinders might drop in. That dust is explosive, is it not?

A. It would if the dust-room was constructed that way, but ours are not constructed that way.

Q. Those are built after the railroad was there?

A. They are all built close.

2692 Q. Yours are entirely different?

A. They are tight buildings; it is blown in from the top.

Q. In this case long before this railroad came there or there was any idea of its coming there, Backus & Son had built their mill and their dust-room was only seven feet from the line of River street. They do not blow their dust in under the boilers, but they let it come down into the bin by itself. It is used as an article of commerce, they have a sale for it and make a profit out of it and they take it away with wagons, having a large opening on the side of the street so that the wagon can be backed in and they load it and cart it away. The railroad has since been built right along there, fronting at an elevation of about 14 feet in the clear, say 20 feet to the rail. This wide door is right on the street, there is an upgrade there also, so that the engines have to struggle in passing it; there are three switches in front of it, so that there is a liability for a live cinder to drop right into this dust-room if it happens to be open. Now, would you consider that a source of danger?

A. I should under those circumstances, certainly.

Q. It would affect the rate of insurance, would it not?

A. I should think it would.

Q. It ought to?

A. It would under that condition.

Q. You have no parallel case to that in the Saginaw valley?

A. No, sir, nothing at all; nothing of the kind.
Q. A great many insurance companies are withdrawing from your valley, aren't they?
A. Well, I don't know of any.
Q. You don't know of any that have withdrawn from there, refused to renew policies?
A. I don't remember of any now.
2693 Q. You have had a good many fires up there and some very disastrous ones?
A. We had one last spring in East Saginaw, in May.
Q. Bay City was pretty nearly all burned up?
A. Yes, a year ago they had quite a serious fire.
Q. You are rather a scorched region and insurance companies have suffered very heavily there?
A. Yes, sir.

Mr. ROBISON: Insurance rates are lower than they are here.

Q. Are your insurance rates lower than they are here?
A. I don't know what the rates are here, I never compared them and know nothing about them. They ought not to be, they ought to be on the same basis. The basis is precisely the same, I will say that.
Q. Do you furnish rates for companies doing business here as well as in Saginaw?
A. Well, the same companies do business here, the same companies are in Saginaw.
Q. You have nothing to do with furnishing rates for this city?
A. No, sir.
Q. Are you acquainted with this 80% clause that is used in insurance requiring people to insure 80%?
A. I know there is such a clause.
Q. Usually where that has been insisted upon the rates are lower?
A. Not with us.
Q. In view of their taking 80%?
A. Not with us.
Q. You keep the rates the same?
A. Yes, sir.
Q. You are in the State of Michigan still, up there in Saginaw, aren't you?
2694 A. Well, I think we are.
Q. Not entirely independent?
A. No, sir.
Q. Isn't the insurance business pretty uniform in all these cities? Is there anything peculiar about Saginaw?
A. Nothing that I am aware of.
Q. Have any of the companies up there introduced the 80% clause?
A. Yes, sir.
Q. Although they insist upon one's insuring for 80%, they do not lower the rate or give him any countervailing advantage?
A. No, sir; there is no change in the rate there on that account

Q. Have you had any reduction of rates there at all within a few years?

A. No, sir. There is a change of rates, of course, all the time; some go down and some go up.

Q. Nothing like a reduction on any plan?

A. No, sir, no general reduction.

Q. The changes of rates are individual changes?

A. Individual changes, according to the hazard.

Mr. Foreman BAKER: Is this 80% clause generally applied to planing mills up there now?

A. It has not been.

Col. ATKINSON: It is not now so far as you know, I suppose?

A. Well, sir, it will be after this. The companies have ordered the application of the rule.

Q. It has not taken effect yet?

A. It takes effect today. We have a good many plants there, however, that have had the 80% clause on them some time.

Q. What is the object of that 80% clause?

2695 A. I don't really know that I am prepared to give that.

Mr. Foreman BAKER: Isn't it a little curious that the insurance company should insist on raising on a risk of a man insured? Why should they not rather prefer to take just as little insurance as they could on it? Why do they insist on raising?

A. I presume the reason is this. For instance, a man has a building which is worth, we will say, $10,000. He says, Now I will only have a damage of $2,000, he never anticipates it is going to burn up, so he puts on $2,000 and when they have a loss the company is the total loser of that, they lose the whole $2,000, while if he had $8,000 insurance there it would be divided up.

Q. If there was only $2,000 loss they would pay that between them?

A. There would be more premium paid.

Q. It is a sort of an equivalent for a lower rate, isn't it?

A. Well, it is not so treated.

Q. By pulling down the losses?

A. I suppose they are trying to get their money back.

Q. They can afford to insure at a lower rate if they insist upon the 80% clause than if they did not?

A. Well, yes.

Q. So that they are not suffering any more than if they charged a higher rate?

A. My impression is that one object was, at the present time the companies are losing money, and instead of advancing the rates higher they have required this 80% clause.

Q. It is an equivalent to an advance of rates?

A. It is equivalent to that, yes, sir.

Mr. ROBISON: Doing that universally as you understand?

A. Universally.

2696 Q. So that if property such as you mentioned was worth $10,000, for such property the company would let him take his own risk of $2,000?

A. Yes, sir.
Q. And require the man to insure up to $8,000?
A. Yes, sir.
Q. Then they would have three other companies to help them bear the loss, if there was only $2,500 or $3,000?
A. Yes, or the property-owner would carry it himself, just as he saw fit.
Q. If the owner only took $2,000 on them he would have to contribute for the other part of the $8,000?
A. He would be a co-insurer.
Q. So that if he took just $2,000 in a case of that kind he would have practically only an insurance of $500?
A. That would be about it.
Q. And in case of a $2,000 loss he would only get $500, although he paid the rate for $2,000. Well, I guess it is an honest business if everybody understands it. It is a little complicated, that is all.

Redirect examination.

By Mr. BAKER:

Q. You testified on your cross-examination that you have had a good many or a number of very big fires up there. Will you state whether or not they were occasioned by a railroad?
Col. ATKINSON: Do you know?
Q. Well, you are in the insurance business.
Col. ATKINSON: I understand there are a lot of people looking for the man who knows how these fires are started.
Q. Has it come to your knowledge that any of those big fires up there were occasioned by a railroad?
A. Well, the May fire was not occasioned by a railroad. I know that, I was right there when it started.
2697 Q. The middle ground there in the river burned off there one time, didn't it, when they had a large amount of lumber on it?
A. This fire started on the middle ground at Saginaw.
Q. That is in the river?
A. In the river.
Q. And blew across into the town?
A. Blew down and struck the bridge, set fire to the bridge.
Q. When Germain's mill was burned, was that caused by the railroads?
A. No, sir; that came from this same fire.
Q. How far did that fire burn?
A. Oh, it was a mile over, I should say. Germain was much farther than that—that is, from where the fire first started.
Q. Germain's new plant he has just rebuilt?
A. Yes, sir.
Q. That is a 3½% risk, you say?
A. Yes, sir.
Q. There is a side track that runs right alongside of the planing mill, that goes into his lumber yard?

A. Yes, sir.

Q. So that engines pass on that side track in putting lumber into his lumber yard?

A. Yes, sir.

Q. Now, this 80% *per cent.* clause has no effect at all where there is a total loss?

A. No, sir.

Col. ATKINSON: Why, yes, he loses 20%.

A. Yes, where there is a total loss. I took his question the other way.

Q. I guess you will find that you answered it correctly, if I understand it. Let us take a plant that is worth $10,000 and you insure it for $8,000, 80%. Now, if that burns up, the owner
2698 gets his $8,000?

A. Yes, sir.

Q. And he loses $2,000?

A. Yes, he gets to the extent of his insurance, of course.

Q. So that if it is a total loss, he gets all of his insurance. Now, if it is only a partial loss, he gets in the same proportion under the 80% clause?

A. Yes, sir.

Q. That is, if there be a loss of $2,000 and he is insured for $8,000, 80%, he gets in that proportion?

A. He gets his $2,000.

Q. He gets $1,600, or something like, or $1,800?

A. He would get $2,000 in that case.

Q. Simply because he complied with the 80% rule?

A. Yes, sir.

Q. But if he had only $5,000 or $6,000, then it would be proportionate?

A. Yes, sir.

Q. That is, on a piece worth $10,000, 80% would be $8,000, and if he insured up to the 80% clause he would get on a total loss $8,000, or on a loss of $2,000 he would get $2,000. But if instead of taking 80% he took 40%, or $4,000, and a $4,000 loss occurred, how much would he get?

A. He is a co-insurer with the company up to the extent of 80%.

Q. He would get about $2,000?

A. He would get just one-half his loss under that statement. He is carrying the balance of it.

Q. That is, you take the 80% and with the amount of the insurance that he has actually got you make a fraction?

A. Yes, sir.

2699 Q. Then if he sustains a partial loss they pay him that proportion and that is all there is of it?

A. Yes, sir.

Col. ATKINSON: He receives in proportion to his loss as his insurance is in proportion to 80% of the value?

A. Yes, that is it in a nutshell.

Q. As you understood it that was adopted because the majority of the risks were partial losses?

A. That is my understanding of it.

Q. The majority of the losses were partial losses and the insurance companies are compelled to pay the whole amount and the insured bore no portion of it, and the business not being profitable they adopted this plan? Is that so in a general way?

A. That is the theory, yes, sir.

Q. Now, the railroads run right through lumber yards up there, don't they, with the lumber piled on each side?

A. The main lines?

Q. Yes.

A. Yes, in a very few places.

Q. In Wright's yard the main line of the Michigan Central goes right through it?

A. It does.

Q. In a good many places is it not true that sidings run right through a lumber yard like that?

A. Almost all the yards.

Q. Now then, do they have or not a very elaborate system of sidings there? They have a belt line that runs around the city, and you have to go to one siding to get to another manufacturing institution occasionally?

A. In some cases, yes, sir.

Q. You remember where the Germain mill is, they have a siding they go through by the mill property to get to the lumber yard. Do you remember the Spencer mill right across the street?

2700 A. Yes, sir.

Q. So that that mill is on the same spur from the belt line?

A. Yes, sir.

Q. So that they have to go by that property in order to get to Germain's?

A. Yes, they pass that on the belt line to get into Germain's.

Q. So that the engines are working on these side tracks for all these different plants from time to time as they have business there?

A. Whenever they have business, of course.

Q. There is a great deal of refuse alongside of railroad tracks in the vicinity of saw-mills, there are strips of territory where kindling wood covers the ground on each side of the railroad?

A. Yes, there is a great deal of refuse matter scattered around there everywhere.

Q. There are a great many yards where there are piles of edgings that come from the mills pilled up there to be sold for fuel purposes?

A. Yes, they are not so very close to the tracts, however.

Q. Not right next to the track?

A. Not right next to the track.

By Mr. ROBISON:

Q. It is a common practice there, is it not, to carry these shavings for some distance from the mills?

A. No, it is not a very common practice.

Q. There are several places where they do it, are there not?

A. Where the shavings vault is detached some distance?

Q. Yes.

A. There are a few, but very few cases.

2701 Q. Well, Boies' mill you say, is about how far?

A. Well, I should say it was three or four hundred feet. I have been over it a great many times, but I never paid any particular attention. I should say it was three or four hundred feet, though I would not be positive. It is a long distance, and that is the only one that has any such distance down there.

Q. Do you remember Mershan's mill?

A. Yes, sir.

Q. Are you acquainted with that?

A. Yes, he has three planing mills on his plant.

Q. A very large institution, isn't it?

A. Quite a large institution, yes, sir.

Q. They have three engines there. How many are there, engines connected with the one system of boilers?

A. Well, two of the mills are run from one boiler, that is one boiler-house.

Q. Power is conveyed there through pipes for a long distance, or some considerable distance?

A. It is not near as far as it is down at that Bay City mill.

Q. Not as far as the Boies mill?

A. No, sir.

Q. That is the farthest of any that you know of?

A. Oh, yes. Mershan's two mills, I should say, without being definite, were 75 feet apart, and then the boiler-house is off at one side and they both of them take their power from that.

Q. They all connect with the boiler-house?

A. Yes, sir.

Q. This Germain mill, you say, is a one-story building?

A. One story.

Q. That is the part that is insured?

A. That is the part that is insured.

Q. The rest of it is not insured?

A. It is not completed, what is called his factory building,

2702 his three-story one. They are putting in the machinery now.

Q. No insurance rates have been fixed on that yet?

A. No, sir.

Q. How high is that?

A. Three stories.

Q. That is a very large institution, isn't it?

A. Yes, sir.

Q. That is the biggest in the whole valley?

A. Yes, the planing mill is very large; it is 194 by 208.

Q. Do you know how big this other building is?
A. It is 80 by 200 and something, I think. I don't remember, though he told me the other day when I was walking through with him.
Q. There are two of those?
A. No, sir. That is the Germain building you are talking about.
Q. There are two just alike?
A. That is his warehouse, the old building that was not burned.
Q. They are about the same size?
A. Yes.

Recross-examination.

By Col. ATKINSON:

Q. Do you put the same rate on the power-house as on the mill?
A. I do if they are connected or if they stand together.
Q. You make a single rate for the whole?
A. Yes, a single rate for the whole.
Q. If the buildings are separated you make a different rate?
A. Yes, if the buildings are separate. Not necessarily a different rate, but put a rate upon that.
Q. Is it usually higher on the power-house?
2703 A. No, if the power-house is detached it would not be as high. I have not rated Germain's power-house because I am waiting for his factory. It will be much less.
Q. In our case here the power-house, as I remember, is rated by the insurance company at 8 % and the mill at 5½?
A. Yes, sir. Then you take a brick boiler-house, of course, it would rate—yes, I could rate it that way.
Q. You would rate it less instead of more?
A. Yes, detached.
Q. Can you tell us where the rule is different from here?
A. I don't know anything about it one way or the other.
Q. What caused that fire at Wright's?
A. When was that?
Q. You spoke of a fire at Wright's lumber yard or planing mill?
A. Not that I know of.
Q. Wasn't there a fire at A. W. Wright & Co.'s, hasn't there been a fire there within a short time, within a few years anyway?
A. Well, I don't remember of any fire of any extent there since I have been in Saginaw.
Q. Didn't they burn out?
A. Oh, no.
Q. Do you remember a fire starting there and being put out?
A. I do not. I don't remember now anything about it. My impression is, too, that within two or three weeks I saw in the newspaper there was a little damage over there; which mill it was I don't know. Of course, those things are occurring, you pick up your morning paper and you see it.
Q. Do you remember whether that occurred from the railroad, whether it was so reported?

A. No, I think that was in the mill.

2704 Q. Was that at Wright's, but——

A. That was at Wright's, but I would not be positive; I am quite sure there was a little damage over there, but it was nothing we thought anything of.

Q. Do you remember anything of a fire at Brown & Ryan's?

A. Well, that whole thing burned out there three or four years ago, down there by Owen's and all that.

Q. Were they near the railroad?

A. Well, the main line of the railroad was quite a distance from them.

Q. But they had a spur track?

A. All of these mills have a spur track.

Q. What one is on the main trunk line of a railroad?

A. A. W. Wright's.

Q. What road runs through there?

A. The Michigan Central.

Q. What is the extent of its right of way?

A. Well, the lumber comes very close to it. It seems to me it is not over 10 feet.

Q. Over 10 feet right of way?

A. Ten feet from where the lumber is piled up.

Q. That would be from the right of way, but how much from the center of the track?

A. It is right up close to the track.

Q. Have they the 100 feet right of way?

A. I don't know what right of way they have, but the lumber is piled in there. I don't know anything about their right of way.

Q. On each side of the track, then, there is a lumber pile up to within a very few feet of it?

A. About 10 feet.

Q. What is the space left for the cars to run there, 10 feet?

A. It is a very small space, of course. I never thought

2705 of it nor paid any particular attention to it, only I know it runs right through the lumber there and the lumber is piled on each side of it.

Q. Do you think the right of way of the Michigan Central there would be less than 100 feet?

A. I don't know anything about that. I know the lumber is piled nearer than that.

Q. It is piled on the right of way then?

A. I don't know anything about that.

Q. Would you want to say that the lumber was piled so that the piles on each side of the track were less than 100 feet apart?

A. Yes, sir.

Q. Then there must be less than 100 feet of right of way or else it is piled on the right of way?

A. That may be. I know he piles in the streets; the city allows him to pile in the streets.

Q. Wright piles in the street also?

A. Yes, sir; I know that.

Q. He is short of room, then?
A. Yes, he is short of dockage, they claim.
Q. You don't want to tell us it is prudent to pile lumber close up to where these engines are running all the time, do you?
A. I never have known any fire there from it.
Q. Well, you think it would be a prudent thing to pile this lumber right up to the railway track?
A. We do not charge Wright anything for it.
Q. I did not ask you that at all. You seem to be running business at a loss up there, according to your own account.
A. It looks that way.
Q. That is not our way of doing it here. Do you want the jury to understand that you do not consider it an imprudent
2706 thing to pile lumber right up to the edge of a railroad track where there are engines passing?
A. I never have considered any hazard to that lumber pile.
Q. Do your engines have fire-boxes open sometimes?
A. Yes, and drop live coals.
Q. They are like all other engines, though you would not consider it at all dangerous to lumber piled up against the track?
A. We do not so treat it.
Q. You have strong winds there, I suppose?
A. Yes, sir.
Q. Outdoors as well as inside and still you consider that a prudent kind of business, to pile lumber right up to the track?
A. I have always considered it so.
Q. It is done at this yard of Wright's?
A. Yes, sir.
Q. That yard has been burned out once?
A. Not since I have been there.
Q. How many fires have they had there?
A. I don't know that they have had any of any account.
Q. Who else besides Wright piles his lumber that way? Perhaps it would put out a fire to put lumber there.
A. One of Col. Gliss' mills.
Q. The main trunk line runs through his place also?
A. Yes, sir.
Q. How would the number of trains on the Michigan Central, as it passes through Wright's yard, compare with the number of trains on the Flint & Pere Marquette, on the Wabash, the Canadian Pacific and the Detroit, Lansing & Northern, all combined?
A. Oh, it would be very slight, of course, in comparison.
2707 The Jackson branch passes over that road and the Detroit, Lansing & Northern.
Q. How many trains a day does the Detroit, Lansing & Northern run?
A. Well, there are three passenger trains each way over the Central and two over the Detroit, Lansing & Northern, and all the freights.
Q. That would be ten. And there would be the freight trains?
A. Yes, sir.

Mr. BAKER: Do you mean the Detroit, Lansing & Northern?

A. The Detroit, Lansing & Northern.

Q. Where does it come?

A. Through Alma. Goes to Grand Rapids. That is where we make our connections, goes to Howard City.

Q. You haven't answered my question yet, whether you consider it a prudent thing to pile lumber right up against the railroad track?

A. I have simply told you what my practice was. I have so treated it as a prudent thing, making no charge for it in that case.

Q. Don't you think the cinders from an engine would sometimes burn a board?

A. I don't know but it would; it never has to my knowledge.

Q. We have a number of people here who swear that they have picked live cinders from a board and they have burned into the board and have set fire to piles and buildings alongside. Now, surely that would be a danger to lumber as well as to a building?

A. It may be.

Q. But you don't increase your rate up there?

A. Not at all, sir.

2708 Q. You have a very large number of lumbermen up there as clients in your insurance business?

A. Yes, a great many.

Q. The companies rather compete for that business, I presume?

A. Well, some do and some do not.

Q. And treat the lumbermen as well as possible? Some don't care for it?

A. Some don't care for it.

Q. Why?

A. Because they are not writing that class of risks. Every company, you know, has its risks.

Q. They do not like the risks?

A. Some risks they will not carry.

Q. Some companies do not care for that kind of risks?

A. No, sir.

Q. Others compete for it?

A. Yes, sir.

Q. You regard it as desirable yourself?

A. Well, it is a gambling business.

Q. That expresses it, doesn't it?

A. Yes, sir.

Q. You gamble for it?

A. Yes, that about expresses it.

Q. Would you just as soon insure a pile of lumber that was alongside of a track as if it was 100 feet away?

A. Well, if I was carrying it myself, I should say no; I should prefer it away.

Q. But if you were carrying it for an insurance company you should say what?

A. Well, the insurance company makes its rules; it makes the

lumber rates and it does not charge for it. They make their rate from experience.

Q. What do you make it from?

A. From their experience.

2709 Q. You say if you were carrying it yourself, you would make it different?

A. No, I say I might consider it not as desirable; I did not say I would increase the rates.

Q. What would influence you in that?

A. There is fire there and I should prefer it to be farther off.

Q. In other words, there is danger always from a proximity of fire?

A. Supposed to be.

By Mr. BAKER:

Q. Have you got that little table that you make up rates from, where you start with the basis?

A. Yes, sir; that is simply on a planing mill.

Q. It starts with a basis rate of 3½ and then it shows what you increase it on?

A. Yes, those are the different charges for the defects.

Q. I notice for a shingle roof you add ½%?

A. Yes, sir.

Q. No watchman you add one-half of 1%?

A. Yes, there is a charge for that.

Q. No brick shavings-room you add 1%?

A. Yes, sir.

Q. If wall of mill has unprotected openings you add one-quarter of 1%?

A. Yes, sir.

Q. That is the way you go to work to fix a rate on a planing mill?

A. That is the way we arrive at it.

Col. ATKINSON: What is an unprotected opening:

A. Without iron doors.

Q. That is, no windows?

A. Yes, openings in the walls without being properly covered.

Q. So that if you had windows next to the railroad the

2710 way to keep the rates down would be to close them up with iron shutters?

A. Well, if they should be protected from whatever the exposure is.

Q. That would spoil the light, wouldn't it. It practically prohibits windows on the sides where the exposure to fire is?

A. You take a boiler-room for instance——

Q. So that we could get cheaper rates by putting iron shutters on the windows and keeping them carefully sealed?

A. Against an exposure.

Mr. ROBISON: He don't mean that.

Col. ATKINSON: I guess he does.

Mr. ROBISON: They would not have such an unsensible thing as that.

Mr. BAKER: I will put that in evidence and it can be copied in the record.

Paper marked Exhibit House "1," and is as follows:

EXHIBT HOUSE "1."

Michigan Inspection Bureau,

Planing mill.

Name.....
Owner.....
At..... Mich.

Basis rate—3 50

Mill building (additions).

	1. Each story above one	25
	2. Shaft under floor	50
	3. Shingle roof	50
	4. Shingle roof painted fireproof paint	25
	5. No blowers	50
2711	6. Blower, wooded pipes and no cut-off	25
	7. Manufacturer of sash, blinds and doors	1 00
	8. Manufacturer of boxes or carpenter shop	50
	9. Frame building	50
	10. Not whitewashed throughout	25
	11. No watchman	50
	12. Watchman, but no watch clock	25
	13. Wood stoves properly set and pipes securely arranged	25
	14. Coal stoves properly set and pipes securely arranged	10
	15. Steam pipes not on metal brackets or without protection where they pass through floor or partition	25
	16. Dry-house (in building)	1 00
	17. Lighted by other than coal, gas or incandescent electric light	25

Boiler-house (additions).

	18. Brick adjoining, with fire-wall above roof of mill, and cut-off	25
	19. Brick adjoining, not cut off	50
	20. Frame adjoining, not cut off	75
	21. Frame adjoining, with fire-wall and cut-off	50
	22. Frame boiler-house detached 10 feet from frame mill	50
	23. Frame boiler-house detached 25 feet from frame mill	25
	24. Frame not whitewashed	25
	25. Shingle roof on boiler-house	25
	26. Space over boilers less than 8 feet	25
	27. Space between boiler arch and frame sides less than 3 feet	25
	28. No ventilators in roof	25

29. Metal stack, no jacket..... 50
2712 30. Metal stack on brick base, rising at least three feet above roof..... 10
31. Metal stack with good iron jacket..... 25
32. No spark-arrester to metal stack..... 25
33. No brick shaving-room..... 1 00
34. Brick shaving-room not cut off..... 50
35. If wall of mill has unprotected openings..... 25

Fire apparatus (additions).

36. No extra force-pump and hose or public water works... 50
37. Extra force-pump and hose in boiler-house..... 25
38. Less than 250 feet 2½-inch hose..... 25
39. No casks of water and buckets in mill..... 25
General condition.....

Total.....
Examined..... 189.

GEO. H. HOUSE, *Inspector.*

CHARLES H. ELLIS, sworn on behalf of petitioner.

Examined by Mr. BAKER:

Q. Where do you live?
A. Detroit.
Q. What is your business?
A. Civil engineer.
Q. How long have you been in that business?
A. Since 1863 or 1864.
Q. Are you the civil engineer that built the union depot elevated road?
A. Yes, sir.
Q. Were you in the Saginaw valley last Sunday?
A. Yes, sir.
2713 Q. Did you go through the yard of the Wright mill referred to here?
A. Yes, sir.
Q. How close to the main line of the Michigan Central is the lumber piles?

Col. ATKINSON: I object to that as incompetent and immaterial. It seems to me that whether Mr. Wright pursues a certain course or not should have no influence on this jury. If he piles his lumber up there it may escape fire or may not; the fact that he does it does not carry with it any weight or not as to what should be done by others.

Mr. BAKER: We have the testimony of Mr. House in connection with that, that there has never been a loss there in 12 years.

Col. ATKINSON: We are having your statement with Mr. House's. I do not think this testimony is competent.

Mr. BAKER: It seems to me we have a right to make comparisons of that kind.

Col. ATKINSON: Suppose it is burned up?

Mr. BAKER: It is not burned up. It stands there both sides of the track.

Col. ATKINSON: We are getting Mr. Baker's testimony, and I take an exception to the statement.

COURT: Answer the question.

Exception for respondents.

A. As I said, I was in Saginaw last Sunday. I went to this location and walked along the line of the Michigan Central track from the street which crossess there, where the electric cars run, beginning at that point on the curve of the railroad, which is quite a perceptible curve (the degree of which I cannot state). There were 15 piles of lumber on one side and 17 piles on the other, ranging in hight from 10 to 20 feet at least. Those piles were within a
2714 distance of 420 or 430 feet; intermediate between these piles were driveways for teams.

Q. 420 feet from what?

A. From this street where these piles begin, going south or southwest a distance of 420 feet. These piles on the south were within seven or eight or nine feet, as I remember it, as I measured some of them. I measured one extreme from the center of the track, some ten feet, say, from the center of the track.

Q. Well, from the rails?

A. From the rail there were from six to seven or eight feet, just about that average distance all the way around. On the other side they were about twenty feet from the rail, from the other rail, making a throat through there through which the Michigan Central runs of about thirty-four feet in width. That is the width of the right of way, or whatever the way through there is; whether that is their property or not I do not know. That exposure I know was there some sixteen or seventeen years ago when I located the Saginaw branch of the Michigan Central railroad. We made a connection very near that point. I was at the same locality and we ran out the line of that in order to make a map of it. I know that not those piles, but similar piles were there, similarly situated, and the piles that I saw there last Sunday had marks on them indicating that for some purpose or other they were counted in 1890–'91; '93 I think it was; no marks previous to 1890, I think.

Q. Did you make a trip around on the belt line?

A. Yes. Well, what shall I say about it?

Q. You were on the belt line, and did you go down to Zilwaukee on the main line of the Michigan Central?

A. Yes, and on the east side of the river went down to Bay City.

Q. Do you remember down below Bay City the planing
2715 mill where the boiler-house and the shavings-room are quite a distance apart?

A. Yes, sir.

Q. Did you measure that to see how far it was apart.

A. I paced it. The buildings were as I paced them from 390 feet, more or less, apart.

. How large a blow-pipe between them?
. I think it was twenty inches, galvanized-iron pipe.
. With a metallic dust-arrester over the shavings vault?
. Over the shavings vault a round galvanized tank like.
. With an opening from the vault into the boiler-room?
. I presume so.
. You did not see that?
. I did not see it, but there must have been an opening some-
re, because at the other end in the planing mill was a blower
h arms leading to each one of the machines, one or two or three
s to each machine, where they collected the dust by suction and
n blew it or forced it to the boiler-room.
. Did you visit any other planing mills there in the valley?
. From Bay City to East Saginaw we passed right alongside the
k of the Flint & Pere Marquette railroad, so that they were
ly noticed, two small planing mills and a box mill marked the
higan Box Company. I think that was the name. Those had
dently dust-arresters of that same kind.
. They were on the main line of the F. & P. M.?
. On the main line, and between South Bay City and Bay City
oticed a planing mill just south of the Flint & Pere Marquette,
at which the Michigan Central had track connections, and
6 those two tracks seemed to run through the mill. At Sagi-
naw, at Zilwaukee and Carrolton—at Zilwaukee there was a
nt in regard to the piling of lumber there at the Bliss lumber
d, in the planing mill and lumber yard——

Col. Atkinson: This I object to as immaterial.

Court: It strikes me, Mr. Baker, we ought not to go into that.

Mr. Baker: I do not care to go all over the Saginaw valley, but
ill ask one other question, whether or not the planing mills up
re are equipped with electric lights?

. Yes, I noticed the Mersham mills are fully equipped.

. Will you state whether or not the planing mills up there have
nections with the fire-box under the boilers and their blow-pipes
s to blow the shavings right into the fire-box?

. I cannot say as to that. They have got connection from their
dust bin that was in sight in that boiler-room, those tubes lead-
, where there are automatic feeders. Whether they are connected
h the blow-pipe, I do not know.

. Whether they are actually connected with the blow-pipe, you
not see?

. No, sir.

Cross-examination.

By Col. Atkinson:

. When were you up there?

. Last Sunday.

. Who was with you?

. Mr. Baker, Mr. Robison, Mr. Potter and Mr. Sanders.

Q. You had F. A. Baker, and George Robison, and Mr.
2717 Sanders I suppose is the lawyer who testified here yesterday?

A. I did not see him, but I presume it might have been him.

Q. A ruddy-whiskered man?

A. He is the attorney of the Flint & Pere Marquette railroad.

Q. Mr. Potter?

A. Yes, he is the general superintendent of the Flint & Pere Marquette.

Q. I suppose you went up to see the country for the purpose of giving testimony?

A. I went up at the request of Mr. Baker.

Q. You went up to see how things were working there?

A. Yes, sir.

Q. You thought you would see the work better on Sunday?

A. Hardly. No, I think I should have seen it better on a week day.

Q. Things were quieter, if anything, on Sunday?

A. They were quieter Sunday. Of course I would have been pleased to see the wheels in motion.

Mr. ROBISON: There is not so very much difference at Saginaw.

Q. You went up on a special train, I suppose?

A. No, sir. The regular train Saturday night.

Q. Gracious! You had been up there all night, then, when you went out there on this trip?

Mr. ROBISON: Tell the truth, Ellis.

A. The night was not included in the day; it did not lap over into the day at all. Is that what you mean? You mean did the night business work into the day?

Q. The night business did not lap over into the day?

A. No, sir.

Q. Oh, I did not quite catch the astronomy of it.

2718 A. I did not know what you referred to, about the night business. That is a little out of the line, I presume.

Q. You went up there to come back and testify?

A. Mr. Baker requested me to go, and he requested me yesterday to appear here.

Q. To give testimony?

A. I presume so.

Q. You went through this Wright lumber yard particularly and measured these piles?

A. I went through there because I was very much interested in that location.

Q. How wide is the right of way there?

A. I don't know, but I could ascertain from the Michigan Central railroad.

Q. Ten feet.

A. Oh, it must be more than that, because the clearance for the cars would now have to be at least twelve or thirteen feet. They have a throat some thirty feet wide.

Q. This lumber must be piled on the right of way, if they have ne ordinary right of way?
A. Certainly.
Q. Then it is just brought there and piled up for shipment, I ppose?
A. Well, it has been there some time.
Q. How do you know?
A. Well, as I said, I noticed the marks that were about there.
Q. Who made those marks?
A. I could not tell you. The marks are as any lumberman would o and as I have seen before, and I understand they mark their iles for inventory and counting. It marked the year, the month nd the day, and sometimes the number of feet in the piles.
Q. This lumber is piled out near the track for shipment and is on the right of way of the railroad?
719 A. I don't know what it is piled up there for; for shipment, I presume.
Q. You don't mean to say there have been piles there for shipment since 1890?
A. I did not say so. I said there were piles there in 1881 and in '9; similar piles.
Q. Then you did not mean to tell us that by the mark you could y this lumber had laid there since 1890?
A. Well, it is pretty good evidence that it did.
Q. That is what you want to be understood, then?
A. Yes, that those marks were evidently put there in 1890, '91 nd '92.
Q. This is in Wright's yard where these piles are?
A. I don't know as it is his lumber. He may have sold it. I on't know as to the ownership of the land or the lumber at all.
Q. What kind of lumber was it?
A. Pine lumber.
Q. What quality?
A. There was a general run of lumber, one and two inch stuff, 12, 4, and 16 feet long.
Q. Culls or good quality of lumber?
A. Of good quality of lumber, I should judge.
Q. There is a throat there that the train passes through, about ow wide?
A. About 33 or 34 feet.
Q. Do you know any portion of the Michigan Central right of ay that is less than 100 feet?
A. Yes, I think I do.
Q. Where?
A. Well, there are certain places. You are confining me to ex-ct testimony and I am speaking from memory now. I used to have some connections with the Bay City road. I think in
720 Bay City they have narrow widths of land, that is very often the case, where they are restricted, where the land is val-able.

Q. I am speaking of the Michigan Central.

A. That is not any more of the Michigan Central than the Bay City is; that is the old Jackson, Lansing & Saginaw.

Q. What is the foundation of these piles, are they piled on the ground?

A. Piled on the ground.

Q. Tracks on both sides of the piles or on one?

A. Not there.

Q. A single track?

A. That is a single track there, the main line.

Q. Do passenger trains pass through that track?

A. Must have to.

Q. You passed over that track when you went up?

A. Yes, I walked over it on Sunday.

Q. Where is the Wright yard proper?

A. It evidently begins at that street, possibly just before you get to it, because that middle ground, what used to be North Saginaw, is all one lumber yard. I could not say where he begins or where he ends.

Q. I am getting old, and I would like to know whether this is a part of Wright's yard, this right of way, or whether that lumber is piled there apparently for shipment?

A. I said as to the ownership of the land and lumber I did not know. The lumber is there, but whose it is I don't know. There is some lumber on somebody's ground at that place.

Q. All you can say is that there is some lumber piled on the right of way up in Saginaw?

A. Yes, sir.

Q. Apparently for shipment, and some is marked 1890 and some 1891 and some 1892?

2721 A. With the month and day.

Q. Who made those marks, you do not know?

A. I don't know.

Q. You were taken up there to go to see them and come to swear to the fact?

A. I don't know as to that.

Q. Where were these marks?

A. On the side of the piles, as Mr. Backus piles or any other lumberman. He can tell you better than I what they were there for.

Q. Just what were the marks?

A. There would be, for instance, 1890, marked 20; that would be on a board half way to the end of the pile, where the headers come through; it would be the filling stick in there or half way on the other side; it would be on one or the other.

Q. You saw boards on the piles with those kind of marks?

A. Yes, sir.

Q. They were not all then on the same places on the different piles, relatively on the same places, that you saw the marks; there did not seem to be any system?

A. Yes, they were generally about the height of where they could

conveniently made and easy of observation and easy to find; t there for some purpose.

Q. You think the mark was made after the board was in that e?

A. I should judge so.

Q. Had you ever seen any one making those kind of marks?

A. Yes, and I found also marked on some piles, in one place, for stance, the lower part of the pile, 1890, and above that I found e number, 1892, and in another place 1893 higher up, for some purpose; inventories, possibly.

22 Q. So that in all probability these boards were in the yard when the inventories were taken?

A. I should presume so.

Q. Some of those marked 1890, 1891, and '92 and '93, all came t together and got into this pile for shipment; the same pile?

A. I don't think that is a fair inference.

Q. I don't care what you think as long as that is the testimony.

A. No. I understand sufficiently to swear that I find it is almost iversal with lumbermen in their lumber yards to mark their es in a certain way and I have asked them what it was for, an ventory; they put the year and the month and the day and some- nes the number of feet. It would not be fair to infer that these ards came out and were put in there in that prominent posi- n——

Q. You will have to listen if you understand?

A. Without some purpose.

Q. You cannot talk all the time.

A. I am through.

Q. And assume to understand what I want you to give us infor- tion on. Did you find in the same pile boards of different dates?

A. Yes, sir.

Q. How many different dates did you find on the boards in the ne pile?

A. As I said, I found no dates previous to 1890. I did not notice her in any one pile any duplication of the year. I found one rk for one year and one year marked for another.

Q. You don't want to argue this, do you?

A. No, sir.

Q. You don't care what effect your testimony has if you get at the facts?

23 A. Not at all.

Q. You found some marked 1890, 1891, '92, and '93 in the ne pile?

A. I think I did find them. I did not notice whether they were in the same pile, yes, sir.

Q. How are these piles covered, anything to protect them from e weather?

A. As I said, some of them were 8 or 10 feet high and some 20 t. They have been taken off there——

Q. Are they protected in any way by boards placed upon a slant in any way against the weather?

A. Nothing further than the usual slant of the piles. They were not hooded over, as some piles generally are.

Q. So that they are not like the piles that are put up to stay for any length of time?

A. No, sir. I said your inference that they were for shipment was evidently correct.

Q. I think I understood you to say that the piles showed they were being piled now, that the work was going on, only interrupted for the Sabbath, I suppose?

A. I could not say but that it was. These driveways for teams indicated it was to be taken off by teams. I do not think it was taken by rail.

Q. You don't know whether that lumber was brought in by the railroad and put there by Wright and placed there so that his teams could take it away?

A. I don't know anything about that.

Q. Was any of that dressed lumber?

A. No, sir.

Q. Where does Wright get his supply of lumber?

A. I don't know.

Q. You had been up there often before?

A. Oh, yes.

Q. So that this trip was purposely to get testimony, then?

2724 A. That is the same question you asked before. I went at Mr. Baker's request and am here at his request. I suppose that is the purpose.

Q. We have a maxim of law that when you are looking for testimony you generally find it?

A. I suppose that is the purpose.

Q. How did you happen to go below Bay City to see this mill that has its power-house three or four hundred feet away?

A. Well, we had been covering some other portions of Bay City, and I think Mr. Potter suggested that there was a mill there that was well equipped, and he made the remark that it was a point that both the Michigan Central and the Flint & Pere Marquette were so anxious to get into that they were tumbling over one another with their side tracks when it was built.

Q. They have side tracks there?

A. Everywhere side tracks in lumber yards; nothing else in Bay City and Saginaw.

Q. All through these lumber yards there are side tracks?

A. Everywhere, among the timber, docks, slabs and fields of lumber; nothing but side tracks, so close the car could hardly get by any of them.

Q. A trunk line does not usually run through the yards?

A. No, sir, not where they have room.

Q. About how many trains would pass over that line that you have been speaking of up here, compared with the line in front of the Backus mill?

A. I could say very closely if I had a time-card of the Michigan Central.

Q. Well, about what proportion?
A. Oh, I could not tell. I do not even know how many trains they run out of the Fort Street depot.
2725 Q. One to fifty?
A. Oh, more than that.
Q. One to twenty-five, locomotives passing?
A. Oh, I should think more than that.
Q. Can you give us some idea?
A. I would rather give it to you closer than a mere wild guess.
Q. You want to be so exact you cannot give us an approximation?
A. Colonel, I like to be as precise as I can with you.
Q. Is there any upgrade there in front of where you pass through these piles?
A. I should judge not, I should think it was level grade.
Q. The point of all this testimony, I think if I understand counsel on the other side right, is to show by you that there is no risk from railroads?

Mr. BAKER: That is objected to. It is not competent for the witness to testify to the point of testimony or the position of counsel.

Q. I want to know if you wish to be understood from the way you saw the lumber piles or anything else that you have ever seen in your life that you do not think that there is any fire risk from the proximity of a railroad?
A. I could not testify that pine would not burn, that slabs won't burn, that sawdust won't burn, and that pitch won't burn. There was pitch hanging there on these piles that I could have lighted with a match and it would have gone; it is a tinder box there.
Q. If a live cinder touched that pitch it would burn?
A. If you put fire to it it would burn like oil.
Q. So that there is a fire risk?
A. When you put fire to pine or pitch it burns. I am not an expert as to risks or exposure. I do not pretend to be.
2726 Q. Now, just lend me your ear?
A. Yes, sir.
Q. You assume in saying that pine will burn——
A. Yes, sir.
Q. In connection with my question as to proximity of a railroad, that fire comes from a railroad. You say it does?

Mr. DICKINSON: You nod your head. Speak so the reporter can get it.

A. I was waiting for the end of your question. I have not answered it.
Q. You have traveled over those roads a good deal?
A. Yes, sir.
Q. You have seen the woods on fire?
A. A great many times.
Q. Apparently ignited from the railroad?
A. Evidently.

Q. So that there is always a danger from fire from passing locomotives?

A. I know it is a very common thing for locomotives to set fire to the lumber woods; it is full of timber.

Q. And dry lumber would be a very bad thing to have the cinders light on?

A. Yes, sir.

Q. You have had fires in this city from the railroads?

A. I don't know. I never investigated them, and I could not testify as to facts of that kind.

Q. That has been the claim, has it not?

A. I presume so, yes, sir.

Q. You have no doubt at all that this elevated railroad running along by buildings and throwing its sparks and cinders upon them increases the fire risk?

A. Well, it depends whether it increases it from its exposure from other points. To answer you correctly, I was thinking of the
2727 elevated road in Chicago, the Alley road, where everything is exposed, and they do not seem to burn.

Q. I want you, if possible, to think of the elevated road here?

A. Yes, you take this road just as it is.

Q. We had a case last night.

A. Put a——

Q. Well, what were you going to say about the case last night?

A. I interrupted you then. Excuse me.

Q. I am willing to be interrupted.

A. I would say you have a case last night which there was testimony here about which I have just listened to. It was set by the locomotives. I could not contradict it.

Q. That may occur any time?

A. Fire is liable to occur from a burning chimney; exposes are more where there is fire.

Q. This Sunday trip, while I suppose it had many pleasant instances——

Mr. DICKINSON: Especially in the night.

Q. And leaves pleasant memories, have not satisfied you that fires are not sometimes ignited by locomotives?

A. No, sir, I know they are.

By Mr. BAKER:

Q. It is a single track that the Michigan Central has through Wright's lumber yard?

A. Yes, sir.

Q. Is it usual for a railroad company to load and unload lumber on a main track?

A. No, sir, it is not.

Q. You do not mean to be understood that that lumber is piled out there to load onto cars on that main track?

A. Oh, no, I would not want to be understood as testifying
2728 as to any use that is going to be made of it. There are tramways, plank roads for teams, similar to what Mr. Backus has in his lumber yard.

Q. And Mr. Wright has a saw-mill there, hasn't he?
A. Yes, sir.
Q. It is on the river?
Col. ATKINSON: A saw-mill or a planing mill?
A. He has got both. I did not go into the planing mill and I could not give you the locations exactly.
Col. ATKINSON: Did you go through the mills; these planing mills?
A. I went through some of them.
Q. And on Sunday?
A. Yes, when the doors were opened. There were one or two we could not get into.

By Mr. ROBISON:

Q. This lumber that is piled along the track in Wright's yard, is not a single line of lumber without any back of it?
A. No, sir.
Q. Isn't it a continuation of a lumber yard; the lumber yard begins back and runs as far up and as near the track as they can get?
A. It extends from there, excepting for the driveways between it, down to his mills.
Q. But it is not a single line of lumber piled along the track?
A. No, sir.
Q. Back of there, there are a number of other piles?
A. Yes, sir.
Q. Now, this Wright's yard is not a single isolated case of lumber piled along the railroad track, is it?
A. Oh, no.
Q. Didn't you see many other places where the railroad ran through tunnels of lumber?
A. Yes, everywhere.
2729 Q. But this is the most pronounced case where the trunk line runs through it?
A. Yes, the most pronounced of any I saw.
Q. There are miles of it, are there not, where side tracks run through it in that way?
A. I should judge so.
Q. Did you hear a man up there make an estimate of the number of miles?

Objected to. Question withdrawn.

By Col. ATKINSON:

Q. I understood you exactly the opposite to what you now tell Mr. Baker. You told him, as I understood you, that these piles were not put there for the purpose of shipment apparently. You told me they were.
A. I think I was careful to tell you that I could not state.
Q. You do not mean then——
A. He asked me and I refused to be definite in regard to it.

Q. He has a way of getting you into trouble that way. You do not mean to change your testimony?

A. Not at all.

Q. You assented to his proposition that they were not there for the purpose of shipment; that the railroad never ships on its main track.

A. I said I could not testify as to that.

Q. What facility had the Central for shipping except its main track?

A. It has side tracks.

Q. Where are they, in connection with this that you speak of?

A. There are sidings on the south of these piles, between there and the river.

Q. Then you made a mistake in answer to a question I
2730 asked you before, as to whether there were tracks also on the other side of those piles. There are side tracks.

A. There are side tracks. I supposed you wanted me to answer your question exactly. There are side tracks back of the piles in the lumber yard.

Q. These piles then lay between Wright's side track and the main track of the railroad?

A. Yes, I think there are side tracks over there.

Q. Whether they are there for present shipment or not you cannot tell?

A. I cannot tell you.

Q. Were the other gentlemen looking about at the time you were there?

A. They were there, yes, sir.

By Mr. ROBISON:

Q. Do side tracks run through the mills up there anywhere?

A. Yes, I saw a case where locomotives run through planing mills.

Q. This Germain mill, that has been testified to here, do you remember a side track running into that mill?

A. Yes, sir.

Q. The whole length of it?

A. Well, they had a siding in one part of the L. I don't think they went through the mill.

Q. I mean the mill they are operating now?

A. Yes, sir.

Q. Do you remember any other mills where the railroad ran through?

A. At Carrolton there are two tracks running through the Eastman mill.

Q. Entire length?

A. The entire length.

Mr. DICKINSON: Side tracks?

A. Side tracks, locomotives running through there.

2731 Col. ATKINSON: Those are not tracks for fast trains or general traffic through the mills, I suppose?

A. No, sir. At Spencer & Co.'s there are other side tracks running through those mills close to the planers.

Q. Do you know on the main line of the Flint & Pere Marquette of planing mills located?

A. I testified to two between South Bay City and Bay City.

Q. Do you remember a place there where there are three?

A. That is the place. One on the south side, I think had no connection with the Flint & Pere Marquette; the Michigan Central runs to that.

Q. Isn't there one place on the main line of the Flint & Pere Marquette where there are two planing mills right alongside of the track on one side and on the other another planing mill?

A. Yes, I spoke of those.

By Mr. Foreman BAKER:

Q. In the case of this lumber piled where there are three years minuted in the same pile, 1890 then would be nearest the ground?

A. Yes, sir.

Q. And '91 next?

A. Yes, sir.

Q. So that, you think, indicates that the piles, so far as 1890 is concerned, were piled there in 1890?

A. I assume it was. I assume it was an inventory mark.

Col. ATKINSON: Any difference in the color?

A. In the color, yes. Some of those piles had a seasoned color on it.

Q. Much darker?

A. Darker, yes, sir.

2732 Q. It looked then as though the bottom of the old pile was left there and new lumber piled on top of it?

A. Yes, in some cases.

The COURT: Anything further?

Col. ATKINSON: No, I was just thinking how slowly lumber sold up there.

Recess until 2 p. m.

WEDNESDAY, *Nov. 1st*, 1893—2 p. m.

GEORGE M. BROWN, after being duly sworn on behalf of the petitioners, testified as follows:

Examined by Mr. BAKER:

Q. Where do you reside?

A. Saginaw.

Q. How long have you lived there?

A. Twenty-six years.

Q. What is your occupation?

A. Civil engineer. And superintendent of roadway and structures for the F. & P. M.

Q. What do your duties consist of?

A. I have charge of the maintenance and repairs of the tracks and buildings, bridges, etc.

Q. Suppose a new track has to be built anywhere, what have you to do with it?

A. Direct as to the work and the detail.

Q. You have charge of it?

A. Yes, sir.

Q. And you are connected with the Flint & Pere Marquette railroad?

A. Yes, sir.

Q. I suppose you are familiar with the other tracks in the Saginaw valley?

A. Yes, sir, I am.

Q. That is, East Saginaw, Saginaw and Bay City.

2733 A. Yes, sir.

Q. The Flint & Pere Marquette has a line that connects those two places?

A. Yes, sir.

Q. And it also goes across the river there on its way to Ludington?

A. Yes, sir.

Q. Are you interested in any other business?

A. I am interested in the lumber business.

Q. What is your connection with that business.

A. Owner or half owner of a saw mill, and of timber.

Q. Can you explain to the jury how the lumber piles are marked? When Mr. Ellis was on the stand he testified there was some markings on the lumber. You are in the lumber business; will you tell us what that is?

A. Our practice is to mark each pile as it is completed with the day, the month and the year. So that we may know the age of the lumber, we also put on the number of the courses in the pile, and sometimes the number of the feet. That enables us to take an inventory quick at the end of each month in order to correct our insurance.

Q. How do the different markings come on the same pile?

A. Sometimes a pile may not have been completed; it may have been partly completed and counted at the end of the month, and then the following month may have been finished up higher, and the different markings would show the age of the lumber, and the amount of each.

Q. And of course if it was only built up part way there would be one marking, and afterward if it was completed or partly taken down there would be a different marking?

A. Yes, sir,

Q. Now with reference to the Flint & Pere Marquette system up there, have they a belt line that runs around the city?

2734 A. Yes, sir.

Q. What is that used for?

A. For regular trains and to reach the manufacturing plants on both sides of the river.

Q. Does that appear on the ordinary map of Saginaw?

A. Yes, sir.

Q. (Producing large map.) Will you show us on this map the belt line of the Flint & Pere Marquette? Just trace it around there?

A. This being the depot of the Flint & Pere Marquette railway, and the location of their shops, starting from there, crossing the river to the west side, and running by some manufacturing plants, and in around here to the west side, following this line there we have a passenger station, which is called the West Side depot, or Court Street depot; going from there we pass on through here, and at that point we cross the Michigan Central main line, where we make connection with the Saginaw Valley trains of the Detroit, Lansing & Northern system for Grand Rapids and other points West, and then pass on with the main belt line, running down, reaching all these plants here and crossing the river to the east side, and up here connecting with these manufacturing plants, and out this way, connecting with the main line down to the depot. About 13 miles run.

Q. Which side is East Saginaw?

A. Here, on this side.

Q. Now, whereabouts on the line is the Germain mill?

A. It is right here.

Q. That is marked "E. Germain;" is that the location of it?

A. Yes, sir, and here is the main line of the Michigan Central.

Q. What mill is this here?

A. Pratt (?) & Spencer's.

2735 Q. Where is the Mershan mill?

A. That is here in this Y, where they connect with the Michigan Central.

Q. Is this the main line of the Michigan Central?

A. Yes, sir.

Q. Where is the Wright property?

A. It is right here. The Michigan Central comes down Water street until it reaches the Wright property, and then it angles off through his lumber yard.

Q. You say that belt line is used for regular trains; passenger trains or freight trains?

A. Both.

Q. But I don't suppose there are many passengers on it in a day?

A. I think there are five each way.

Q. It goes round the city, I suppose, to pick up laboring men and people who want to go out to the shops?

A. Yes, sir, passengers.

Q. And it also furnishes railroad conveniences for a large number of manufacturing plants?

A. Yes, sir.

Q. Does the main line of the Michigan Central on the Wright property run right through a lumber yard?

A. Yes, sir.

Q. How many years has it done that, to your knowledge?

A. Twenty-five or twenty-six years, ever since the Michigan Cen-

tral road was built. I don't remember whether it was 1868 or 1869 that that division was built there.

Q. Was it about that time?

A. Yes, sir.

Q. Will you state, if you can, about how many miles of
2736 sidings you have on the F. & P. M. system that runs through lumber yards and by planing mills, where the risk is supposed and claimed to be extra hazardous?

A. Of side tracks, in excess of thirty miles in Saginaw proper.

Q. Then there is this Wright property where the main line; is there any other lumber yard where the main line runs through it?

A. Yes, sir, there is.

Q. Whereabouts are they?

A. Well, the Frost Lumber Company, where the Michigan Central and C., S. & M. runs.

Q. That is the Cincinnati, Saginaw & Mackinaw road?

A. Yes, sir.

Q. That is operated by the Grand Trunk?

A. Yes, sir.

Q. Comes up by Durand?

A. Yes, sir.

Q. They have an entrance in the south side of the city?

A. Yes, sir.

Q. And to what extent are there planing mills and box factories on the belt line and main line there?

A. I was looking over some of them last evening, and I saw where there were over three or four miles of main line passing within 100 feet of planing mills, and through yards adjacent to mills.

Q. Have you a map with you of the Wright property?

A. Yes, sir.

Q. Will you produce it, please?

A. Yes, sir. (Producing maps.)

Q. Who made that map?

A. It is made by the engineer department of the F. & P. M.

Q. In your office?

A. Yes, sir.

2737 Col. ATKINSON: I object to any testimony in regard to that map as incompetent and immaterial.

COURT: I think, Col. Atkinson, the objection is good.

Mr. BAKER: We will take an exception.

Cross-examination.

By Mr. ATKINSON:

Q. You have been in the employ of the Flint & Pere Marquette railroad for how many years?

A. 27 years.

Q. Continuously?

A. Yes, sir.

Q. How are you interested in lumber?

A. I have a half interest in a saw-mill.

Q. You say a lumber pile is partially made one year and a little more is put on it the next year, and a little more on it the third year, and so on for three or four years, to complete the pile?

A. Sometimes it appears that way.

Q. It would not happen very often that way?

A. No, sir.

Q. It would be quite exceptional, would it not, Mr. Brown?

A. I don't know as it would.

Q. It is exceptional?

A. Certainly.

Q. It sometimes happens?

A. Yes, sir.

Q. How wide is the Michigan Central right of way?

A. Of my own knowledge, I could not tell you.

Q. You pile lumber along the road, I suppose, for shipment?

A. Yes, sir.

Q. Is it usual to pile lumber for shipment part of one year and keep it three or four years before you finish the pile?

2738 A. That is sometimes done.

Q. The lumber is allowed to season, then, right by the railroad track?

A. Yes, sir.

Q. I suppose the point of your testimony is, what counsel intended to show by you is, that there is no danger from fires in a railroad running near lumber. It does not increase the hazard. Do you want us to understand that way?

A. I have not been advised as to what they want to prove by me.

Q. I am telling you now. You want us to understand that a railroad running by a lumber yard is not a source of danger?

A. I know the general practice of all lumbermen is to pile——

Q. Now, Mr. Brown, can't you say whether you so understand it or not?

A. I know from my own experience in my own yard——

Q. I am not asking you about that. What I want to understand, and it will save us lots of time if you will tell me, is whether you want us to believe that a railroad running by piles of lumber, close up to them, does not increase the fire hazard?

A. We do not consider that it increases it so that we are unwilling to take the advantages of it.

Q. You want us to understand that it does not increase the fire hazard?

A. Not if due care is used in handling locomotives.

Q. Then it depends upon the care of the men who handle the locomotives?

A. A careless man could set fire with his locomotive the same as a tramp might start a fire with a pipe.

2739 Q. It is not an uncommon thing for men who run locomotives to become careless and who have to be discharged?

A. I never heard of one in——

Q. Then that is one calling in which a man is never careless?

A. I was going to qualify my answer by saying by reason of any carelessness in handling the engine in a lumber yard.

Q. So that a man who is careless all along the line you think would be careful when he got in a lumber yard?

A. I don't admit men are careless all along the line.

Q. Never?

A. I admit men are sometimes careless, but as a rule men are not.

Q. We sometimes have people killed from the carelessness of men handling a locomotive?

A. You may call it carelessness or error in judgment.

Q. If a man was careless in opening his fire-box near a lumber yard, it would be likely to set it on fire?

A. Unquestionably.

Q. Do engines throw sparks in your part of the country?

A. They throw sparks to a limited extent.

Q. If that spark lights on a dry board it is liable to burn it?

A. It hardly ever lights——

Q. Did you ever travel through the country as far as Alpena?

A. I have never been to Alpena.

Q. Have you ever been up as far as Mackinac City?

A. Yes, sir.

Q. Have you ever seen any fires burning along the side of the road?

A. A great many.

Q. Fences are burned sometimes?

2740 A. Yes, sir.

Q. And fences are usually 50 feet from the line of the railway, are they not?

A. Usually from 35 to 50 feet.

Q. And they frequently are burned from fire from the locomotive?

A. It is possible. I know they are burned from other sources.

Q. It is more than possible, is it not? It is the ordinary reason attributed for the fires, is it not?

A. Not always. In a new country where they are clearing lands——

Q. Of course, you can burn wood without having it lighted from a locomotive, but it is a very common thing to have fires set from locomotives?

A. I dare say it is in dry seasons.

Q. And are not fires sometimes lit fifty or sixty feet off?

A. I never knew of a case of that kind.

Q. Did you ever hear of such a case?

A. No, sir, usually from the fire-box, not from the smoke-stack.

Q. Then you never heard of a case where the fire took place from the smoke-stack?

A. Not fifty or sixty feet from the road.

Q. Well, any distance? This lumber, I understand, is piled up

near the tracks so as to give the trains but little room in which to pass?

A. I never saw a fire started from the smoke-stack of a locomotive.

Q. We had a fire here last night that took place in the roof of a building near this elevated road up as high as the top of the smoke-stack. It took fire in the shingles; do you think that came from the fire-box or the smoke-stack?

2741 A. It is so reported. I think the evidence showed it was about 20 feet distant.

Q. Do you think it was lit from the sparks of the smokestack?

A. I could not tell you.

Q. You would not suspect it was lighted from the fire-box, would you?

A. No, sir.

Q. So that if it came from the railroad it must be from the smoke-stack?

A. Yes, sir.

Q. And twenty feet off it would be a source of danger?

A. It might be——

Q. Oh, give me the answer. Would it, Mr. Brown, be a source of danger within twenty feet? Never mind the map, just tell me. We are gathering up all the information we can for future use here?

A. I consider that shingles, within 20 feet of the track, as reported, would add to the danger.

Q. Then where the roof is dry it would add to the danger?

A. Not where lumber was dry, but lumber and shingles, old shingles. Old shingles are entirely different.

Q. Where the lumber was fine enough, I suppose. Then you don't mean to tell us that locomotives do not increase the fire risk, and I suppose that is all your evidence is introduced for?

A. I never heard of its increasing of it, by reason of its setting fires.

Q. Have you in Saginaw any parallel case to the one we are considering here, an elevated road running close to a large building throwing smoke and cinders on it and around it?

A. There is no elevated railroad running by manufactur-

2742 ing plants in Saginaw. The only elevated road I know of is run from a coal chute to the wood yard.

Q. That is through your own property?

A. Yes, sir.

Q. Then you have no experience of a parallel case to this one?

A. No, sir.

Q. Have you had much experience in lumber?

A. I was brought up in the lumber business from a boy.

Q. Is dry sawdust quite combustible?

A. No, sir, it does not dry very deep even in the warmest weather.

Q. You don't answer my question. I ask you if dry sawdust was quite combustible, and you say it does not dry very well. I say after it is dry, is it quite combustible?

A. What I meant is, as sawdust is deposited over surfaces——
Q. If it is dry it is quite combustible?
A. Yes, sir.
Q. And fine sawdust made from dry wood, kiln-dried wood, the greater fineness would be still more combustible, would it not?
A. I suppose so.
Q. And more likely to be lit by sparks? Haven't you been called in the service in any case to pay for damages done by your company for burning fences and crops?
A. No, sir.
Q. Your jurisdiction then does not extend out of the city?
A. Over the whole line of the F. & P. M. railroad, and for a number of years I settled all damages for fire claims of all descriptions.
Q. What kind of fire claims?
2743 A. Everywhere we had any to settle.
Q. For burning fences through the country?
A. Yes, sir.
Q. How wide is the right of way in places where you have burned the fences?
A. From 40 to 100 feet.
Q. Your track is in the center of it?
A. Yes, sir, usually.
Q. Do you remember any case where the right of way was 100 feet wide where you burned the fences?
A. I know where fences are *they* were burned.
Q. So that they were burned nearly 50 feet from the track?
A. They have run from the track to the fence?
Q. The fire would be communicated to the fence?
A. Yes, sir.
Q. When were you subpœnaed?
A. Yesterday.
Q. What planing mill does the track pass within 100 feet on your road?
A. It passes within 15 feet of some mills.
Q. What mills?
A. The York & Tillotson mill.
Q. Do you know how that is arranged with reference to the light, etc.?
A. Yes, sir.
Q. Is the track elevated there?
A. No, sir.
Q. How high a mill is that?
A. There is no machinery in the second story, although it is quite a high story.
Q. All the machinery is below?
A. Yes, sir.
Q. The railroad is on a level?
A. A light grade.
2744 Q. Is there any upgrade in front of it?
A. Yes, sir.
Q. How much a mile?

A. Well, 40 feet.
Q. 40 feet to the mile, and you do switching there, I suppose?
A. A great deal.
Q. That is the nearest parallel, is it, to the Backus case?
A. There is one other point I consider more dangerous.
Q. One other point still more dangerous than that?
A. Yes, sir.
Q. We will take that later on. What is the size of this mill?
A. If you will allow me to measure it on the map I will tell you actly.
Q. No, just tell us.
A. I should say it was 150 by 200 or more.
Q. And two stories high?
A. I think the posts are at least 16 feet with an elevated part ough the center.
Q. What is the roof made of?
A. Gravel roof, I think.
Q. What do they manufacture there?
A. They dress all grades of lumber and manufacture molding, h, door-, blinds and, I think, boxes.
Q. Where is their machinery located?
A. All on the ground floor.
Q. On which side of the ground floor, next to the railroad or ay from it?
A. All over the ground floor of the mill site where the track runs m which they take the lumber from the cars to the machines.
Q. Their own side track?
A. Yes, sir.
Q. I suppose they keep locomotives running through the mill all the time?
A. Only into the mill switching; they run by the end——
Q. Don't locomotives run into the mill?
A. They do if they have occasion to.
Q. And that is common?
A. Yes, sir; there is a track on each side of the mill.
Q. That is for their own accommodation, is it?
A. Yes, sir.
Q. The trunk line does not run through the mill?
A. No, sir.
Q. And you say they do all kinds of planing there?
A. Yes, sir. The F. & P. M. and the Michigan Central both go there.
Q. How long has that mill been running?
A. I guess about four years.
Q. Whose did you say that was?
A. York & Tillotson.
Q. They work in all kinds of wood, I suppose?
A. Yes, sir.
Q. Have you ever run a planing mill yourself?
A. No, sir.

Q. Is there any one here from Saginaw that has, that you know of?

A. Not to my knowledge.

Q. Is the exhaust greater when you are pulling up a grade than it is when you are not, in a locomotive?

A. Yes, sir, usually.

Q. When the exhaust is greater you are more likely to throw sparks?

A. I think that is the theory. I am not a locomotive engineer. The greatest danger to my mind in handling a locomotive is stopping and then starting up again.

Q. Stopping and starting?

2746 A. Yes, sir, after the fire has been still a little while, as they would be switching.

Q. From your starting a train out after you have fired up is there likely to be more throwing of sparks for a short distance than there is after it has got well on its way?

A. I think so.

Q. So that when you are near the stopping point you are more likely to get the cinders?

A. When very near, yes, sir. Anything that is light is soon thrown out.

Q. And when you are checking up or pulling upgrade and exhausting you have the same danger?

A. Not when you are checked up.

Q. When you are pulling up, then the cinders are scattered?

A. Yes, sir.

Q. Do you know enough about lumber to know whether or not soot is a desirable thing on the face of dressed lumber?

A. I should not consider it desirable.

Q. Locomotive smoke contains soot, does it not?

A. My attention has never been called to any lumber.

Q. Have you never noticed any cinders on the cargoes of lumber as they come in, cinders and soot from the locomotives, on lumber brought in on cars?

A. On cars that are near the locomotives I should suppose there would be cinders on top.

Q. You would expect that?

A. Yes, sir.

Q. Would not also some cinders fall each side?

A. I would expect so.

Q. If you had lumber piled alongside would it not get covered with soot and cinders?

2747 A. Cinders might fall on it, but I don't think soot enough would fall on the lumber to damage it. If the board was rolled over there would be no cinders adhering to it.

Q. We have a number of gentlemen here who receive lumber by cars and they seem to be under the impression that a great deal of cinders and soot fall on the lumber; are they all mistaken, Mr. Brown?

A. I do not say but what cinders will fall on cars of lumber. It is reasonable to expect it.

Q. But where cinders fall you think the soot would not come down on the lumber?

A. I don't think cars moving in a train would be so covered with soot as to damage the lumber. That would be my judgment.

Q. Have you ever seen your trains cleaned out after they arrive, after a journey, the passenger cars?

A. They are always swept and cleaned.

Q. Have you ever noticed soot in them?

A. Yes, sir.

Q. Have you ever noticed soot on the window-sills of the cars?

A. I have noticed fine dust, dust that will go wherever the air will.

Q. No soot? Do you mean to tell us soot does not settle on your cars as they are moving? Do you not know that it will make you look like a black man before you get to the end of your journey, sometimes spoil your collars and cuffs and neckties? You don't mean to tell us that in your experience there is no soot of that kind, do you?

A. What I mean to tell you and what you asked me was, whether soot will settle on lumber in its transit.

Q. It will settle on anything that comes in its way?

A. Yes, sir.

Q. And you think it an undesirable thing on the face of lumber, especially dressed lumber?

2748 A. I should think so.

Q. It would spoil the lumber for the best finish?

A. Yes, sir.

Q. It would spoil the lumber unless you wanted it for antique or ebony finish?

A. Well, I am not an artist, and when you talk of antique and ebony finish I am not a judge.

Q. You say you have no planing-mill men with you down there?

A. No, sir.

Cross-examination.

By Mr. ROBISON:

Q. These piles of lumber that are piled in Wright's mill are piled right along the track, are they not?

A. Yes, sir.

Q. The track is used on the right of way—the right of way is used by that company as a part of its yard, is it not?

A. I don't know who owns the right of way, that is, whether the Michigan Central has a mere trackage right or not. It sometimes happens that railroads have only a very narrow right of way. I know when the road was built there Mr. Wright's yard was there, and he has always piled his lumber in close proximity to the track.

Q. How near to the railroad?

A. I should say about 15 feet distance. You stand at one end of

that yard and it is a regular tunnel. You cannot see the end on account of the curve.

Q. Do you know how long that is?

A. The yard extends there for over 1,000 feet.

Q. Has there been any fire in that yard from engines that you know of?

A. No, sir; not that I know of.

Q. Is he there now?

2749 A. Yes, sir.

Q. And you say this yard has been there 27 years?

A. Yes, sir.

Mr. DICKINSON: Did you say the railroad has been there 27 years?

A. Oh, no; I didn't say that.

Mr. ROBISON: How long has the road been there?

A. I don't know that. They cross the F. & P. M. main line, and the F. & P. M. main line was built in 1867, and we were there a year first.

Q. And this railroad has been going through this lumber yard since 1868?

A. Yes, sir.

Q. Twenty-five odd years?

A. Yes, sir.

Q. And the lumber has been piled there all this time in the same general way?

A. Yes, sir.

Q. There is the top of a pile taken off, I suppose, today, and tomorrow or next week it will be built up again?

A. Yes, sir, and it stands there until it gets dry and in good shipping condition.

Q. And it may stand there a month or it may stand there three or four years, may it not?

A. Yes, sir.

Q. Is not this lumber inventoried once in a while?

A. I dare say it is.

Q. Do you know what these marks mean on these piles?

A. Yes, sir. The lumber is hauled from the yard to the planing mill by teams and dressed and shipped as they have orders for it, and all planing-mill men want to know the age of their lumber, whether it is air-dried or whether they have got to put in a kiln.

Q. Is this Wright's yard the only one in the Saginaw valley where the railroad runs through the yard?

2750 A. No, sir. In all the yards they run about as near to the lumber pile, alongside of it, close to it.

Q. In whose yards?

A. In Van Auken's yard.

Q. What road runs there?

A. The Michigan Central.

Q. How near to the piles of lumber does that run?

A. Less than 20 feet.

Q. Any other yards that you think of?

A. Ducharm's yard.
Q. How near does that run?
A. The F. & P. M. runs within about 20 feet. The Michigan Central is a little further away. The F. & P. M. have a track between the C. S. & M. and the Michigan Central. The Marsham mill is on the triangle.
Q. The main line of all these roads runs right by these mills?
A. Yes, sir.
Q. Is that a large mill or a small one?
A. It is a large one.
Col. ATKINSON: How near is that mill itself to the railroad?
A. His mill is divided up into different departments. There are three or four different mills, each of them quite a large mill.
Q. Covering what?
A. Each mill might cover from 100 to 200 feet.
Mr. ROBISON: Do you remember mills on the main line of the F. & P. M.?
A. I could tell exactly on the map if you want accurate information.
Q. Do you remember some mills on the main line, where there are two on one side of the road and one on the other, in close proximity to each other?
A. Yes, sir.
2751 Q. Whose are those?
A. One of them is the Bay Manufacturing Co. and the other is H. P. Merrill & Co. It is not H. P. Merrill either——
Q. What do they do?
A. They do a general business.
Q. How near are they from the tracks?
A. They are not over 30 feet from the F. & P. M.
Q. And another one on this side?
A. Just about the same distance; not to exceed that.
Q. Whose mill is that?
A. I don't remember the name.
Q. Same kind of business, is it?
A. Yes, sir.
Q. It is a fact, is it not, that there are miles and miles of track in those two cities running between solid walls of lumber on each side?
A. There are over 30 miles of side track proper running through lumber yards and mills and there are three to five miles running through lumber yards adjacent to mills.
Q. How wide do you say the right of way is at Wright's mill?
A. I don't know.
Q. Can't you tell by your map?
A. No, sir.
Q. The map does not show that?
A. No, it shows the track and shows how near the lumber is to it.
Q. Did you make that map for the purposes of this trial?
A. No, sir.
Col. ATKINSON: I want to ask you, Mr. Brown, did not the Michi-

gan Central originally go around by Reese and not go through Saginaw at all?

A. No, sir, they went to Reese afterwards. The Detroit & Bay City road was built in 1872, I think——

2752 Q. And was built through by Saginaw first?

A. No, sir, it went by Bay City.

Q. And this road from Saginaw to Bay City was acquired as a sort of side track for the accommodation of business places?

A. No, sir; from Saginaw to Bay City the Jackson, Lansing & Saginaw road was built first.

Juror BAKER: I am not sure that I understood you with reference to this York & Tillotson mill, whether you said there were two tracks running through the mill or through the mill yard.

A. Through the mill.

Q. Through the mill building?

A. Yes, sir.

Q. Do they run locomotives right through it?

A. Yes, sir, they run cars through there. The main track runs within 12 feet of the mill.

Col. ATKINSON: How far through the mill do they go?

A. They would only have occasion to go in there to place cars as the millmen may want them.

Q. Is there a switch at the other end?

A. The switch passes continuously through the yard.

Q. I don't understand that. Does the locomotive go through the mill?

A. Yes, sir.

Q. How could it get back? How does it get back? Are there not bumpers at the other end? Has it got a switch to come back on?

A. There are no bumpers there. It continues right through the mill.

Q. And passes where?

A. It connects with the Michigan Central system on one side and the F. & P. M. on the other.

Q. And it is customary for locomotives to run through
2753 there, to change their tracks, and pass from the track of one company to the track of another company?

A. Yes, sir.

Q. Did you ever see a locomotive in there in your life?

A. No, not in the mill.

Q. Not in the mill?

A. No, sir.

Redirect examination.

By Mr. ROBISON:

Q. Let us see about that. The York & Tillotson mill is not the only one that locomotives run through?

A. No, sir.

Q. How many are there; a good many of them where the tracks run through the mill?

A. Yes, sir.

Q. Does not the track run through this great mill, this new one of Germain's?

A. I think one track, their shipping track runs through the mill.

Col. ATKINSON: It is a one-end track that runs through the mill?

A. That particular mill, yes, sir.

Mr. DICKINSON: Do you mean to say that a locomotive ever to your knowledge went into a mill?

A. Yes, sir.

Q. When?

A. I have known locomotives to go into Esterbrook's.

Q. Have you ever seen the locomotive in there yourself?

A. I built the tracks——

Q. Have you seen the locomotives in there yourself?

A. Yes, sir, I have.

Q. Running through?

A. Not running through. It is a one-end track. The
2754 locomotive went in there when the cars were so far in that they could not reach it without backing in to get it.

Q. The customary way is to back the cars in, to kick them in, not to head in and drag in the cars, but to push in a sufficient number?

A. It is not the rule.

Q. The locomotive then comes and takes ahold of the cars, and does not necessarily go into the mill?

A. Sometimes they have to back in after them.

Q. Did you ever see that done?

A. Yes, sir.

Q. When?

A. I cannot recollect the time.

Q. Have you seen it within five years?

A. Yes, sir.

Q. When? Give the court some idea?

A. Couple of summers ago, I think.

Q. You saw a locomotive go into a mill?

A. Yes, sir.

Q. Puffing; smoke and exhaust?

A. It don't move much without having more or less smoke.

Q. How fast did it go in?

A. At a moderate rate, oh, half as fast as you would walk.

Q. Move slowly in, couple on and pull out?

A. Yes, sir, pull out.

THOMAS J. HASCALL, sworn on behalf of petitioners.

Examined by Mr. BAKER:

Q. Where do you live?
A. Saginaw.
Q. What is your occupation?
A. Master mechanic of the F. & P. M. R. R.
2755 Q. How long have you been master mechanic of that road?
A. Eighteen years.
Q. What are the duties of a master mechanic?
A. To look after the rolling stock of the road and machinery.
Q. Do you know anything about the locomotives?
A. Yes, sir.
Q. Can you build one?
A. Yes, sir.
Q. Can you run one?
A. Yes, sir.

Q. Can you explain to the jury the construction of a locomotive as they are made now-days, with special reference to the reduction to the amount of cinders that can escape from it? How do you build them to reduce that to a minimum?

A. We use what we consider the latest known appliance for reducing cinders and smoke to a minimum in a locomotive, called the extension front end, and in connection with that we use a brick arch in the furnace carried on water tubes.

Q. Explain that brick arch to start with. How is that placed in the fire-box? Is this diagram the sectional or side view of a fire-box to an engine?

A. That represents the section of a fire-box of an engine.

Q. Can you illustrate by this book, what do you call your brick arch?

A. Those are the tiles. This represents what we call a water tube running through from the throat sheet to the back sheet. The water circulates through that tube. This is what we call the arch tile——

Q. What is the purpose of that arch?

A. That arch is for the cinders to *in*tinge against this
2756 brick arch, and when the arch becomes heated to a certain extent it prevents the dense volume of smoke. It is to help create a combustion in the fire-box.

Q. Does it not force the smoke from the coal here to the back part of the fire-box?

A. It forces the smoke right over to the back part and it passes over and comes down through the flue, passes through these water tubes. We use three tubes on our engine; on some roads they use four. This fire-box is about 30 inches wide, this way, and here is a water tube here, and another one near the center, and one on that side, and these arched tiles are laid on these three tubes.

Q. And this represents the end of them?

A. Yes, sir, this is a section of the fire-box cut through the center.

That shows the bottom flue and that the top, and this is the stay against the flue sheet.

Q. So that the smoke and cinders from the coal pass up through these flues and around the end of the arch to the fuel?

A. Yes, sir.

Q. And the theory is that it creates combustion there and consumes more or less of the cinders?

A. Yes, sir, it wears out to a great extent the cinders.

Q. When the cinders go into the flues it passes the length of the boilers through the flues, what do you have through the other end of the spark-arrester?

A. We have what we call a deflecting plate in there.

Q. Will you explain that? Is this the end of a boiler here?

A. This is the end of the flues. There is a row of them right through. This is what we call the dry pipe, this is the steam pipe running down through there, and this is the exhaust pipe and this is the petticoat pipe, not in general use, it appears to be on
2757 this diagram. This is what we call a deflecting plate, bolted above the top of the flues, and drops down here?

Q. It is a piece of iron plate?

A. Yes, sir.

Q. Any holes in it?

A. No holes until it comes down here. Here we perforate this plate below the netting. That plate comes out and drops down within 14 inches of the bottom of that circle, which makes it less here, and runs right across 14 inches, to the center. This netting commences there and runs over here instead of running up there. We carry it right straight through on a straight line.

Q. What size of mesh do you use in that netting?

A. We use what we call three by three mesh. It is number 12 steel wire gauze.

Q. Does all of the smoke that comes out of the smoke-stake have to go through that mesh?

A. Yes, sir, it has got to go through there.

Q. Do the cinders collect anywhere in this cinder box?

A. They collect in here.

Q. Does your engine exhaust into this smoke-stack?

A. Right direct.

Q. And that is an exhaust of steam?

A. Yes, sir.

Q. And I suppose that has some effect on the cinders to reduce the number and quantity of them?

A. Yes, sir.

Col. ATKINSON: Is that the effect to reduce the number and quantity of them?

A. The exhaust is to create a draught.

Q. It increases the cinders, does it not?

A. It increases the cinders—you create a vacuum in here and that throws the cinders out. In the old device the cinders were on

the bottom and forced them out, but in this we create a
2758 vacuum in there which draws the cinders through. We are not forcing them through, but we are drawing them through.

Mr. BAKER: Does the steam itself have any effect on putting any of the cinders out?

A. Oh, no.

Q. Did you see some netting out here in the hall?

A. I saw some as I walked past, but I didn't notice it particularly.

Q. Do you use a netting on top of smoke-stacks now?

A. Not of that kind. This is all the netting we have. Formerly with the old style of engine they had a big bell-shaped smoke-stack and a mesh across the top of it. What we call a diamond stack, diamond top, made with an opening of about 30 inches on top, then there was a cone in here, and then there was another part like that, and this netting would go from here to here.

Q. Now, Mr. Hascall, will you show me where the dampers are?

A. Here is one and there is the other.

Q. One on each end?

A. Yes, sir.

Q. So that you can take draught in there either way?

A. Yes, sir.

Q. Does it depend upon which way you are going?

A. Not all together. Sometimes they use the back damper going forward and sometimes the forward damper.

Q. What does this represent?

A. That represents the way the damper is hung. That is the joint. This is hung on here, this raises and lowers.

Q. When an engine is in operation and the damper is open, there is a draught in it, I suppose?

A. Yes, sir, the exhaust that draws it up through the grates.

Q. That is the way engines are generally constructed at the present day?

2759 A. Yes, sir.

Q. The extension front and the brick arch. Do you know of any road that uses any different device?

A. Some roads are using the diamond stack.

Q. What roads are they?

A. There are some on the Michigan Central and some on the Lake Shore, but they are equipping all their new engines with the extension front, straight stack.

Q. I suppose you are familiar with the state of the art of locomotive building?

A. Rather.

Q. That is your business. Do you know whether or not this is the latest improvement in this regard?

A. Yes, sir, I consider it the latest improvement.

Q. You don't know of anything any better?

A. No, sir, I have not found anything any better.

Cross-examination.

By Mr. DICKINSON:

Q. That is your own invention?

A. Why, no, sir.

Q. It is something that has grown up by your experiments on the F. & P. M. road?

A. Our design is to test them on the road by experiments with the engines.

Q. How long have you had this device on the F. & P. M. engines?

A. Ten years.

Q. Do you know whether it is also upon the D., L. & N.?

A. Yes, sir.

Q. And upon the Michigan Central?

A. Some.

Q. Do you know whether it is on the Pennsylvania road?

A. Yes, sir.

2760 Q. It is in use there?

A. Yes, sir.

Q. There has been an effort on the part of all the railroads for many years to reduce the cinders and smoke to a minimum, has there not?

A. The effort has been to reduce the cinders to a minimum as a fire protection and to reduce the dense volume of black smoke on account of the economy of fuel; that has been the effort.

Q. How many devices have been applied to this end?

A. Well, sir, that is a question it is impossible for me to answer.

Q. Are you not familiar with at least 1,000?

A. I was going to say that Clark could show you about 1,000, and C. W. Williams and those parties.

Q. You testified on the former trial, didn't you?

A. Yes, sir.

Q. Has the Pennsylvania put in this device since then?

A. Well, I don't know. They are using it right along.

Q. Did you testify on the former trial that the Pennsylvania had tried 561 devices for preventing the issue of cinders? Didn't you testify on the former trial in answer to this question, "Do you consider the Pennsylvania road, take it all in all, especially its eastern connection, we will say between New York and Washington—do you know it is reputed to be the best conducted road in the country?"

A. It was so reputed.

Q. Do they have this device?

A. I don't know.

Q. Do you desire to change your testimony?

A. No, sir, but I have no recollection of that.

Q. Did you, on the former trial, testify as follows: "Q. Do you know that the Pennsylvania road has tried 561 devices for smoke

consuming upon their road? A. Yes, sir." Did you so testify?

2761 A. That is right.

Q. And to the question: "Has your device been offered to the Pennsylvania people?" And did you answer: "No, sir?" Did you so testify?

A. That is right.

Q. Do you know whether it has been put on the Pennsylvania since?

A. I was in the Altoona shops two years ago this winter and they were putting it in. All new engines were being equipped with that device.

Q. Did you in answer to this question testify as follows: "Do you know of any one that has succeeded with a cinder and smoke consumer in avoiding cinders and smoke?" And did you answer: "I have seen it advertised by some road; I don't know what road, but I don't know personally. Q. Do you know of any one that has succeeded except yourself?" referring to this same device, and did you answer: "I didn't say that I had succeeded."

A. Yes, sir; that is right.

Q. You are constantly trying to improve these, are you not?

A. We are to work at it all the time, making all the improvements we can, if we find any possible.

Q. But your trains still throw cinders and black smoke?

A. To a certain extent.

Q. They throw fire, do they not, still?

A. Not very much.

Q. Not very much?

A. No, sir.

Q. Will you please state how it is, if it be true that the F. & P. M. cars, the D., L. & N. cars, closed passenger cars, coming into this station here, within the time your device has been applied,

2762 covered with cinders so that a pint and a half to a quart of cinders is taken out of each car? Do you know how it comes about?

A. Well, sir, I shall have to see that with my own eyes before I would believe it.

Q. You would not believe it?

A. No, sir, not until I saw it.

Q. Now, has there been any device—this is largely the product of your experiments, is it not?

A. Largely.

Q. Does that device or any other device prevent the throwing of cinders and smoke?

A. I never have seen any device and I can find none on record where the prevention of black smoke was entirely eradicated.

Q. And where the prevention of cinders was entirely eradicated?

A. The cinders are reduced to a very small amount. You might call it dust more than cinders.

Q. How wide are the interstices, the meshes in your device?

A. I should say that the openings are $\frac{7}{32}$ about of an inch square.

Q. They burn out sometimes, don't they, and have to be repaired?

A. They wear out.

Q. How often?

A. Oh, we have had them in engines for two years without any deterioration perceptible. That is all owing to the class of engines and the kind of work. Take a heavy engine, where they are doing heavy work all the time, and the netting will deteriorate in five or six months, sometimes less.

Q. Do you succeee in getting your engineers to report as soon as there is a break in the meshes?

A. We do dot wait for engineers to report. We have
2763 a daily inspection. There are two men whose business it is the first thing in the morning to inspect every engine, that is, at the terminal point. Of course they do not strike every engine every day. Every fourteen days there is a general inspection made. The front end is opened up and a general inspection made of the front ends, and that is done by taking out the center plate on the side of the smoke arch and putting a lamp down in the smoke-stack so they can look down through the netting.

Q. I suppose the F. & P. M. road now, since you have had this device on for the last 10 years, the lumber shipped in on cars is not covered with cinders as it used to b[illegible]; is that so?

A. Well, I have never looked at it.

Q. Never examined to see whether it is so?

A. No, sir, I have never had any business to do that.

Q. No business to see whether the cinders fall on the lumber?

A. No, sir.

Q. This device is on the Michigan Central?

A. I believe it is.

Q. The same device?

A. Yes, sir.

Q. Now, if cinders come out of the Michigan Central cars a quarter of an inch thick and a quarter of an inch broad; come out on these cars from their engines, you would be astonished, if they were used in this device, that it should be so?

A. Not at all, sir.

Q. If the mesh is only $\frac{7}{32}$ of an inch wide, how do the cinders get through?

A. I don't know anything about the size of the mesh that the Michigan Central used.

Q. What size of mesh is on the Canadian Pacific?

A. I don't know.

2764 Q. What upon the union depot engines?

A. I don't know.

Q. What upon the Wabash?

A. I don't know.

Q. What engines pull in the F. & P. M. trains in here?

A. The F. & P. M. engines.

Q. With this device?
A. Yes, sir.
Q. Now, you are master mechanic up there?
A. Yes, sir.
Q. Do you examine your engineer's work?
A. Yes, sir.
Q. Was this device largely for the purpose of avoiding fire risks up in your country?
A. Not particularly. That was one consideration.
Q. Do you not instruct your engineers in running through places where there may be inflammable material, is it not part of their duty, especially on the Flint & Pere Marquette, to avoid all danger from fire?
A. Engineers are instructed to use all necessary caution.
Q. In approaching inflammable material?
A. At all times.
Q. But in approaching inflammable materials especially?
A. There is nothing I know of limiting him to that. He is instructed to use caution at all times.
Q. I will ask you this question, whether you did not testify before as follows: "Q. Is it not true that with the best you can do there is always more or less danger from a locomotive, and will be so long as a locomotive makes steam by fire? Of course you may reduce it comparatively, but don't you always think there will be more or less danger from a locomotive in passing inflammable mate-
2765 rial, so long as the steam is made or the locomotive power is generated with fire?" What do you say to that now?
A. No more danger from a locomotive or anything else with fire passing inflammable material.
Q. There is no more danger from a locomotive moving, than from a standing fire, or a permanently located fire? Do you want the jury to so understand?
A. We don't admit that a locomotive is throwing a continuous stream of fire.
Q. I have not said that. I asked you whether you wanted to be understood by this jury that there is no more danger from a moving locomotive than from a standing fire?
A. Your question implies that the locomotive is throwing a continuous stream of fire.
Q. I will put this question to you: Is there any more danger from a locomotive moving upon a track at the rate, say, of 15 or 20 miles an hour, than from a standing engine?
A. I will answer that question this way——
Q. You can say whether there is more or less danger?
A. (Continuing:) Then you can construe it as to whether or not it is dangerous. I will take and run a locomotive, properly equipped and in good condition, over a bridge, with any amount of gunpowder that you may have under the bridge, and think I am perfectly safe.
Q. Now, we will have a comparison if you please; whether you want to be understood by the jury, that a locomotive running

on a track drawing a load is no more dangerous to surrounding property than a stationary engine?

A. Well, sir, I don't consider it is.

Q. Now, did you testify before as follows: "Q. When sparks and cinders and smoke are emitted from an engine, is the tendency
2766 for the smoke and cinders to deflect and fall; take weather like this today? A. A day like this would have a tendency for the cinders to deflect and fall." Did you so answer?

A. Yes, sir.

Q. And did you testify as follows: "Q. Take any day, is the tendency of cinders to go down from the smokestack?" Did you answer: "No, sir, they would go up. They have got to go up first. Q. How many feet? A. I don't know. Q. From the force of the emission from the smokestack, after that force is lost, the tendency is to fall? A. It is so soon that you see these cinders come lighted that we cannot measure it. Q. What is the tendency of cinders after they lose the force from the smokestack, whether to rise or fall? A. By the force it receives it goes up. Q. And then after it loses the force? A. It has got to fall down." Did you so testify?

A. That is all right.

Q. Did you testify as follows: "You have run out on engines and trains yourself? A. Yes, sir. Q. Don't you know that the smoke lays along and falls at the side for miles, so that you can see it from the car window on whichever side it is? A. I have not lately. Q. Do you tell this jury that smoke and cinders fall right over the back of the train? A. They do unless there is a strong wind. Q. Suppose there is a wind from the river which would be blowing towards the Backus property, on that side of the elevated structure, and there were smoke and cinders, would the cinders be more likely to enter the windows than running at grade? A. If there is a train coming in on our road, pulling an ordinary passenger car, and running over that road, running past Mr. Backus' property, I should be willing to assert that if he didn't see the train go by he would not know by the amount of cinders he would get in there; if he did not see it, he would not know it went by." Did you so testify?

2767 A. I testified to that, yes, sir.

Q. Do you think that a locomotive that carries a heavy load will send out more cinders and smoke than an engine running light?

A. Well, take a locomotive that is pulling a heavy load, it consumes more coal, and will consequently throw out more cinders than an engine running light.

Q. And it is the same rule as to trains going up a grade?

A. Certainly.

Q. It works harder?

A. Certainly.

Q. Now, will you tell us, if you please, the length of an ordinary passenger car?

A. To give you an average, 60 feet; say 66 feet over all. Some are longer and some are shorter.

Q. What would be the extreme length of a train say with eight passenger coaches with a locomotive?

A. I will approximate the length.

Q. Yes, and include the platforms?

A. About 575 feet, an approximation. Five to six hundred feet. Somewhere along there.

Redirect examination.

By Mr. BAKER:

Q. Do you know anything about a device by which there is a steam jet that is made to exhaust or go into the smokestack? Is there any such device in use in connection with this front-end extension?

A. There is a blower pipe that goes into the smoke arch. It has a steam jet for creating a draught in an engine when she is at rest. When an engine is at rest there is a blower pipe put in there to create an artificial blast.

2768 Q. Do you know anything about a device or a steam jet that is put in there for the especial purpose of deflecting the cinders?

A. There is what we call, I think, a Hutchin's device, and then there is a device that is put on engines by Mr. Barnes.

Q. Of the Wabash?

A. Yes, sir, the master mechanic of the Wabash road. He has a series of pipes around his fire-box on the front side and on the after side, and then he has a pipe in connection with that that runs into the smoke arch, so that he always has a continuous draught through there, and that is for the purpose of drawing the air in to prevent the black smoke.

Q. Is that in use on the Wabash in addition to your own device?

A. I believe it is.

Q. It is not in general use?

A. No, sir, it is not in general use; there are some roads in the country I have seen it on. I have had it on our engines and it is of no benefit.

Q. It is of no substantial benefit?

A. No, sir.

Col. ATKINSON: What is that?

A. The injection of steam jets into the furnace.

Q. The Wabash design?

A. Yes, sir.

Mr. BAKER: You were not here when that design was tried here?

A. No, sir, I was not. I didn't know anything about it.

Col. ATKINSON: That was on No. 39?

Mr. BAKER: Yes, sir.

WITNESS: It is no good in my experience. I derived no satisfactory results from it, and abandoned it.

2769 Recross-examination.

By Mr. DICKINSON:

Q. You have an eight-thirty Flint & Pere Marquette train going out of here each morning?
A. Yes, sir.
Q. A passenger train?
A. Yes, sir.
Q. Do you know what engine pulls it.
A. Yes, sir; engine No. 24.
Q. It has the number 24 painted in large figures on it?
A. Yes, sir; it is on the dome.
Q. It went out this morning, then, didn't it?
A. Yes, sir.
Q. You didn't see it pass, did you?
A. No, sir; I didn't.
Q. That is one of your best passenger engines?
A. Yes, sir.
Q. With all the improvements that you know of to make the pouring out of the sparks and cinders at a minimum?
A. Yes, sir, and I feel very proud of the engine.
Q. That is one you feel specially proud of for its success?
A. Yes, sir.
Q. Especially with reference to cinders and smoke?
A. Yes, sir; when she is in condition.
Q. Is she in condition?
A. Supposed to be.
Mr. BAKER: When was that train inspected last?
A. I could not tell you without looking at my record.

By Mr. ROBISON:

Q. Look at these cinders that were taken from the Backus mill on the afternoon of September 6th, 1893, and state what, in your judgment, whether they came from an engine burning bituminous coal?
2770 A. These are wood cinders, some of them.
Q. Did those come from an engine burning coal?
A. Well, possibly.
Q. How could they come—they were picked up in Backus' yard on the afternoon of September 6th?
A. I could not tell you, sir.
Q. You don't expect to find charcoal cinders from an engine burning wood, do you?
A. No, sir; from an engine burning wood we do?
Q. From an engine burning coal, I mean?
A. No, sir.
Q. That is charcoal from fine wood, is it not?
A. I should say so.
Q. Will you expect to find that kind of cinders from a coal engine?
A. No, sir.

Recross-examination.

By Col. ATKINSON:

Q. What do you start fires with?
A. We start the fires with wood?
Q. Pine wood, sometimes?
A. Very seldom. We generally use hardwood with us.
Q. It lights better with matches, I suppose?
A. Well, the way we use it it does. We don't use matches.
Q. You sometimes use pine?
A. Sometimes, but not generally.
Q. When you do it makes charcoal?
A. Pine wood makes charcoal like any other wood.
Q. That is all.

Mr. BAKER: The only additional testimony I want will probably be furnished by an admission. I didn't bring the men here, but this same device is in use on the other two roads. Mr.
2771 Barnes testified to it, and these diagrams were made by Mr. Morrison, of the Wabash. I haven't thought to bring him here, and I desire it to appear here that the same device is in use on the other roads that now use this superstructure.

Mr. DICKINSON: All right.

Col. ATKINSON: That only covers the roads now using this depot?

Mr. BAKER: Certainly.

Col. ATKINSON: And they may discontinue it at any time?

Mr. DICKINSON: I want you to admit this ordinance, Mr. Baker, that we put in before.

Mr. BAKER: You may consider that in evidence. Consider the petition in evidence.

Mr. DICKINSON: The ordinance of the city of Detroit, then, is permitted in evidence, providing among other things "that this depot structure shall have under it suitable iron pans or shields to catch the ashes and refuse from locomotives under the tracks of said elevated road along and on River street, and along and on any other street above which said roadway shall be constructed." That is all I want to read of it now.

HENRY N. BACKUS, recalled on behalf of the respondents.

Examined by Mr. DICKINSON:

Q. Did you see the F. & P. M. train go by on the superstructure this morning, the 8.30 train?
A. Yes, sir.
Q. What engine?
A. No. 24.

Q. What was it doing as to throwing cinders and so on?
2772 A. When I saw her she was passing the Peninsular stove works, and she was throwing cinders at a terrible rate. I so considered it, and smoke everlastingly.
Q. To what extent?

A. Oh, so the air was thick. It rolled out. I don't know as I have seen any more so than I did this morning.

Q. Did you see the cinders as they fell?

A. I was on the corner of Tenth street when it passed and others saw it up at Eighth street. Mr. Griswold saw her up at Eighth street.

Q. Was she throwing a great profusion of cinders?

A. Yes, sir.

Q. And of the same size of cinders you have shown?

A. Yes, sir.

Q. What time was that this morning?

A. I think it was a little late, about 9 o'clock.

Cross-examination.

By Mr. BAKER:

Q. Where were you?

A. At the foot of Tenth street.

Q. On the building?

A. No, sir, I was on the corner of Tenth and River streets. I was not at my factory.

Q. She was working very heavy?

A. Yes, sir.

Q. That was a good deal nearer the starting point than your factory?

A. Some nearer.

Q. How many cars did they have on?

A. I could not tell you, but I am under the impression about seven coaches.

Q. Baggage cars.

A. It was her regular train.

Q. Did you notice whether the damper was open or not?

2773 A. No, I could not say that. I was on the ground.

Q. All you know about it is there was a heavy volume of smoke and some cinders coming out?

A. Yes, sir, a good many cinders coming out. I didn't count them.

Mr. DICKINSON: We now ask the court, inasmuch as there has been no showing of the public necessity of this railroad down there, to dismiss the case.

COURT: I shall deny the motion and you may take an exception.

Mr. DICKINSON: Now, may it please your honor, I ask, inasmuch as your honor will remember before the question of necessity had something to do with your honor's ruling, as to who should have the opening and closing, and now the question is wholly upon the injury to the business and damages, I ask your honor, that the Backuses, who have been brought into court on this question, shall have the opening and closing, precisely like any person brought into court under an order to show cause.

COURT: On that matter, when the question was asked me upon

the former trial, I expressed some doubt as to whether it was only a question of damages, as to who would have the opening and closing, but after the matter was argued, the objections made to the confirmation of the report, I mean subsequent to the time when it was presented to me, of course it was an entirely off-hand opinion at that time; since that time, Mr. Dickinson, I have examined that question, as you will find on page 93, and I find the authorities are universal that the petitioner shall have the opening and closing.

Mr. DICKINSON: In cases where the element of necessity is eliminated?

COURT: I don't know as directly upon that question. They have the affirmative, and having the affirmative it strikes me,
2774 under the rule laid down by Thompson on Trials, on page 247, and there are two Illinois and one Ohio case directly upon the subject, and all these cases hold that the petitioner has the opening and closing.

Mr. DICKINSON: Then your honor so rules?

COURT: Yes, I so rule, and you may take an exception.

Mr. DICKINSON: I will take an exception.

(The further examination of this case was then adjourned to Friday, November 3, 1893, 9 a. m.)

NOVEMBER 3, 1893—9.30 a. m.

Argument of Mr. Robison.

If the court please, and gentlemen of the jury: You have listened very patiently, it seems to me, to the somewhat tedious proceedings of this case, commencing a long time ago—just when I have forgotten myself now—and continuing up to the present time. A great deal of the testimony that has been given has been on subjects about which I presume the most of you are ignorant, subjects you know nothing about any more than the ordinary man engaged in business of his own does, which has been uninteresting to you and a great deal of it, it seems to me, according to the view I take of this case, has not very much to do with the case at all; and I ask you to be patient a little longer and hear what I have to say to you about the case, promising that I shall not take up anywhere near the time that has been talked about in your hearing in court, knowing as I do that you are as well acquainted with the facts as I am, because I know nothing of it except what the testimony here has shown, and believing that it is a matter which rests entirely in the good judgment, discretion and common-sense of twelve men,
2775 citizens of Detroit, who are to decide between these parties contesting here. I can only call your attention to facts which seem to me to be important in the case, without undertaking or attempting to undertake to influence you in any way by appealing to your prejudices or undertaking to make a speech—a thing I am unable to do at any rate.

Mr. DICKINSON: Oh!

Mr. ROBISON: Which is true, and of which I might say the same of some of the gentlemen on the other side, if necessity required.

Mr. DICKINSON: That is better.

Mr. ROBISON: I want to talk business to you and nothing else.

Now, the situation is just this: Some years ago the project was formed of bringing into this city, into the central part of the city especially, the passenger trains of several of the lines of railroad that were already in the city at that time and of others that wanted to get in. Mr. James F. Joy, I believe, was the head of the institution, the testimony here shows, and the union depot project was formed—a plan of establishing a passenger depot on the corner of Fort and Third streets, in which a number of railroad companies were interested and were parties. You remember the testimony shows that some years ago one railroad—a small one in importance compared with the other great lines who have their headquarters or do their business at any rate in this city—the Detroit, Lansing & Northern, was practically shut out of the Michigan Central depot. It had undertaken to compete with the Michigan Central railroad, to do business from this city to Grand Rapids, and it proposed to build a line from Grand Ledge, a station on that railroad, to Grand Rapids, and by the construction of that line have the shortest
2776 route from here to Grand Rapids. It was at that time paying $10,000 a year rent to the Michigan Central for the use of their depot. Immediately on forming that plan the Michigan Central raised the rent from $10,000 a year to $40,000 a year, practically compelling the Detroit, Lansing & Northern to stop business in Detroit or find some other place where its passenger trains could enter. That probably was the beginning of this enterprise; that united the Flint & Pere Marquette with the Wabash railroad, which had a depot a long distance from the center of the city, down at Eighteenth street, I think it is.

Mr. BAKER: Twelfth street.

Mr. ROBISON: Twelfth street. It is a long distance at any rate from the center of the city, inconveniently located—and another railroad company, probably the largest or at least one of the largest in the world, the Canadian Pacific—they all united with this little road, the Detroit, Lansing & Northern, which was forced out of a place where it could land its passengers; and this union depot project was undertaken. A great deal of money has been expended in procuring a site and the proper facilities for reaching the depot. The city of Detroit gave this company the right to run its road on an elevated track through River street, and the law provides that property owners along that street or along any street which is taken or occupied by a railroad of this kind, should receive whatever damages, extraordinary damages, they might suffer by reason of this railroad being built, by reason of these elevated tracks being built, by reason of this street being occupied. We know, as a matter of fact and a matter of evidence also, that the project has succeeded; the depot is built, trains are running into it, it is one of the greatest enterprises and one of the enterprises of which the city itself may be most proud of all there are in our community—the

union depot system that we have here at the present time.
2777 It has been accomplished in the face of the most strenuous opposition from all hands and by the outlay of money that never should have been exacted by compelling the company to pay——

Col. ATKINSON: I desire an exception to this statement.

Mr. ROBISON: As the testimony shows, $96,000 was paid to the respondents in this case, Backus & Company and Absalom Backus, Jr., for the privilege of running that road in front of their place. The testimony shows other large amounts, forty-odd thousand dollars—the exact figures I cannot remember—in these statements (and I do not think it is of the greatest importance) forty-odd thousand dollars, I believe, to the Peninsular Stove Company and thousands of dollars to other property-owners along the line of that street; some few thousands to the Michigan Central—for the privilege of entering this city with other railroads and competing with them for business. About the smallest amount that has been paid—I think I am stating the facts—was paid to the Michigan Central of all those who sought damages from this company. So I say, gentlemen, that it has been in the face of the most strenuous opposition of people living along the line of this street that this railroad has had an opportunity of coming in here at all. But most of these matters have been settled. The testimony shows that this one and the Peninsular Stove Company are the only two, as I remember, and if I am mistaken I hope that the jury or the gentlemen on the other side will correct me, if it is a matter that they consider of any importance at all, because I mean to state the facts as I understand them—this case of Backus & Company and the one of the Peninsular stove works are the only two that are left unsettled. You will remember, gentlemen, that in each one of these cases it was necessary at first for a jury to pass upon the necessity of tak-
2778 ing this property before this railroad could be established. On the other trial a large amount of testimony was taken on that branch of the case as to whether it was necessary for this depot company, in order to reach its terminus over its tracks at the other end of the city, for them to come up through River street, whether it was the most practicable and best route that could be laid out. A jury has determined that point, and so much of it has not been appealed from by either party, and is settled beyond all question. Now, then, before this railroad company could pass Absalom Backus' place, his planing mill on River street, before it could use the structure it had erected, before it could use its tracks built on the west from A. Backus & Company, and on the east to the depot building, it was forced to pay Backus the amount that the jury determined, $96,000, was it not?

Mr. BAKER: Four hundred, I think.

Mr. ROBISON: Well, $96,000. From that decision the company took an appeal. The supreme court said it was wrong, and it is now before you to determine again how much Backus & Company are injured by the passage of this road, the building of this structure in front of their place on River street.

Mr. DICKINSON: You do not mean to say that the supreme court said the amount was wrong, but that there were errors in the trial.

Mr. ROBISON: As I understand it that said so. I do not think that they said in so many words that the amount was too much.

Mr. BAKER: Yes, they did.

Mr. ROBISON: I think they said as much as to say that.

Mr. BAKER: Well, they said it.

Mr. ROBISON: Well, then, Mr. Dickinson, you and Baker fight that out.

2779 Mr. DICKINSON: I take an exception to the statement of Mr. Baker that the supreme court said the amount was wrong.

Mr. BAKER: Well, we will get the decision.

Mr. ROBISON: If the supreme court didn't say so, it ought to have said it. The testimony was before the supreme court.

Mr. DICKINSON: Nothing was before the supreme court except what was necessary to establish the error.

Mr. ROBISON: One of the claims was that the damages were excessive, as I understand it.

Mr. DICKINSON: Not in the supreme court.

Mr. ROBISON: Well, it does not make very much difference.

Mr. DICKINSON: I take an exception to the statement that the supreme court said it was wrong or considered the amount, and to the statement, or the substance of the statement, that the opinion of the supreme court should have any influence whatever on the subject of damages in any case.

Mr. ROBISON: I think myself that that is true.

Mr. DICKINSON: I take an exception to it as an abuse of the privilege of counsel to make any such statement, under the constitution of the State.

Mr. BAKER: I desire to put on record here that in view of the action of counsel for respondents in bringing out the award of that jury, we shall insist on reading to the jury, with the permission of the circuit judge, the decision of the supreme court on the question of damages.

Col. ATKINSON: I would like to also have the reporter note while these exceptions are being taken and the argument made, the circuit judge was not present.

Mr. BAKER: Well, he has just stepped out for a moment.

Mr. ROBISON: If there is any trouble about that I desire
2780 to wait until the circuit judge returns, so that these matters can be got on record.

Mr. BAKER: You better go on with your argument, Mr. Robison, and we will give that attention at the proper time.

Mr. ROBISON: So I say, gentlemen, that whether the supreme court said so or not, and there seems to be some question whether you will be allowed to know whether they did or not, they certainly might have said so; and as I was saying, that is the situation at the present time. That decision and award of the jury was appealed from and the case is here for you to determine yourselves,

and I suppose that you will exercise your own judgment, as you have a right to do, and as you ought to do, and that is all we ask of you to do—to give the matter a fair consideration and use your good judgment as business men, men of common sense and experience, and say how much Absalom Backus has been injured by the building of this railroad in front of his place. You understand, gentlemen, that no land has been taken from him, not an inch—not one inch of property that Absalom Backus holds or owns has been taken from him. There has simply been put an elevated railroad in front of his place in the street, running along in front of his property, and it is for that that he is entitled to whatever damages a jury shall say he suffers. Now there should be no prejudice in your minds against the railroad in this case. I know that there is naturally a prejudice in the mind of almost every man against a railroad corporation. It is natural, it is something that cannot be avoided, and it is something about which I have nothing to say to you. I do not appeal to you to discard it entirely, I only ask you to use your good judgment as honest men and citizens,
people that understand your own business, who know what
2781 facts are when you see them, and act accordingly, remembering, if you are going to think of the railroad at all, that it is not a weak, puny individual that the railroad company is fighting here, that it is not the home of a little private person that is being injured in this case at all, but the property of a rich corporation that, according to the testimony in this case, if it is true, is making more money a year—has in some years, at any rate—than the union depot company ever will.

Mr. DICKINSON: To that statement as to what the union depot company makes, we will except.

Mr. ROBISON: This is a matter of argument, I think, and a fair one. Absalom Backus himself has but very little interest in this controversy. His is a large property; there is no doubt about that. He has a number of acres at the foot of Eighteenth street, testified to here as to be worth $2,000 a foot, by Mr. Henry Backus, something which I do not think you will exactly agree with—$800,000. Mr. Backus himself says it is worth $600,000. He has quite a piece on Fort street—I have forgotten now the valuation he put on that, but he leases it for $1,000 a year, he says. He has a piece of property the rental value of which is $5,000 a year, the piece of property in front of which this road runs; he has property in the northern part of the State that he values at $400,000, and he has a farm in Indiana. I don't know how much that is worth, but I notice from the testimony that there is a fence in front of it a mile long, running along the railroad; and all this property in the city at least is leased to Backus & Sons, a corporation in which he owns no stock, and the lease has yet to run twenty-three years. And he receives from that property $18,000 a year. In twenty-three years he would receive something over $400,000 in rent.

In answer to a question asked him while he was on the wit-
2782 ness-stand, he stated that this business of his, this lumber mill that he had been building and bringing to its present

proportions, was for the sake of having something to support him and upon which he could rely in his old age. Now he has a property which he has rented—dead sure of his rent—to a corporation in which he has no interest whatever, having sold out his stock entirely, and rented for a sum of money which will amount to something over $400,000 when the lease expires. Now you can hardly, at this distance, gentlemen, undertake to say how much this property is going to be damaged by the shutting out of light and by the cinders and by the dirt that is thrown out by the engines on this road twenty-three years from now. Understand that at the end of that time he will have received over $400,000, and how, at this time, can you say what the position of that property will be twenty-three years from now? At that time there will be no steam railroads, probably; everything will run by electricity; there will be no dirt or cinders to be thrown out, be no danger from fire or anything of that kind. At any rate, it is so uncertain what his damages will be or what the effect on this place will be at the expiration of his lease that you can hardly fix an amount of damages to him at this time, with the understanding and with the knowledge that you have, from the testimony and from the testimony of his sons here, that he has no interest whatever in this business—not one dollar has he got in there. And with a property that is leased to an institution that is making from $36,000 to $70,000 a year for a period of twenty-three years yet to run; so he has not very much interest in the case, has he? Now, then, gentlemen of the jury, there are damages which an institution of this kind suffers from another institution being erected and run, for which they cannot be paid, for which they are not entitled to be paid. And Backus & Company, if they had a planing mill situated in the country, away from any rail-
2783 road, where there is no dirt or annoyance, no cinders, no smoke and no shutting out of light, could do business exactly as they want to. There would be no interference with the machines; there would be no grit, and their workmen could do a full day's work without any trouble from the want of light; there would be no such lumber turned out of it as has been shown to you and piled up in front of you; everything would run smoothly and all right; but their business would not be worth anything, they would have no markets. It is an institution like the union depot company built in a city that allows other people to live, that makes it possible for Absalom Backus, Jr., & Sons to make a profit of from $36,000 to $70,000 a year. Suppose things of this kind were not coming into Detroit at all; suppose there were no other mills going up around the city, no railroads coming into the city, no opportunities for the railroads that are already in, no terminal facilities for them to do business here at all, would Absalom Backus' property be worth as much as it is? Isn't there a connection between all the business enterprises, and one lives off the other? So there are certain incenveniences which follow the building of such institutions in their neighborhood, which men must put up with. You all know that here in this city, if you let a pile of lumber stand out anywhere, I don't care where you go, anywhere in the city, dirt will accumulate on it,

which would not be there if it was piled up far away in the country somewhere where there is no business; but they are doing business right here in this city, and they must put up with certain inconveniences that follow from the carrying on of other enterprises around in their neighborhood; and it is only the extraordinary damage which they suffer for which they are entitled to receive pay at your hands.

Col. ATKINSON: Do you contend that they are compelled
2784 by law to put up with any inconveniences caused by the union depot company?

Mr. ROBISON: Certainly I do.

Col. ATKINSON: I take an exception to that statement. I understand under the constitution they are entitled to full compensation.

Mr. ROBISON: Now, let us see, gentlemen. Here is this elevated road built along in River street. Suppose it was shoved over thirty or forty or fifty feet, whatever the distance is I don't remember, and I don't think that part is of very much importance to what I want to say—suppose it was shoved over and this company had all its own property, had all the land absolutely on the other side of the street? Of course Mr. Backus is situated so that they could not buy in the rear without going to the other side of Fort street, and Mr. Backus is peculiarly situated for the illustration I want to make; but suppose this railroad was built on the other side of River street on their own land, would it have a right to go along there without any compensation to Backus whatever? Wouldn't it have a right to throw smoke the same as ordinary locomotives do? When the Michigan Central puts in another track or puts on an extra engine on its road, does it have to pay Backus anything? When another steamboat comes along the river and throws smoke which blows over into Backus' mill and soot and dirt, does it have to pay Backus anything? Would it have to pay Backus anything because of the light it shut out by building up a wall on the other side, or if the Michigan Central should put up a building all along the entire length of River street in front of Backus' mill and 100 or 200 feet high and shut out the light from Backus, would they have to pay Backus anything?

Col. ATKINSON: Suppose a spark comes from the Michigan Central or the ferry and sets Backus on fire?

2785 Mr. ROBISON: The ferry would not have to pay for it unless it was shown——

Col. ATKINSON: To that I take an exception.

Mr. ROBISON: Unless it was shown to have been done through the negligence of the ferry company. That is all there is about it. Suppose a spark flies out of Backus' place and sets fire to one of his neighbors without anybody's being to blame for it, something that Backus could not help, he would not have to pay for the damage that is occasioned by that spark. It is only when it occurs through Backus' own negligence. Now, as I was saying, gentlemen, those things this company could not be compelled to pay for, and so Mr. Backus must put up with the ordinary inconveniences that result from institutions of that kind being built, without compensation.

There are a great many injuries done and a great deal of damage suffered by property-owners from other property-owners for which the damaged ones cannot receive any compensation.

Mr. DICKINSON: Do you want the jury to understand that if you set fire to Backus' mill with one of your engines that there is no liability?

Mr. ROBISON: No, sir, I do not mean to be so understood.

Mr. DICKINSON: Unless we prove negligence—do you mean that to be understood?

Mr. ROBISON: Well, I would not care to state about that.

Col. ATKINSON: Why should you be liable? The ferry company isn't.

Mr. ROBISON: Well, I would not be liable; I do not think I would.

Mr. DICKINSON: If the union depot company set fire——

Mr. ROBISON: There would be no use of any insurance com-
2786 panies if every person was liable for every fire occasioned without any fault of their own. I say that if this company uses the very best devices that it can, that are known to the art, to save other property from danger from fire and by accident a property is burned through them, they cannot be compelled to pay the damages that are suffered. Right on the corner of Third street, I guess it is, or Second street, at any rate, stands the residence of Allan Shelden, and on the next corner to it is that of Mrs. Chandler. That is injured, unquestionably injured, by the building of the union depot and by other business enterprises on Fort street. Fort street has gone back; it is not the street it used to be for purposes of that kind; they are damaged; their property is not worth what it was; but would it be contended for a minute that because there is a big business enterprise gone up on the other side of the street that they must pay people over there because their residences are not as valuable?

Mr. DICKINSON: You contended all through the trial when the property was taken on Fort street that the union depot increased the value of the property.

Mr. ROBISON: I don't know what was contended there; I was not in the trial. Of course, if there was any such contention as that made, it seems to me to be all balderdash—to say that for the purpose of having a place to live in, that the building of an institution of that kind, or any other institution of any kind, would increase its value as long as they wanted to live there.

Mr. DICKINSON: You are right about that. It was contended that it would increase the value of the property for other purposes, business purposes.

Mr. ROBISON: It may be that it does; I could not say, I would be inclined to think it did. If business property is worth more than residence property, it does increase it; if business property is not worth more than residence property, it does not increase it.
2787 It depends on what you want to use it for. If Allan Shelden wants to live there, it's a pretty poor place to live in—a

thing which the distinguished counsel on the other side well knew when he got out of that ill-begotten country.

Mr. DICKINSON: It is well-begotten.

Mr. ROBISON: Well, it was well-begotten, but it has turned out bad. Congress street down here used to be the leading residence street in the city of Detroit. Allan Shelden used to live on Congress street; but livery stables went up on one side and a brewery or bottling works on the other side——

Mr. DICKINSON: And worse.

Mr. ROBISON: And worse, and Allan Shelden wanted to get out of there.

Col. ATKINSON: I wish you would be a little easier about Congress street.

Mr. ROBISON: Well, you don't live there, of course—which property developed into valuable property, a great deal more than what it used to be when Shelden lived on the place—not on account of Mr. Shelden's moving, but I am only calling him by name as fixing the time. And that is just the case here every day, or almost every day; and right over here on Washington avenue, next to one of our biggest churches, there is a big livery stable being carried on. Now, that of course injures that property next to it for certain purposes. If a man wants to live there, that place is not worth much to him; if it is a dwelling-house it will not rent for much, will it? But you cannot go and sue the livery-stable keeper for the damage that it is causing you if you own the property. There are certain things that must be put up with, there are certain damages that owners of property suffer that they cannot get compensation for, that nobody is liable for, that simply accrue to a man by reason of the way things are done in life. Just so with this Peninsular
2788 stove works. In the first place it was a glucose factory built on Fort street. Why, immediately it was built the residences on Fort street became less valuable for residence purposes; they were worth very much less because Fort street immediately began to develop, as it began before to a certain extent, into a business street, and it could not be used for residence purposes any longer; it was not desirable. So that every man that had a house on that street who wanted to live there or wanted to rent his property for residence purposes was out of pocket. His property was worth less; he could not get as much for it, but it was one of the things he had to suffer for the good of the general public.

Col. ATKINSON: But the courts closed the glucose factory up.

Mr. ROBISON: No, sir, they did not close it up.

Col. ATKINSON: They enjoined them from using it.

Mr. ROBISON: They enjoined them from using it, to a certain extent. They closed it up because it was not a profitable institution.

Col. ATKINSON: It was enjoined for being a nuisance.

Mr. ROBISON: Simply because it was making a stink, that is all. They have not undertaken to close up the stove works, or Backus' mill on Fort street, or any of those business enterprises located on Fort street; they did not undertake to close them up, for they have a right to be there, and right next door to Allan Shelden's place

Mr. Backus or anybody else has a right to put up a brick planing mill; and Fort street is coming to that. Here goes the post-office up down below here. The street as a residence street is ruined, and for a time property has depreciated and become less valuable, only as it is wanted in particular instances for business purposes. It is going through the transformation that streets do go through when they are turning from residence streets to business
2789 streets, and in some instances the property becomes worth less for a time, until business takes up the entire street. Fort street is not the only street of the kind in the city. Miami avenue is another, and Congress street has lost entirely its dwelling-houses, there are no more dwelling-houses on that street, except at the far end. Larned street the same, and that is the way property goes and the way streets develop from one thing to another, from dwelling streets to business streets, not only in this city, but the world over. And there are certain damages and inconveniences and losses that men have to stand. It would be impossible and a wrong to make the people who have hurt their property pay them the damage they have lost. Would it be right to make the Peninsular stove works, for instance, pay Allan Sheldon and these other people up and down the street, the damages they have been put to, or the losses on their property by the building of these business enterprises on the street? Would that be right? It is not right and it is not law. They do not have to pay and they should not pay. People have to suffer, I say, for the good of the general public, and, to that extent in the same way, Backus must suffer, if he does, everything except extraordinary losses that he is subjected to by the building of this road in front of his place. Of course it is different when a railroad or any other public enterprise comes along and takes a man's property right away from him, and converts it to its own use; but here is a case where the road simply runs by Backus' property, and he must be paid what damage, extraordinary damage, he suffers on that account. Now, the Backus mill is located in a place here that all other lumbermen and all other planing-mill men say, or the most of them say, is an inconvenient location generally. There is not another one located right in the
2790 middle of the city on property worth $2,000 a foot, for the yard itself. There is no other yard in this city located on property like that. He can go on Woodward avenue on almost any corner from the river north and buy property for a good deal less than that. So if his property is worth any such money as that, it certainly ought not to be occupied and used for the purpose of a lumber yard. Why don't he go out in the suburbs of the city, as other lumbermen do? We have Mr. Thompson here of the Delta Lumber Company; he got his property out there for about $600 an acre, as I remember it now; it is worth more than that at the present time, maybe two or three thousand dollars an acre, but that is a great deal different from $2,000 a foot, and is it any wonder that Mr. Backus says he cannot compete with these people any longer, and isn't there some other reason for it if he cannot, which of course we do not concede and I do not believe; but if he is occupying

property where the rental value is so great, why not go out where he can get his rents at the same rate that other people are paying, and so compete with them in that way? This company is paying $18,000 a year rent, when it could carry on the same business in the same way by the expenditure of perhaps $5,000, and because they are forced to go somewhere else to do business, why lay it all to the elevated railroad? How can he compete with this Delta Lumber Company, for instance, doing the same kind of business that he is—how could he be expected to compete, with this company paying $18,000 a year rent for premises they could get somewhere else for four or five thousand dollars a year? There is that amount of money certainly which they are throwing away that they cannot charge to the elevated railroad. And he says the competition is very close in this business, and they have to figure very closely and sharply in order to make a living at all. Of course they have
2791 managed to skin out one year $70,000, and the rest of them $36,000 a year, but the competition is mighty close, and if he only had a fair show and this elevated railroad didn't run by there, why what would he do? Competition is close and the railroad is grinding the life out of him, and yet he manages to scale out $36,000 a year after paying $18,000 a year rent.

Mr. DICKINSON: You do not state the testimony at all—up to the time of this construction.

Mr. ROBISON: Up to the time of this construction a year ago, and now bear me out, gentlemen, in saying that he does not know how much he has made since. Has he brought one single book or one single figure before you to show that he is not making money now, or that he is not making $36,000 a year? He says it is impossible to figure out and it is impossible to tell, but could they not bring the book-keeper in here and show their sales each day and compare them with the sales of the year previous? Could they not estimate the profit, the percentage they are making in profit now, with other years? Do you suppose that they are losing money, as Henry Backus says? Absalom Backus, Jr., does not undertake to say that, and I do not believe he would say so; but Henry Backus is crazy on this subject, absolutely insane, if he is honest about it he is insane; he does not know what to do nor where to turn his hand nor what is going to become of him. They have got these millions and millions in property in this city, and what to do with it he does not know, but don't you believe that it would have been possible to them to show you if they had been losing money, if it is a fact, and do you believe it, and in view of the fact that they have been losing all this time that they are carrying on their business today at a loss—do you believe it? They have not done one single thing toward looking up another site or thinking how they could
2792 conduct their business hereafter or what they would do. That is not reasonable. If you were doing a business that you knew you were losing at every day, you would stop it straight off, it seems to me, or, at any rate, you would have gone far enough to be looking around to find some other place. Other people do business in competition with Backus in other places in this city,

and it seems to me it would be possible for Backus to do it. If he has been losing money, as he says he has, he certainly would have been looking around to see if he could not better himself somewhere and locate somewhere in the city where he could scale off a slight profit and not be running all the time at a loss.

Now, of course, they are entitled to damages. I do not deny that if I was on the jury I would give them damages, too, and a great deal of it would be from sentiment, I think. In a case where a man has got a house, a fine residence or a business, or anything that he is satisfied with, and some one comes up on the next lot to it and puts up a livery stable or a brewery or locates a saloon or any other thing that my family do not like, or that I do not like, for business purposes—if I had a chance, or if, in another case where it was not my property and I saw an instance where that was done and had an opportunity, I think I would make the man who put up the livery stable or the other obnoxious business pay for it if I could. Ordinarily you cannot do it; the law does not permit you to do it. There is no relief in law, and if it should be undertaken to give damages every time there are damages—and there are damages—if there was an opportunity to levy on the property of one man to satisfy the damages of another, business could not be conducted, but when I did get an opportunity, I think myself, gentlemen of the jury, as a matter of sentiment, if nothing else, I would give damages. Now, here is Mr. Backus. He says, and I believe him in that, certainly, that he had all the opportunities
2793 for doing his business that he desired. He had railroad connections; he had a fine plant. He had a street, River street, which he could use and did use in his business, and along comes a railroad. I don't care whether it damaged him or not, if they came along there and he did not like it, I think that he ought to be paid for it. I know I would be in favor of doing it if I had an opportunity myself, because there is something taken right away from him that he does not want to lose. He wants it just as it is, and it does not make any difference whether the taking of it away hurts him or not, if he wants to be left as he was, he has a right to be paid to a certain extent, and he is entitled to damages, and probably is entitled to more than he actually suffers—just as a matter of sentiment, I say. I know that is the natural feeling of mankind, and there is no use trying to get around it.

Col. ATKINSON: You think a man ought to have something for being forced to change his situation?

Mr. ROBISON: You ask me that question honestly, and I say that I do.

Col. ATKINSON: Well, you are reasonable.

Mr. ROBISON: I know it is true; I know everybody feels that way, and any one that undertakes to stand up against it is foolish. That is the natural feeling that every man has and if a railroad come along at the back end of my lot, when I wanted it myself, I would expect they would pay well for it, or any other public enterprise. If I have got property situated just to suit me, just as I want it, why, if they want to open a street through and it changes all

my plans and it fixes the property so that it would be better for the general public undoubtedly, or else the jury would not open the street—but it makes me change my plans differently from what I wanted them, and I think I ought to be paid something extra, something more than it is really worth; how much, is a matter of
2794 judgment. I say it is all a matter of sentiment that these damages are allowed to a great extent. Now, you can see that here the way it goes. Here came a contest in this very proceeding between two railroads, the Michigan Central and the union depot. They did not have a jury in that case; they had three commissioners appointed by another provision of law. There was M. W. O'Brien, Col. Hecker and George H. Barbour who sat and heard the testimony, looked the premises over and considered how much this union depot company, running in front of the Michigan Central flour sheds, a large number of feet there, damaged them. They were damaged, it shut out their light, scared their teams, threw dust and cinders and sand and oil and all the stuff that comes from these union depot company engines and from none others. Of course the Michigan Central is running along there. In there and out of there, but that does not do anything, according to the testimony we have had here. They allowed them ten dollars a foot front. That was the damages that the Michigan Central railroad received, an amount which of course, would not be very much in Backus' case; but he is entitled to damages. Now they are claiming damages, as I understand it, for the obstruction to the light, for the dirt that is thrown, the cinders, sand, smoke, and soot, and the oil, and the extra hazard of fire, and scaring of teams on River street, and—I guess that is all, as I remember now. Now, gentlemen, you have been down there yourselves, and you are capable of judging. If the building of that elevated road in front of this institution has shut out the light from Backus' mill so that they cannot do work down there, he is entitled to be paid for it. Of course, if the line of the street was right in front of Backus' mill, or the line of Backus' lot—if there was another lot right in front of Backus' and not the street, why the union depot or anybody else would be en-
2795 titled to build up a wall there any number of feet high and Backus could not get any damages. It does not make any difference, and it would shut out the light. Don't you see how that is, gentlemen? A man has a right to put up a wall if he puts it up on his own premises, and he can shut out the light from the other man's property, and the other man must accommodate himself to the circumstances. If he cannot get proper light the law will do nothing in regard to it, if he cannot get proper light or light enough to do his business, if that wall is put up, he has got to change his location or change business. It may be a damage to him but it is a damage that he cannot collect any pay for. It is one of those things that happen with the way of doing business, with the way of living. We are all entitled to live and some man's family has got to give up some things for the benefit of the general public. That is the rule that is adopted. But if this railroad built out on the street shuts out the light, according to the law, Mr. Backus is enti-

tled to damages. Now you have been down there yourselves and you have seen what the result is and what the effect is; and you have been in other places and I say your own judgment should go further in that matter than the testimony that is given here. If all the testimony that has been given before you is to be believed, it is funny how Backus is doing business down there at all in that basement. And you must consider, I submit, the situation of that basement. It is not contended that above the basement story there is any interference with the light, not enough to amount to anything; they have plenty of light in all the other stories except down in this basement. Now you all remember, you have been in places of that kind before, where other kinds of business are carried on than the planing-mill business, and where one story is built into a side hill, and it is not a very light place, is it? My own
2796 recollection goes back to the basement story of a barn on a farm, where we built a basement story. You build it into a side hill, and the back end of that barn is always dark, more or less, and it is not calculated to be a light place. It is not a place that is light, and if absolutely pure, clear light and plenty of it is necessary for the carrying on of the business, it was never calculated for that kind of a business, with a railroad in front of it or away from it, because the back end of a basement building never can be made light without artificial light. There is no use trying to get around that; it is absolutely true and everybody knows it. Now the business was being carried on there yesterday all right. I was not down there with the jury, but I was there in the forenoon on other business and looked in there and the planing machines were running, and the men were working, and, so far as I could judge, they were able to do work in a workmanlike manner. I noticed men feeling of the lumber as it came out and looking at it to see whether it was all right or not, and I did not see any of these pieces coming out with a knife edge on one side and a half or three-quarters of an inch thick on the other. And I do not believe that it could be made dark enough so that a man would allow lumber of that kind to come out without knowing it, if he was paying any attention to his business whatever; and certainly not the location of this railroad in front of it or the passing of trains would have that effect. Now it has been testified to by Mr. Griswold—which expresses and explains it about as well as it can be done—that a passing train on that elevated railroad has about the same effect as a cloud passing across the sun on a sunny day. Of course there is a sort of shadow if a person is in a building or inside, away from the sun, caused by the cloud passing across the sun; there is a shadow which makes it somewhat darker, a trifle, at any
2797 rate. Possibly that may have that effect. I have not been there and seen it. I think that no trains passed there yesterday when I was there, but I think they did when you were there, and if they did, then you know yourselves what the effect is, and if I am wrong about it you will not pay any attention to what I am saying. But that is the testimony of Mr. Griswold, and it seems to me that that is the natural effect it would have. Now, if they are

so very anxious for light and so much of it, you remember, do you not, a shed and fence in front of this place, built up as high as the windows themselves. I may be exaggerating this, but it seems to me now as though it was ten feet high. Maybe it is not as high as that—eight or nine feet.

Col. ATKINSON: The shed by the fence?

Mr. ROBISON: Right in front, right along the sidewalk as you walk along River street on the left-hand side. To my mind, prejudiced as I am undoubtedly, it seems to me it is ten feet high. Maybe it is not over six, but there is a tight board fence built up there and I think, if I am not mistaken, a shed or roof extending from this fence on River street up towards the building. Isn't that the situation?

Mr. BAKER: Certainly.

Mr. ROBISON: That shuts out more light than forty elevated roads up there. This fence is right square in front of the windows, a fair illustration would be, that window here being the window of Backus' mill and this table here would be the shed built up here fully as high as the top of those windows, and here is the elevated road up here. Now do you say that this road, running through there, shuts out all the light from Backus' mill when he has had this fence there for years? It is not so and that is all there is to it;

2798 it is poppycock. And if they needed the light they are telling about here, and if they have been needing it all the while, they would have had the appliances in this mill that every other mill, as we have heard here testified about, has, and that is the modern appliances for giving light in places where it is needed. Other mills have an electric light plant connected with them. We have the one that Mr. Thompson testified about, this big institution, the Delta Lumber Company, which has electric light, and then the testimony about the mills in Saginaw, some of them a great deal larger than Backus', to say the least, and electric lights in every one of them and no elevated railroads running by them either. Now, if Backus wanted to do business and wants to compete with these other places, he has got to adapt himself to the situation as he finds it. He has got to have mills like the others. He says that his machinery is very much superior, not another mill is equal to it and yet he works down there without an electric light. He has got a little gaslight, a flicker of a light, two of them in some places, over these fine machines which require the finest kind of light according to their testimony, to adjust and run. It would seem to me that a business man would not do business in that way. That he certainly would do what he can do at an expense of $800 as was laid out in the Delta Company, where $800 put in that institution 80 electric lights—as big an institution as the Delta Lumber Company—and 80 electric lights would make Backus' mill lighter than it ever was in daylight. There is one thing, as I remember, that Backus or Henry, one or the other, testified to, and that is that they were afraid to do it because they thought it might dazzle the eyes of the workmen. They don't know how it would affect the eyes of the workmen in there. It would be too light for their pur-

pose, but at any rate he is bound to try it and see; other companies are doing it, and other mills are running in that way. But you have seen it, as I have already said, for
2799 yourselves. Here is a road which is not a solid, tight structure; some light goes through that. It is built on these legs standing out there, and they stand some forty feet, I think, from the mill. I think that is the testimony—forty feet. Here is a place forty feet for the light to get through and not interfered with in any way. Now, there are streets in Detroit and in many other cities, and how many alleys are there ten feet across, twelve feet and twenty feet? Twenty feet is a good, wide alley, I believe—right through the business part of this city; alleys built up with walls one hundred feet high and twenty feet of light, and yet they do business back in there and no fault found, no trouble with it at all; and here is a place forty feet wide for the light to get into Backus' mill, but they cannot expect light from forty feet or four thousand feet to come down into Backus' mill and light up the back end of a cellar, because that is all there is—where there is no light at all, no chance for it to get through except as it comes through the front; and, as I understand it, the basement part of the mill is the only place where there is any fault found. There is another trouble, I believe, that one of the witnesses testified to, that the rolling of these railroad trains across there makes it so noisy that they cannot do any business I think it was Mr. Robinson that testified to that. Well, I don't know. As I said, I was not there; I have not been there when a railroad train went along the elevated road. There is no question but that it will make some noise, but this is no nursery down there, where you got to keep quiet. There are hundreds of machines buzzing as they don't anywhere else hardly, and the idea of finding fault with a railroad train running across that elevated road! The only noise that it could make or the only thing that it could do would be to shut off the noise of some of those planers when they are going. When there
2800 are none of those machines working there is no one there, and the noise does not hurt them, but the idea of a railroad train forty feet away, when running over there, where there is ten within about the same distance over on the other side, the Michigan Central, running train after train by the same mill, only on a track lower, yet the noise of these trains is never thought of and no harm comes from it at all; it all comes from this elevated road. They probably make more noise than they do on the level, but I don't think there can be any serious difficulty, or that the noise of that railroad interferes with Backus' lumber mill or planing mill, because the planing mill makes more noise than a railroad train, anyway, and a man would have to holler to have himself heard in the mill when the planers are going, and on all occasions, whether there is a train going over the road or not. Now, it is claimed that these engines throw cinders. Well, so they do to a certain extent, but it strikes me very strongly, gentlemen, and very strangely, that it is only the engines that are on this union depot elevated road that throw this dirt and cinders complained of by Backus. There

are cinders thrown by all engines, according to the testimony here, some more and some less, but we have done everything that we know of to bring it down to a minimum. If there was any appliance that could be put on these engines by which they would throw fewer cinders and less dirt, it certainly would be done. We have done the best we can and we want to run a railroad along this place; we want to run engines along there, and our engines have got to smoke as long as we burn coal or fuel of any kind. By and by we hope to run our road with electricity and do away with that part of Backus' injuries, everything except the noise of the trains and the light, but in those days perhaps we will have light enough so that we can furnish him light enough that will rival day-
2801 light itself. Of course the time is coming when that has got to be done, when all these trains are going to be run by electricity.

Col. ATKINSON: Don't you think the airship will be the principal means of travel in those days?

Mr. DICKINSON: Edison is making an electric airship.

Mr. ROBISON: It is possible that will be so, but I do not think I am looking ahead a great many years. Backus is not going to be damaged until twenty-three years from now. He has got his place rented for twenty-three years—$410,000 he is going to take in before he commences to be damaged. It don't make any difference to him how much Backus & Company are damaged by us, absolutely it does not; $18,000 ever year, $18,000 every year, whether they do business or not. He has got his place leased, and so I say—and I do not think I am exaggerating a great deal when I think that within twenty-three years there will be no locomotives on that road, judging from the progress we have made within the last ten years. Ten years ago it would not have been supposed that on Woodward avenue, or any of these lines——

Mr. DICKINSON: I will interrupt you and we will take an exception to that line of argument, as the true damage, the true measure of damage is to take the property as it is today, as we find it, and as the railroad is, as we find it. The true rule of damages is the ultimate damage if the railroad facilities are used to their maximum extent—ultimate, by the present devices.

Mr. BAKER: That is, in other words, the jury are not to consider anything which is in its nature speculative.

Mr. DICKINSON: That is the point. It is not whether we may have airships or electric railways on trunk lines.

Mr. BAKER: In discussing the question as to the damage sustained by Mr. Backus, as the owner of the real estate, he cer-
2802 tainly has a right to call the attention of the jury that Mr. Backus' damage does not commence until he returns into possession of his property at the end of his lease. In estimating his damage the jury are to consider the property as it is.

Mr. DICKINSON: Suppose the damage is such that it absolutely ruins his property for the uses for which it is rented, what then? The concern of Backus & Company may become bankrupt, and suppose they do not pay the rent?

The COURT: My impression is, and of course there has been no discussion of the point, that the jury are to take into consideration the value of the property as it was prior to the erection of this railroad and allow such damages, if there are damages, for depreciation after the construction.

Mr. DICKINSON: Not only of the plant itself but of the realty.

The COURT: Whatever damage may result from it.

Col. ATKINSON: To count from the time it is done.

Mr. BAKER: Undoubtedly.

Mr. DICKINSON: What we object to is the discussion as to the prospective building of electric railways later on, or of airships.

The COURT: I shall tell the jury distinctly when I come to charge them, that they are not in any way to consider any speculative damages.

Mr. DICKINSON: Or speculative relief.

The COURT: Or speculative relief.

Col. ATKINSON: That will include balloons as well as airships.

Mr. BAKER: If they go both ways, all right, but they are claiming they have got to move out of here and Mr. Backus has been finding a great deal of fault with that and what he is going to do with his property at the end of these twenty-three years he does not know.

2803 The COURT: As far as that is concerned, that seems to be objected to, but on the other hand, that may be to a certain extent speculative, and I think when I use the term speculative the jury will understand what I mean. You may go on.

Mr. ROBISON: But I think these are things that you gentlemen will take into consideration to a certain extent, that is you have a right to consider, it seems to me, that the world is progressing all the while. Of course you are going to give damages now to Absalom Backus and to A. Backus, Jr., & Sons for all time to come, presuming this line is to stay there forever and this railroad is to go through there and run by there forever and he is asking for damages. He is asking for damages for years, so much a year, from now, how far into the future I do not know. And you have a right to consider and must consider that this property is not always going to stay in just the same shape it is in now, and this property is not always going to be used for a planing mill. You have got to take into consideration the course of business and the natural tendency of business and the progress of business. And I claim to you that you should consider that twenty-three years from now, when his property comes back into his hands, the chances are that he won't want it for this purpose at all, but that you are to give him a great amount of damages now because twenty-three years hence it will be thrown back on his hands and he cannot use it, would be nonsense.

Mr. DICKINSON: He will probably be with his fathers then.

Mr. ROBISON: I hope not.

Mr. DICKINSON: He will be 100 years old.

Col. ATKINSON: But the railroad company will be pounding away at his ghost just the same.

Mr. ROBISON: He certainly has got the nest-egg they were talking about for his old age laid up anyway, and I am very glad of it.

Mr. BAKER: Col. Atkinson wants his ghost to recover damages.

Mr. ROBISON: We are talking now simply about how much damage should be allowed him on account of light. Now he can only get damage as the light affects his business. If they can do business down there, and do it reasonably well, they are not entitled to damages for that. They are not entitled to damages if they can do business down there reasonably well; it may not be quite so convenient for them, but I don't think it shuts out their light enough to talk about at all; yet they have made a great claim on that, and I say that certainly it is a matter that you are to consider. But if you find, after looking it over and considering the testimony, and what you would naturally expect from a building of this kind and superstructure like this, built forty feet off from the mill, if it does not obstruct them so that they cannot do business reasonably well, he is not entitled to any damages. I think you will find that he can, and is, and is succeeding in doing business the same as he always has been doing. Now one of the great claims that they make for damages is the increase of the fire risk. I shall not undertake to say, because I do not believe it, that the running of an engine or the running of railroad trains by a lumber yard or planing mill, does not increase the fire risk.

Col. ATKINSON: You don't believe that it does?

Mr. ROBISON: I don't believe but that it does. I believe it does; there is no question in my mind about it. I do not see how a machine going along and spouting fire to a certain extent, as
2805 they say it does, and as we know it throws sparks—all engines do—I do not see how it can help increasing the fire risk.

Col. ATKINSON: You differ, then, from your Saginaw witness. He said it could not increase the risk.

Mr. ROBISON: I do nothing of the kind. Wait until I get through and you will see.

The COURT: I think you better let Mr. Robison proceed, Colonel.

Mr. ROBISON: The Saginaw witness did not deny but that the running of engines through a lumbering district or where lumber is piled right alongside, within a few feet of the cars as they run through, and as it is shown to you they do in Saginaw miles and miles through lumber piles, lumber on both sides from ten to twenty and thirty feet high, and through acres upon acres of kindling wood, pure and simple, slabs and edgings that most of you, at any rate, have seen piled up in that country. He does not deny but that there is a fire risk. There is no question but that there is a danger from railroads running through there. If there was not any danger from that, there would not be any necessity for any insurance. That is about the only thing they can catch fire from, ordinarily, in the center of the district; but what these men do say is that the risk is not increased to such an extent as to require an increase in the rate of insurance. Now that is what our man Chapman testified here. Mr. Chapman is the man whose business it is to attend to

these things—not for the union depot company, because they have no connection with him whatever, but for all the insurance companies in the community. He is employed by the three companies, the Detroit Fire & Marine, the Michigan Fire & Marine and the Grand Rapids Fire Insurance Company, for the purpose of investigating these institutions in this city, of looking up the property in this city and saying how much the rate ought to be on that
2806 property. He does not fix the rates, but he reports to his insurance companies the rate that ought to be charged, and he certainly, so far as I can see, is a fair man. There is no reason for his fixing these rates on different buildings at any different price from what he thinks they ought to bear. He tells you that he will not say that this elevated road does not increase the risk down there, because it does; but not to such an extent as to require the rates to be raised. And his testimony is borne out by Mr. Jones and the facts in the case, that they actually are not raised, as a matter of fact, if you come to investigate it. Certainly the mill down there is inflammable material, isn't it? It is a hazardous risk, and so understood. The require a rate on it of five and a quarter or five and a half per cent., which is a high rate of insurance, but that has been the rate on this mill for years; it was the rate before this elevated road came there, it was the rate before it was thought of, and it remains the rate today on that mill, five and a quarter per cent. Now these insurance companies have their money invested in this business. Mr. Chapman is appointed for that purpose, and this institution that hires him, these three companies, sell his reports to the other insurance companies and the testimony here shows that they are used by almost all the companies in the city, and the rates remain the same on the mill. I understand they are different on the powder-house there—about the same thing as a powder-house—this dust building. The rate is different there from what it has been, but Mr. Chapman said there had been no rate fixed by him before or by his predecessor and when he came to fix it, he put it at 8 per cent. on the dust-house, and thinks that it should have been the same before this elevated road came there. Of course it is a dangerous piece of property, liable to catch fire and burn, but Backus' mill has been going there a year now or very nearly a year and no fires have
2807 caught on it, but it is liable to, liable to burn. If it was not, there would be no necessity of any insurance, there would be none sought. And it may burn from the union depot engines or it may burn from some other source. It has burned three times before the union depot got there, so there is a risk in Backus' mill and there always has been a risk and always will be, whether the union depot company runs steam-engines or whether they run them by electricity or whatever they do, Backus' mill is liable to burn them up and he has got it insured because of the chance of it burning. But the rate remains the same on the mill. Now Mr. Jones, who appears to you as a friend of Mr. Backus, owns property down in Backus' lumber yard, and he has always been in favor of Mr. Backus. As the testimony here shows, he was on one of these juries

when the railroad was trying to get through Backus' property down below there. He says he has increased the rate on this engine-house and its connections. But he has done it, gentlemen of the jury, in face of the fixing of the rate by this man whose business it is and who says that the rate should be 8 per cent. on the dust-house alone, but that on the other property the rate should be just as it has been, four and a half; and who can say, who knows, whether the rate has not been fixed on this other property for the purpose of this case. I do not say that it has, but I leave it for yourselves to infer whether there is not an arrangement between one of the Backuses——

Mr. DICKINSON: You are mistaken about the power-house; it is the same as the dust-room.

Mr. ROBISON: I say just what Mr. Jones put it, but Mr. Chapman says it should be less.

Mr. BAKER: Said it should be four and a half.

Mr. ROBISON: And that is the rate that he recommends to Mr. Jones himself, but Jones does not take it. Now, I do not say
2808 that there is any arrangement between Jones and Backus, that it should be made that way, or that it is not, but it certainly bears some marks of it, it seems to me. Here is an unbiased and unprejudiced man who says that that is a fair rate to put on that place. Of course the fact remains that it was insured for less than that before, but he says that it was too cheap before and that the risk on this dust-house was greater than that before, and it would seem to me that he uses common sense. If you were going down there to judge for yourselves which piece of property was the most liable to burn, it seems to me you would say that the dust-house is the greatest risk, with the dust flying around there, all open, with fire liable to drop in right from Backus' own mill or from somewhere else, that it was always a greater risk. That is what Mr. Chapman says, that it was always a greater risk than any other part of the institution down there, that there was no comparison between the mill and engine house and this dust-room, there is no comparison between the other buildings and the dust-house, and the dust-house was always the greater risk. And it seems to me also that common sense teaches us, that that engine-house, built by itself, with the dust-room on the other side of it, is not the same risk as the dust-house is, and that common sense would teach you that the rate on that engine-house ought to be surely as low as it is on the mill. What is the necessity of it? Why should the engine-house be a greater risk, with nothing around it but brick walls and iron, no wood—why should the risk on that building and its contents be any greater than on this mill where wood is being worked there continually and sawdust flying in every direction and dust of all kinds. Common sense, it seems to me, would teach you, without any technical knowledge of the insurance business whatever, that Mr. Chapman was correct when he told you
2809 that the risk on those buildings was no greater, on the engine-house was no greater, or not as great as on the mill itself, and that the rate ought to be four and a half, despite the fact

that Mr. Jones said the insurance ought to be eight per cent. and that Mr. Backus has to pay it. The union depot company ought not to be charged for that, if he pays excessive rates, or if he has been paying too low rates before compared with the risk. If he got his dust-house insured for four and a half or four and a quarter before this, and has to pay eight now, when all insurance experts say it should have been eight before, should the union depot be charged with the extra expense he is put to? Not at all, and I do not think you will compel us to do so. But there is a risk, and that dust-house should pay a high rate of insurance. You have seen it down there yourselves, and you can see why it is a risky insurance, why it is a great risk to insure that kind of property. There is a rattle-trap concern built up there—I cannot give you the dimensions of it—but inside this lattice-work is contained a framework, wood, and then this wood is covered with a highly inflammable material, four thousand yards, I believe Mr. Backus testified, if I am not mistaken.

Mr. DICKINSON: Twenty-five hundred yards.

Mr. HENRY BACKUS: Twenty-two hundred.

Mr. ROBISON: Which is it, twenty-five or twenty-two hundred?

Mr. DICKINSON: Well, suppose it is four thousand.

Mr. ROBISON: Well, it is a good many yards, anyway; a large amount of inflammable material over this wood frame inside of this lattice-work. If there is any fire going to catch, there is the place it would naturally catch—when he can change all that by an expenditure of not to exceed two thousand dollars. He can make that absolutely or very nearly fireproof by putting up a dust-
2810 arrester such as all other people, or most everybody else, uses all over this country, but just his obstinacy keeps him from doing it, and, of course, it is not to be found fault with. That is the kind of a dust-arrester that he wants, and he is entitled to use it. If he thinks it is best, he is entitled to his own views of it, and if he wants to arrest dust by the use of the Backus dust-arrester he has a right to do it; but I say that you ought to be satisfied from the testimony here that it is not a safe one for him to use, in so far as the fire risk is concerned. If there is a fire catches in that institution from outside it will catch in that dust-arrester, because there is nothing to prevent it. It is just like putting a lot of shavings outside. Here is the open lattice-work for fire and sparks to drive through from any direction, with any wind from anywhere, wherever it comes from, and it is likely that a fire will break out some time or other, possibly from one of our engines, but should we be made to pay for that? When we show Mr. Backus how he can overcome that great risk, and don't you believe it can be done? Isn't it reasonable that it can be done? We have shown you that nearly all the mills in the Saginaw valley use this sort, and there are some big institutions up there, and they are certainly after the best they can find. They are not using a dust-arrester when there are other better ones right in the near neighborhood of their plants. I believe there are only three or four Backus dust-arresters in use in the city of Detroit.

Mr. BAKER: Three altogether.

Mr. ROBISON: Three of Mr. Backus' dust-arresters in Detroit, and all the rest are these metallic concerns that are absolutely fireproof, no fire can get into them and no fire can burn them, and now we have shown you by the testimony that his rattle-trap or fire-trap on top of that building can be replaced by an expenditure of two thousand dollars, and we are willing to pay it and to protect
2811 him from fire, to keep the fire out of his place. But, of course, Mr. Backus is a peculiar man and his peculiarities are all right in a good many respects. There is not any one who respects him more than I do, his doggedness for one thing, he is a fighter from way back and everybody likes such a man, and he likes his own way, and it don't make any difference whether the dust-arrester is a good one or a bad one—it is mine and I want it. That is what he says, and I am going to use it and I am willing to pay eight per cent. instead of four for the sake of having it up there, as an advertisement if nothing else. He wants to keep it there, he makes them, sells them, he has a patent on them. Of course if he would take his down, the patent Backus dust-arrester would not sell very readily. He sold one three years ago and he must get a mighty big price for them or he would go out of the business; the last one he sold was three years ago, except that he did sell some of this jute or whatever it is that he covers them with, to some one up at Cadillac, some time within the last year, but if he takes that down he cannot sell any more, and he would have to go out of the business. But I like his style, he wants to use it and can afford it, but for heaven's sake don't make us pay for it. Let him keep it there, but say to him, if you do, the union depot company has not got to pay for your idiosyncrasies; you must do it at your own risk. We have got one that we will put in there such as everybody else is using and pay for it, and we expect that you will say that we have got to pay for it.

Recess.

The COURT: At this time I wish to call the attention of counsel to the fact that I find, in looking over the former record, that there was an allowance made to Dean & Davison.

Mr. DICKINSON: One dollar, I guess; merely formal.

2812 The COURT: There is nothing in the testimony in this case in regard to that.

Mr. BAKER: They have some mortgage on the property, or did have.

Mr. DICKINSON: It is merely nominal at all events.

The COURT: Will that be a question the jury will have to pass upon?

Mr. DICKINSON: No.

The COURT: The only question will be as to the allowance to A. Backus and A. Backus, Jr., & Sons.

Mr. DICKINSON: Yes.

Mr. BAKER: It appears in the testimony that Mr. Backus owns the land and A. Backus, Jr., & Sons own the plant, and Davison &

)eau were the executors and trustees under the will of Crozier Davi-
)n, who had a mortgage on the property at one time, but whether
; is paid or not is wholly immaterial; they do not come here and
sk any protection at all.

Mr. DICKINSON: No.

The COURT: Will there have to be a finding on that question?

Mr. BAKER: Why, yes, they can find a dollar.

Mr. DICKINSON: A dollar?

Mr. BACKUS: That mortgage has been discharged.

The COURT: If that is the case it drops out entirely.

Mr. ROBISON: Now, gentlemen of the jury, there has been a little estimony introduced here as to the value of this property. Of ourse, I don't know myself just how that is going to be considered, r in what light. I don't know just how you are going to consider he question of the value of the property and connect it with he question of how much damages there are to Mr. Backus. Of ourse the claim is that you are to consider just what it is worth for planing-mill purposes; that if Mr. Backus can earn
2813 $70,000 a year profits out of that place, that is a good thing for him to keep; or I will come down to $36,000 and shade that some; but it is a good property, and it ought to be left to him in as near the same shape as it was before the railroad came, and if Backus & Co. are dealing in an honest way, as they do business, and earn a profit of $70,000 or $36,000 a year, I am glad of it. It is a credit to the city to have such an institution, and there is no question about it that it is a first-class planing mill. Nobody has any right to, and nobody can truthfully cry it down or claim it is not so, or of no account or value to the city in the way of a credit. There is not any use in talking about it, but all I claim is that it is just as good today as it ever was. I actually believe it is, but I do not expect you gentlemen will look at it in that light. I would not if I was on the jury. As I stated before, even though it is exactly in the same shape as it was before, if Mr. Backus did not want the railroad there, he ought to be paid for its coming there; I believe that myself. Of course, if it is to be looked at simply for the use of a planing mill and for planing-mill purposes, it is ruined, as Mr. Backus said—not Absalom Backus, he did not claim that at all.

Mr. BACKUS: I do.

Mr. ROBISON: You did not very strongly, but Henry Backus is clean gone on it. He has not the slightest idea which way to turn nor what he is going to do, he is in a bad shape. He is lying awake nights and what he is going to do he don't know, he is running along here at a loss, certainly losing money every day and he is in bad shape, and I pity him if he feels as he actually thinks he feels. It is too bad, but I do not think we are to blame for it. He has got a pretty good institution down there yet, and take all except the back end of that cellar, there is considerable light around there
2814 yet. And there is lumber around there and going up that elevator and through those planers and rip-saws and cross-cut saws and all the other kind of saws that have been testified to that I don't know anything about. But his business is going

on and it is going to go on, and I will tell you this, gentlemen of the jury, that after this thing is finally settled, after this verdict is rendered and it is finally settled that Absalom Backus, Jr., & Sons, it won't be two weeks before something is done down there to make that institution just as they want it. It is too thin to say it cannot be arranged so that they can do business because there is an elevated road constructed forty feet away in the street in front of them. They are too shrewd and sharp and careful and smart business men to have any such thing as that happen. Just what change they will want to make I don't know. It seems they were not entirely satisfied when they burned out because Henry Backus says they looked around to see if they could not find a better place, and if they could not better themselves. There was something the matter, they were not just exactly satisfied, their lumber yard is a good ways from their planing mill for one thing. Take all other big planing mills in this country and you will find the lumber yard and planing mill right close together. Take the Delta lumber yard and planing mill that has been testified to, and they have the lumber yard and planing mill right in the same inclosure, lumber right at hand. You take all the lumber mills and planing mills that you have visited yourselves, anywhere, of any extent, and you will find they do not have to draw their lumber some blocks before they get it to their mill. It is no wonder that he does not want his institution located just exactly as it is, because he could do better with it somewhere else, if he had not had the land just as he did have it. But after this thing is finally settled, I believe that their fire-trap of a dust-arrester up on top will be taken off in the first place and they will put up a modern one, such as has been invented within
2815 the last few years, and such as is in general use in the planing mills and these factories where they make dust everywhere in this country. I say in general use, not in every instance, but in general use, and that is what will be put up in place of this institution he has got up there. They will turn their dust door around so that they will take their dust out away from in front the railroad, and away from where there are engines or fire, or if necessary they can locate their dust-room in a different part of the yard. It has been testified here that the dust can be carried 500 feet without any trouble directly to the engine-room. It costs some money to do it, sure, and we expect to pay for it and are willing to pay for it. And it will be done, but Henry Backus is not in the state of mind that he thinks he is. If he thinks he is as bad off as he pretends——

Mr. HENRY BACKUS: I don't believe you could run it as well as I.

Mr. ROBISON: Neither do I, but I don't think I would belly-ache around about it as much as you do, to tell the truth. I think you are very likely honest, but you are worked up into such a state that you are out of your head.

Mr. HENRY BACKUS: I have got a pretty bad dose, that is a fact.

Mr. ROBISON: Well, this commenced when you were a boy, you must remember.

Col. ATKINSON: Do you think that is a proper way to argue a case, to turn around and abuse a man?

Mr. ROBISON: I am not abusing him at all; I don't mean to, but I don't believe it. I believe he is honest in it, but I think he is out of his head.

Mr. HENRY BACKUS: That is contrary to the statement you made yesterday when you were down there.

Mr. ROBISON: What is that?

Mr. DICKINSON: Never mind that; that is a conversation between you two.

2816 Mr. ROBISON: If there is any conversation I had with him I am willing he should tell it. I am sorry for the frame of mind he is in. I do not think Absalom Backus is half as bad off as Henry—or the other one. The brother is all right, but of course he feels bad about it; but I think he feels a good deal worse than he really is. And it is true that they will fix that place up in two weeks after this thing is settled so that they will run along and without any particular danger and with plenty of light and all that, which can be done. Mr. Henry Backus is so excited about this thing that he states his property down there is worth $800,000. He said, in the first place, $2,000 a foot. It must be a state of excitement he is in when he says that, because everybody knows better—$2,000 a foot where their lumber yard is. That is not of very much importance, except to show that his testimony is, naturally enough and naturally to be expected, shaded in his own favor. You can naturally expect that, and when you find that he is testifying to the value of his property down in that location in that way, $600,000 at least, and from that to $800,000, it seems to me that when he fixes prices on other pieces of property around the planing mill and the machines and real estate in other places, you ought to make some allowances, and when he tells you what the building will cost, when Henry Spitzley, a man that some of you know, a man whose reputation, I believe, is a good one in this city, as a builder, as good as anybody's, and one of the men that people would go to if they wanted a building put up—when he tells you that the carpenter-work in it will cost $22,612.09, and states that he will take a contract for putting it up for that price, and Henry Backus tells you that it costs pretty nearly three times as much as that, twice as much anyway, I think that Henry Backus is probably mistaken and that Mr. Spitzley is more apt to be correct
2817 about that. And I think you ought to look at it in that way.

Now, Mr. Spitzley is a man that is unbiased in the business, he has not any interest in it, and of course Henry Backus, especially the way he feels, I think you will believe has some interest in this case and feel- somewhat interested, and his testimony naturally enough no more than is to be expected, is likely to be shaded in his own favor, and I am not finding any fault with it. Mr. Finn, for the mason-work, said the building would cost $26,884, and Mr. Backus did not dispute that.

Col. ATKINSON: He added $1,500 for the retaining wall which he did not take in, for extra thickness.

Mr. ROBISON: He added $1,500. He said he thought it should not be that.

Col. ATKINSON: Well, he estimated them two feet thinner than they were.

Mr. ROBISON: Yes, there was $1,500 to be added to that, which would make $28,000. Those figures were not disputed. Mr. Backus did not know anything about that and he thought those would probably be about right, as I remember it, or he did not know anything about it. Mr. Finn said he would take this job for that price and be willing to take a contract to duplicate the building as it is now, make it new. It is not very old now and it is not worth much less than when it was new, but it would be worth just as much new. He would do that work for $28,000, adding the $1,500 for additional walls, that Mr. Backus says was thicker than Mr. Finn did, but there is no fault found with his figures; they say that is about right. Mr. Spitzley says he would duplicate the carpenter-work in that building for $26,000, that he would be willing to take a contract for it at that price. Mr. Backus says that Mr. Spitzley cannot do it as cheap as that and he gives his reasons;

Mr. Spitzley estimated the flooring too cheap, and this thing
2818 and that thing and the other thing, he estimated too little lumber in, but Mr. Spitzley was at it a week or so, nearly a week, I think, before he could be got here to testify, for the purpose of giving him an opportunity to measure and calculate and he came here with those figures. And if he is an honest man he can build that thing for $22,612, and would make something at it at the same time because he said he would be willing to take a contract at that price. Now there is a great difference of opinion about the machinery. I don't remember Mr. Backus' figures on the machinery, but if the place was taken away, and if Mr. Backus had to move, these machines would still be first-class Backusized machines, every one of them. All he would have to do would be to move them and of course if he had to move them, which I do not concede for an instant, and I do not think he ever will, as long as he is located just as he is, but the machines are still there whatever their value or price is, and the running of the elevated road in front of them does not decrease their value if they can be used just as well somewhere else, that is sure.

Mr. BAKER: Or there.

Mr. ROBISON: Yes, or there, as I think of course they will be used there. There is not any doubt they will be used right in that very spot, but if he had to move them the machines could be moved, and all the trouble there would be or any deterioration there would be, would be the moving of the machines. That would cost a certain amount unquestionably if he had to move them, but I do not think he ever will. There is a great difference in the price. I think our figures are $35,136, as I have them and Mr. Backus' are certainly more than $100,000.

Col. ATKINSON: On the machines.

Mr. ROBISON: I think so. Do you remember, Mr. Baker, what Mr. Backus' figure is on the machinery?

Mr. DICKINSON: Here is the inventory.

2819 Mr. BAKER: His total estimate is about $100,000 more than Spitzley's.

Mr. ROBISON: Of course, in the machinery I included the engine and boilers. That is aside from Spitzley's estimate of the building. I am trying to tell you how much our figures are on the cost of that plant down there and how much his are. His figures of the value of the machinery and boiler and engine are $110,00- in the face of $35,000, our figures. That is three times as much. Now he may be right and our man may be wrong, but I am not going to comment at any length on that, because I do not think it would be of any use. I don't know enough about it to talk any more intelligently to you than you know yourselves. There are the figures of one man and the other, and if you are going to use those figures at all, in finding out what the damages are—something that I do not understand just how you are going to do—it is all left, of course, to your own discretion, and I ask you certainly to consider those figures. Mr. Spitzley undoubtedly left out items that Mr. Backus put in, not very many machines, however. You will find in the testimony of Mr. Spitzley that when questions were asked him about this machine and that machine that Mr. Spitzley knew them by different names. He says over and over again, I think I have got in all the machines; I intended to, and I think I have; but I do not know the machine by that name. And you will find in different places in his testimony that he so testified. Of course there are items that he did not put in at all. These saws that were hanging up, that were not in use, he did not include, and things of that kind; tools around the engine-room, and the wagons that were in use and the carts and the things of that kind, that he did not understand had anything to do with the building itself, and the fixtures in the building. So an allowance ought to be made in Mr. Backus' favor in that

2820 regard. But if you are going to consider the value of this property in estimating how much it is damaged, why, I ask you as reasonable men, men of common sense, that know how these things are done and how people are apt to testify, to consider that, and in a reasonable common-sense way, and no other. We do not ask any favors and expect none. We want you to do as near justice in the case as men can. Mr. Backus is entitled to certain damages. Nobody can deny that, and that he will get them nobody expects to the contrary, and that he will get more than he is entitled to, I expect. That is sure. And I think if I was on the jury myself I would give him more than I rather think he is entitled to, because there is the sentiment in the business that no man can get over. Here is a railroad—the railroad does not make any difference—but if it is a private individual that came in front of this property with an institution of this kind that Mr. Backus said he did not like, I would be willing to pay him for it; but I do not think I would be willing to pay him ten times what his damages are or that I would be willing to give him nine-tenths for sentiment and one-tenth for damages. But so far as I am concerned, I expect that you will give Mr. Backus reasonable damages, liberal damages, for the railroad

running in front of his property, but whatever the damages are that he gets, they will be more sentimental than actual, because the light that is shut off from his place is of no account. I believe that just as much as I do that I stand here, that he is not injured, by reason of that light, one dollar. That he may be injured by the cinders and smoke and soot falling over on his lumber, it may be true, but it is very strange, gentlemen of the jury, as I have thought before, and as I think I have expressed myself before, that the only engines in this whole community that throw cinders and soot and smoke are the union depot engines. Here is the Michigan Central rail-
2821 road right alongside of this institution, as you saw it yesterday, with ten trains running where there is one running on this elevated road, and it is strange that the wind, in whatever direction it may be, north, south, east or west, never carries cinders from the Michigan Central, and that no damage or annoyance has ever come from any of those trains. Now it is not so, and that is all there is to it. The Michigan Central engines throw smoke and dust and cinders just as well as this road does, and sometimes when the wind blows in the right direction, they will come from the Michigan Central track just as well as they will from the union depot. It is just like Peter Henkel's testimony, in which he said that for years and years he had lived on the corner of Fifteenth and Fort streets, and he testified that the Michigan Central was farther away than the other track was, and I suppose I am bound by that, but running there for years, he had never noticed any trouble at all; his clothes could hang in the back yard, and, although there was the Peninsular stove works and the Backus mill pouring out smoke, and the McGregor boiler works and all those business enterprises and machine shops and things that there are on River street and Fort street, right in his neighborhood, he never had been interfered with at all; but when the union depot company, way off in another part of the town, an elevated road nowhere near him—the Wabash road was the one he was finding fault with, but the union depot elevated road was not anywhere near him—yet just as soon as they commenced he could not hang his clothes out any longer. It is not so; that is all there is to it. It is too thin; that is not true, and nobody will believe it, and nobody has any right to believe it. It is prejudice that makes a man testify in that way, because the Michigan Central Railroad engines will smoke just the same as the Wabash do, and just the same
2822 as the Canadian Pacific and the Flint & Pere Marquette, and they have been smoking along here for years, and if Mr. Henkel has had his clothes hanging in his back yard or his front yard, they have been smoked before the Wabash railroad commenced to operate here at all, because there are too many chimneys pouring out smoke all over the city. You know as a matter of fact, some of you, at any rate, that there is an interference in the business part of the city everywhere from smoke. Take your offices, and leave a sheet of paper on the desk with the window up, leave it there a day and it will be black and you cannot use it, and it does not all come from this elevated road either. It is one of the natural

results of people living in a place where there is business carried on. And if you are going to assail business enterprises here because they are throwing smoke and cinders and make some dirt, why the effect of your verdict will be to drive business enterprises away from this town. If people are going to live where there is anything going on, they must expect some dirt, and some smoke and some cinders.

Col. ATKINSON: Are you striking on politics now?

Mr. ROBISON: Well, I might before I get through. But that is a fact, isn't it? Am I talking sense or nonsense when I say that that is a fact; that is, people cannot be allowed to do business here except at a great expense in the way of damages, people that run institutions and run machines that throw smoke and dust and cinders, have got to leave the city, if they cannot do it. And those are things which people must expect, and it is the experience of people that live in the center of the city at any rate. They certainly are interfered with by dirt, not always cinders, I would not say that; but that the union depot company is the only railroad that runs into this city or the only institution or corporation that allows railroad engines to throw cinders is not true; and
2823 that they have thrown them around Backus' place just as much and in as great a degree on the other side, as this railroad has, I think is certain, because there are ten trains running on this side of Backus' property where there is one over here. Of course this one is up above, but according to their theory these cinders will go fifty feet or more anyway, and once in a while there certainly is an east wind and some cinders must come from the Michigan Central into Backus' yard, but not a cinder has he ever noticed, according to the testimony of some of them, except from this one institution. Now that is not true. This is a railroad like the others and it is entitled to come into this city, and it expects to pay what damages it actually creates and a good deal more, and all it asks, as I understand it, is that it be given chance for life. This railroad enterprise that is up there is of as much importance to the city as Backus is, and there ought not to be too much given to him because of sentiment. Give him enough so that he can be halfway satisfied and I don't think there will be any fault found. I think that is all I have to say.

Mr. BAKER: If the court please, Mr. Dickinson made a question in your honor's absence, about the use that could be made in this case of the decision of the supreme court. Mr. Robison called attention, during his argument, to the fact that the supreme court had set this verdict aside as excessive, and Mr. Dickinson took an exception to it.

Mr. DICKINSON: I took an exception to the statement because whatever the supreme court has said of it and thought of it, it should not be stated in this case as at all affecting the jury, and I make the objection on the ground that on this question the jury were the exclusive judges of the amount of damages, and the opinion of the supreme court, who did not hear the witnesses, or see

the place or know anything about it, except from the printed
2824 record, which alleged certain errors of law, could not be used to influence the jury's judgment of the damages in this case. Your honor was absent when I made the objection and took the exception.

Mr. BAKER: All I desire to say about it is this, that if the case had been tried with no effort to bring before this jury the amount of the award in the other case, I should have been very willing to submit this question to the court and jury without any reference to the former proceeding, but Mr. Dickinson put Mr. Backus upon the stand and had him testify that he had received $96,400.

Col. ATKINSON: Mr. Baker, you are mistaken about that.

Mr. BAKER: It is in your own testimony.

Mr. DICKINSON: I asked Mr. Backus about the payment of the money.

Col. ATKINSON: You gave the amount, not Mr. Backus.

Mr. BAKER: Mr. Backus gave the amount.

Mr. DICKINSON: No, he did not.

Mr. BAKER: Yes, the first time it was brought to the attention of this court and jury, he testified to it.

Mr. DICKINSON: I simply wanted to prove the payment of the money.

Mr. BAKER: I know, and in addition to that, if the court please, they put Mr. Dwyer on the stand to prove by him that they had received $49,000.

Mr. DICKINSON: You are mistaken as you can be. You testified to that.

Mr. BAKER: You put that in in the shape of evidence. Now, if the court please, to offset the two highest verdicts that have been rendered in these entire proceedings, I put in evidence all of those verdicts, as your honor will remember; and I give notice now to the counsel they can make any use of it they see fit, and that I will insist before this jury that if they claim anything from the amount of that former award, I shall insist upon the benefit before
2825 this jury of the fact that the supreme court set it aside as excessive and as exorbitant and unjustified.

Col. ATKINSON: We take an exception to the statement that the supreme court did that.

Mr. BAKER: That is just exactly what they did do.

The COURT: What I shall tell this jury is, that they are to determine the question in this case, the amount of the award, entirely and exclusively from the evidence which has been introduced in this case.

Col. ATKINSON: And that the opinion of the supreme court, even if it were that way——

Mr. BAKER: Or the opinion of the other jury. If you concede that, I have no objection to it in any way.

The COURT: If you wish it I will go further and say that they are not to regard the opinion of the supreme court nor to regard the opinion of the other jury, but the sole responsibility of the de-

termination as to the amount to be awarded is under the evidence as it has been offered in this case.

Col. ATKINSON: I think that far, your honor, would be all right, but I think this, if your honor will pardon me, that no counsel ought to state in the presence of a jury that the supreme court had found one way or the other on a question of fact, which is for the jury to decide. Now, you take some of the jurymen, and they may have such respect for the judges of the supreme court that they would think they were better judges of these damages than themselves.

Mr. BAKER: I don't desire to make any use of it at all except with reference to the other verdict.

The COURT: As far as this question is concerned, it has come up heretofore before me, where reference has been made to former trials, and I have always taken particular pains to tell the jury in these cases, and I will so tell this jury when I come to charge
2826 them in this matter, that they are not to regard anything which may have happened in a former trial, but that they are only to regard the testimony and evidence which is admitted upon this trial, and that the responsibility of their verdict rests entirely and solely upon that evidence, and they have to determine according to that evidence.

Mr. BAKER: That is perfectly satisfactory to me.

Col. ATKINSON: We take an exception to Mr. Baker's statements.

Mr. BAKER: I have already taken exceptions to their introduction of the other award.

Col. ATKINSON: He is a peculiar fellow. He will state it whether the court says it or not.

Mr. BAKER: All I want is fair play. The supreme court is excluded and that verdict is excluded, and has nothing to do with the case.

The COURT: The only object I had in this matter is to give fair play to both sides, and I will do it in a conservative way, and not in the heat of argument.

Recess till 2 p. m.

FRIDAY, *November 3d*, 1893—2 p. m.

Mr. DICKINSON: Before proceeding to the argument to the jury, may it please your honor, it is well enough to call attention to a few principles on the lines of which I shall address myself to this tribunal. It has been suggested from time to time in the course of this proceeding from its inception that the measure of damages was to be regulated by the price of real estate and by the injury to real estate. I desire to make the point as strongly as can be made, that under the constitution and the law as construed by the supreme court, the damage to the real estate, however great it may be, is but a bagatelle, or may be but a bagatelle to the actual injury to the business, plant, occupation, or whatever it may be called,
2827 which is carried on upon the real estate. If that be great, compensation must be given for it to the last dollar. If it be greater—three times, four times, ten times the damage to the real

estate—still that compensation must be given which is compensation under the constitution of the State until the single unit—the citizen of the community, whose property is taken or injured, is not taxed one penny more than his neighbors for the public improvement, either an injury to his business or any injury to the realty. And I call your honor's attention to this so that in the instructions your honor contemplates giving, they may follow, not our construction of the decisions, but the language of the decisions of the supreme court, speaking through such learned justices as Justice Campbell and Justice Cooley. I refer to section 15 of article XV. "Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders, and actually paid or secured in the manner provided by law."

The COURT: That merely recognizes the power of eminent domain.

Mr. DICKINSON: And I refer to section 2 of article XVIII. "When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law."

Now what is included within the terms of the constitution as compensation under the decision of the supreme court of this
2828 State, and I shall only refer to a few. I shall mark the passages and ask your honor's attention to them in giving your views of the law to the jury. In the case of Pearsall *vs.* Supervisors, 74 Mich., and I read from page 561. There they interfered with or discontinued a portion of a State road by the appellant's property, and the question was whether she was entitled to damages for that public improvement, or the taking of the property, or the closing of the street, or the interfering with the street. The court says: "The value of Mrs. Pearsall's property may have become very greatly enhanced by the location of her buildings and orchard where they are now situate upon this road. Of this enhanced value she may become completely deprived by taking up this road, and, if so, she will be deprived of her property to that extent, and it will have been taken from her by the authorities for public use and necessity. Certainly on no other ground could she be deprived of such property rights in and upon the road. The constitutional provision is adopted for the protection of and security to the rights of the individual as against the government, and the term 'taking' should not be used in any unreasonable or narrow sense. It should not be limited to the absolute conversion of property and applied to land only; but it should include cases where the value is destroyed or injured by the action of the government, or serious injury is inflicted to the property itself or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto belonging. In either of these cases it is a taking within the meaning of the

provision of the constitution. A partial destruction or any diminution in value is a taking."

COURT: There can be no question about that, Mr. Dickinson.

Mr. DICKINSON: No, your honor, but we are before a tribunal which your honor is to instruct, who may assume that a
2829 public street is public property and may be taken, and I am going to ask your honor to charge the jury that Backus & Sons have a property in the street——

COURT: There is no question in regard to that.

Mr. DICKINSON: I read further: "If the public take any action which becomes necessary to subserve public use, and valuable rights of an individual are thereby interfered with and damaged or destroyed, he is entitled to the compensation which the constitution gives therefor, and such damage or destruction must be regarded as a 'taking.'"

There may be no question about that, but there has been a question in the course of this hearing, and — your honor will refer to your own decision on the motion for a new trial, your honor will find that you applied the rule by reason of the damage to the Backus property solely to the value of the real estate and the superstructure.

COURT: That may have been upon the motion in regard to the confirmation of the prior verdict, but upon that question I shall not have anything to say to this jury.

Mr. DICKINSON: But the question is whether you will find as in that intimation the rule of damages to the *damages to the* real estate, or will say within the language of the books, that the damage to the business, if it be found, shall be compensated to the last degree.

COURT: I do not think, Mr. Dickinson, as far as any opinion I may have delivered in this matter is concerned, it goes to that extent.

Mr. DICKINSON: I know that; I know perfectly well that your honor, it was not fully discussed, and your honor's attention was specially directed to a comparison of the real-estate values——

COURT: I mean that was only one of the incidental questions that arose——

Mr. BAKER: As far as the damages to the business are
2830 concerned, before your honor passes upon that, I desire to be heard.

Mr. DICKINSON: Now, in the case of Reidinger *vs.* The Marquette & Western Railroad Company, in the 62 Mich., there was an attempted change of the plat of the city, and the question was as to the right of the owner in the street, and they raised the question as to whether the dedication was valid, and the court say: "Whether the dedication of the streets to the public, contained upon this plat, is valid or not, the purchaser of a lot fronting upon such street has the right to have the street kept open for the usual and customary methods of travel. The grantor cannot thereafter withdraw or change the use of such public spaces to the detriment of the grantees,

and the destruction of their rights in the streets or public grounds on which their lots abut."

COURT: I think I had occasion to examine that question in the case of Currier *vs.* Berry, as to whether a plat or dedication is valid or not, it makes no difference if a person plats property and sells it according to the plat, the plat is the dedication between the grantor and grantee of all the streets of the plat.

Mr. DICKINSON: Now, as to what is compensation, I refer your honor to the case of The Grand Rapids & Indiana Railroad *vs.* Heisel, in the 47th Mich., page 398. "It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been if the injury had not occurred. Nothing short of this is adequate compensation. In the case of land actually taken, it includes its value, or the amount to which the value of the property from which it is taken is depreciated, and in Jubb *vs.* Hull Dock Co., 9 Q. B., 443, it was held where the property taken was a brewery in operation, the damages included the necessary loss in finding another place of business.
2831 In cases where damage is by injury aside from the actual taking of property, the rule has been to make the party whole as nearly as practicable, and where it affected the rental value or enjoyment, the same principle has been applied as in other cases. There is no reason, and so far as we can discover, no law which allows the wrong-doer to cast any portion of an actual and appreciable loss on the party whom he injures." (In this case the same rule of damages would apply as in the Grand Rapids & Indiana case, and the suit was brought for damages, and the question was what was compensation.) "In such a case as this, it is in the power of the company and always has been to have the compensation settled once for all, and to get any benefit which the law attaches to such a method of ascertainment. Until this is done the possession is a continual wrong."

COURT: A question which arises in my mind is this: There is no question but what the Backuses are entitled to full compensation for such damages as they may suffer, but does not the other rule also attach, and that is, that the jury are not in any way to consider any speculative damages or any probable damages?

Mr. DICKINSON: They can only consider the damages which are actually shown, but the other rule follows, may it please your honor, that they are not to estimate those damages for a year, or estimate the present injury done by the railroad, but they must assume that the railroad is running to its maximum capacity, that it has other railroads, that it may double, treble or quadruple its trains, so far as that is concerned, and they must estimate the damage for the future time, not for a year or three years or five years or ten years.

COURT: That is undoubtedly true to a certain extent, but the question that I have thought about considerably within the last few days is in regard to the testimony which was admitted
2832 in the case in regard to their profits, the profits of their business. Do they not come within the rule which applies in regard to speculative damages?

Mr. DICKINSON: Not at all, your honor. If the profits are shown and the business is destroyed, you can only show it by the effect upon the business, and upon that point I call your honor's attention to the unanimous opinion of the supreme court delivered by Mr. Justice Campbell in the case of The Grand Rapids & Indiana R. R. Co. *vs.* Weiden (70 Mich., 393). "Under our constitution there is never any presumption that a railroad is necessary, or that any particular land ought to be given up to its uses. Every land-owner, therefore, has a perfect right to object to giving up his land, and is not confined to objections depending upon price or value. And a road already established has no better claim than any other to extend or change its lines. Although railroads are allowed by public policy to condemn lands, because they cannot exist otherwise, nevertheless the enterprise is, under our laws, which prohibit public ownership of railways, one of private interest and emolument, and must show its claims to legal assistance."

Now, upon the question of profits: "We are bound to see that parties are not deprived of their property without necessity, or without full compensation for being compelled to relinquish it. And, while respect is due to the honest action of juries, it is not conclusive, and is subject to comparison with the facts in the record. Both of the appellants were using their property in lucrative business, in which the locality and its surroundings had some bearing on its value. Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business
2833 facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether for want of access to any other that is suitable for it. Whatever damage is suffered must be compensated. Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses."

That goes directly upon the question which your honor suggests. Now I shall not take time to refer to the other cases. I will content myself to refer to those three or four leading cases.

And now, gentlemen of the jury, I think it is well enough to consider first principles briefly, to ascertain why you are here and what your duty is; how you come to be chosen to pass upon the question before you. You know that all free government is instituted for the protection of the individual citizen. That is for you, sir, and you, sir, and you, sir. For the protection of your life, your liberty, and your property. This is primary. That is all that government can do for you. That is everything you pay taxes for; to take care of your life, your personal liberty and your property. Nothing else. That is why we rear this great superstructure of the United States, the freest on earth. That is why we have the United States divided up into States so as to secure these three things more certainly—life, liberty and property. More certainly by having a

local government that knows what they are better than the Federal Government at Washington. That is why our experiment on this American continent—successful so far—is called the freest and best government on earth, because it takes the best care of the individual unit, and is not a government by any body of men, is not a government of any aggregation of men, is not a government
2834 of any class, but it is the government of men who work, of men who build up the country and make it great and prosperous and rich. That is why capital comes here, why your capital is safe when invested under this Government of ours. In the old countries, in the past, because today England is nearly free as our own country, the royal authority could take it, and they attempted it not many years ago, as shown in the German reports under the predecessor of the grandfather of the present Emperor, with the strong hand at the palace at Berlin. He did not like a little cottage that was there. He wished to extend his grounds, and he laid his strong royal hand upon the little cottage, as he could not deal with the man, and tore it down, and the right of the individual, even in monarchical Prussia, was vindicated, and the high court of appeals of Germany held that the right of that little cottager there by the King's palace was as sacred from the power of the King as the King's palace itself. And so as governments have progressed, this right of the free citizen to his life and liberty and property, to enjoy it as he pleases, so long as he does no injury to his neighbor, has been more and more protected with the advance of civilization. And we here in the forefront of the nineteenth century make the proud boast everywhere, abroad and here, and justly, that the individual citizen is protected, is free to go and come as he pleases, take care and run his house as he pleases and run his business as he pleases without leave or license from any governmental body or any other man in the United States.

But another element comes in, gentlemen of the jury. Public improvements must be made. We have got to have city halls. We have got to have highways. We have got to have these various things that all may enjoy, and in these cases the constitution says, our written constitutions say, because we have no unwritten constitutions, that may be varied as the prevailing majority
2835 pleases, in England by a vote of Parliament and the signature of the Queen, but our written constitutions still protect life, liberty and property, beyond which you cannot go, provides a way that the individual shall give way for the public when private property is required for the public use. And how shall he give way? He pays his taxes just as you and I pay our taxes. He shall not be burdened, says the constitution of the State, says the Constitution of the United States, he shall not be burdened one dollar more in giving up his property, he who pays taxes equally with you, shall not be put to one dollar of loss if he is bound to give up his property. It is a high-handed proceeding, taken in the abstract, that the Government can say to you, whether you want to sell or not, whether you want to carry on your business or not, whether you want to preserve your business for your children or

not, it is a high-handed proceeding in the abstract when the Government says to you; true, those things are sacred; true, the Government has been instituted to protect you in carrying on your business and living where you please, but the good of the public requires that you shall give way in this instance; but, says the written constitution, if you do give way, if you do give up your own wishes and your own property and your own business site, or the site of your home, you shall not be burdened with one dollar or one penny of loss. Now the jury is not, as my brother Robison says, juries will favor the individual as against the corporation in such cases. It is not true. Our fathers who framed our constitution found that it was not true. But when you want a public improvement, with the newspapers crying, give way for public improvements, the tendency is to walk over a man with the whole sentiment of the community if he stands in the way. And so to provide for his protection—and I now come to your duty—for the
2836 protection of the individual, our constitution provides, not that any legislature, as formerly was the provision of the constitution, could take the property and designate it for public use and determine the compensation to be paid the individual. Why? Because the legislature was a quasi-permanent body; it was composed of men who were there in office for two years, subject to influence, corrupt or otherwise; subject to the influence of a railroad corporation that desires to get possession of his property, so that the individual's property might be taken without just compensation by proper influence or improper influence brought to bear upon people in permanent office like legislators. A railroad lobby might get after them, or a body of newspapers might combine, political sentiment could be aroused, and that legislature could be influenced to do injury to a citizen by the cry for public improvement. And that is the reason the power — neighbors; a jury from the vicinage, twelve men from the courts, gentlemen of the jury, and is put in the hands of a temporary tribunal to determine this compensation and what is his loss; a temporary tribunal who come into office just to determine what that man's loss is, and to go out of office the moment they have determined it. A jury of his neighbors; a jury from the vicinage, twelve men from the vicinage who are not subjected to influence because they are not in office where they can be tampered or molded, but are called from the vicinage or the neighborhood itself, and who come into court, put themselves in the place of the neighbor whose property is sought to be taken, and assess his damages, or his just compensation so that he shall not lose a cent. Now I do not know as I have made myself clear, but that is the origin of the jury that sits here. And we are entitled, gentlemen of the jury, at your hands—the constitution of the State favors this individual unit because it puts here, not a court, not a legislature,
2837 not any permanent officer who may be subjected to influence while in office, but twelve of our neighbors who shall see that we are not mulct one cent by the public improvement which is taken for the public benefit. This being so, I ask nothing from this jury as stated by my learned friend, on the ground of senti-

ment—not one penny. But if there is a man on this jury who is not in favor of that just compensation provided by the constitution, and who is in favor of sending the Backuses out of there with the loss of a dollar by reason of taking this property for public improvement or injuring him, that man violates his oath and his duty, above all as an American citizen, to confine within the lines of the written constitution the power that invades the protection and the guarantees of life, liberty and property. The man, on the other hand, who goes out of his way for the sake of a public improvement in the city and taxes a man one penny more of taxes than he pays in proportion, pays him a dollar in loss on his property that is taken for public improvement, violates his oath as a constitutional member of this citizen's tribunal.

Now let us see about it. Mr. Robison says that Mr. Backus does not claim he will be injured, and after all he says, Mr. Backus has not a home here, to use his own language: This is not a home, he says, of a little private person, but a rich concern, but a rich concern. Is that an appeal to sentiment? A rich concern! Let us see. Let us see whether Backus has any interest. Commencing as a boy at the age of eleven years he learned the carpenter and joiner's trade, an intelligent, bright Yankee boy; no time to get an education, because he had to earn his bread and butter. A bright, efficient, quick, plucky, plucky, plucky American boy that was going to get there sooner or later. And he commences with his hands,
and he made a citizen of this country, coming from a class
2838 of citizens that has made our country the best the world
over. The plucky boys who work and build and add to the riches of the country at large; who add to its prosperity; who are intelligent enough to take care of their political rights, know what is necessary to see to it that those rights and the constitutional guarantees of the fathers shall be protected in every particular and every principle. Men who get on by economy and thrift. Men who build up their fortunes, so that their business concerns managed with this economy and thrift become a unit in the great aggregate that makes of the United States the richest and most prosperous country on earth. It comes from just such boys as that. Backus no interest! A rich concern! And he struggled through it all. He gathered about him first by the hard work of his hands property enough to start his shop. He has built up and gathered together all this property (he inherited nothing) from the pluck and brains of that little boy who went and learned the carpenter's trade at the age of eleven years. No interest! Has he been a faithful citizen, sober, industrious, adding to his country's wealth! No interest! Having honestly accumulated this great property, because it is great, is it not, gentlemen of the jury? It is something to be proud of. He has reached the age of three score and ten; he is sixty-nine; he has worked all his life; he has gathered together piece by piece just the property he wants, hasn't he? Is there any doubt about it? This large piece of property on the river front, all from the earnings of his own hands, and the hands of his boys that he educated after him to take on the business after he should die. He

has gathered this great piece of property on the river front. He has established this successful mill; the most perfect in equipment, and in adjustment and in economy, as all agree, Spitzley who exam-
2839 ined it, and everybody, there is that any one has been in. He has done this by attention to business. The same attention that made him a success and the same pluck that made him get there when he was a boy and learned the carpenter's trade. Never has been off to play. He brought up his boys to work and take care of what he has gathered together, and here he is. No interest! Backus no interest? In 1885 when these boys were getting on, and he was getting on in years, before a union depot structure was dreamed of, before it was dreamed of, gentlemen of the jury, when no thought of it had entered the minds of any soul on earth, then he made the leases, and what for? Mr. Baker drew them. Perfectly apparent. Take the business, boys. I gathered it together and shall not last always. It shall not be embarrassed. It is a paying thing. I have built it up with the experience of years that has lasted me from the time I was a worker in the shop. You have been learned in it, and we have built it up together. I have no one to leave it to, and nothing to desire except for myself and my wife. You put upon the realty a rental value somewhere near the proper proportion of the earnings, which may be great or small; put upon the realty a rental value of $18,000; put it into a corporation so that when one of us dies it won't have to go into the chancery court and be wound up, but may walk right along and be making its earnings year after year as it has done heretofore, and if the rent comes to me I can will that to my wife and she will have enough and be independent of the boys, and won't have to go and live with the daughters-in-law. I am entitled, and she is entitled, the helpmeet of my life, to an independence from my labor, and a good independence, enough and to spare for comfort the balance of her days when I go, and you shall go on with the business, and when we are both gone it is all yours. And he has no
2840 interest? Think of it, gentlemen of the jury, what interest has Backus in this property? Look back across these years and see where he was aiming, and what he was aiming at. Has he got anything else on earth? A farm down there out of this business he has. He has that. No one knows what its value is, for farming property under the protective tariff don't appear to be worth much. But I am not going into politics. He has got that farm, it is immaterial. Did he, in the dark days of 1873 take that great business through the darkest times this country ever saw without bankruptcy, without dishonor, without failure, and pay his debts? Has he no interest to save it and see that it is not injured? Why, gentlemen of the jury, he is not suing for damages. He is not in court spending his time and his money employing counsel because he wishes to be here. That railroad concluded that it wanted to build up River street, and my brother Robison says that everybody thought the railroad when it came up, but it got the city's property on River street, didn't it? It closed that street up. The counsel was blind; it closed the city's street. It didn't ask any pay for this

large amount of real estate they got in the street. Instead of going up through property and taking property which they would have to pay dollar for dollar for, the city surrendered its streets. I think they got a pretty good thing and nobody fought them, but Backus having this thing here, having this planing mill here situated relatively to the lumber yard and his property on Fort street, so that it could be used to the very best advantage with economy, says to you, gentlemen of the jury: I am brought into court, I am brought into court against my will under this power of eminent domain that says that my constitutional guarantees, when I meet a railroad company, are of no value to me, that my property can be taken in spite of me. They can take down my mill under this power of eminent domain; they can rent it or injure it, I
2841 cannot help myself. Come into court with me, Mr. Backus. He does not come into court and sue them. Come into court, Mr. Backus. The constitution says we cannot go by your mill unless we pay you compensation and just compensation. Come into court and defend yourself. Here he is. Now, we do not want to make a penny out of the railroad companies. Why should he? But he says to you, and to each one of you, gentlemen of the jury, this man who has never been a litigant but once voluntarily, and that was when as it appears by the evidence that under an agreement not to switch, they did switch through his lumber yard; all the other times he has been towed into court himself and ordered to give up his property. He is not a man to be sneered at, at all events. He is not a man to be laughed down, at all events. He is not a man whose word is doubted in this community, at all events. A man who has accomplished what he has in this American country of ours is entitled to just treatment and he is entitled to look you in the face, gentlemen of the jury, and every one of you, and say: I am brought into court, but thank God the constitution has given me a tribunal of my neighbors and friends; see to it; don't give me a dollar, but see to it that I am not mulct a dollar of loss. Why? We went into a trial here a little while ago, and on Mr. Baker's testimony the stove works were paid enormous amounts for this railroad to pass by its property—$49,000. Fire occurs right here within 48 hours, fire caused by this elevated structure that sweeps away $45,000. $45,000 at once. And now, gentlemen, at the risk of being tedious, I am going over this testimony with you that we have taken in a sort of desultory fashion from day to day, and I am going to refresh your memory on the testimony, and show you that under the testimony it is inevitable that you
2842 should conclude that this property, this planing mill has been impaired at least 50 per cent., that the profits have been taken off, that the mill cannot be carried on, and that it is not salable, as it stands, to anybody since this superstructure. You can take the statements of counsel or the smiles of counsel as they come to you across the table when testimony of reputable men goes in, for the impression, whatever it may be, that comes from statements and from smiles and sneers but when you come to take the testimony of good and true men having no interest whatever in this

business, you will find the inevitable conclusion is, and the court is going to tell you, you must take the testimony as it it given to you, the inevitable conclusion is that this planing mill has come to its end by reason of this superstructure. If it has, and you fail to do your duty by Backus through fear or favor, I hope it will remain upon your consciences when you think of it and think of the business he has built up and his long life and struggle to make it what it is. Now, I am going to take the testimony and see what there is of it. They open the case, gentlemen of the jury, with the undoubted duty to show you what injury resulted, and to minimize that injury they offer you testimony tending to show some calculation by which you could arrive at the amount of injury. I am going through their testimony witness by witness now, and then come to our own.

Francis Adams testified that this property was worth on River street fifty to seventy dollars per foot. A year ago when he was sworn he testified that it was worth $100 a foot, and he swears that he so testified now. He says at page 10: "I know very little about it since the railroad was built." He has not been inside the mill once. He has been by there and looked in. He himself got $200 per foot front, sold at the valuation of the railroad company, and to
2843 some extent has represented the depot company in acquiring other property. And his $200 a foot front was below there.

Mr. Joy testifies that the property is worth $150 a foot. But Mr. Joy paid for the corner below there, just next to Backus', $400 a foot for 75 feet, or $28,000 for 75 feet; $375 per foot in round numbers. That is at page 26. Now, gentlemen of the jury, on this valuation of property Backus gathered this together in this location with the Michigan Central, situated, as it is, piece by piece in four different arrangements for the purpose of getting an eligible manufacturing site for his business. He dug it out, excavated it and made it. Is that to be compared in value with little pieces of 20 and 40 feet on River street, that are occupied by saloons and one thing and another? Is that a fair criterion of value? This property that is gathered together so that all the witnesses unite in saying that prior to the building of the superstructure this was one of the best sites, and in fact one of the most eligible sites for manufacturing on account of its proximity to the center of the city and on account of its railroad connections. Is it to be a criterion, I say, to your minds, as to the value of this manufacturing site with sparse and scattered pieces of property from 20 feet the minimum to 75 feet in width on River street, that may be worth, if you please, $150 a foot? Are these little scattered pieces to be a criterion of the value of this eligible manufacturing site, with three hundred and ten and six-tenths feet on River street, running back to Fort street, and the situation as this is, as it has been carefully gathered together at odd times?

Mr. Zug says it is worth $100 a foot if there were no railroad connections. He testifies on page 42 as to the situation of the property, and he forms his judgment on sales of property, and

among them is a sale on Fort streets, and a sale of twenty
2844 feet on River street. And such testimony is given as the value of Backus' plant based on such information as that.

Mr. Phister puts the valuation per foot at $150 per front foot.

The next man they call is Chapman, the insurance man. He is put forward as authority upon the increase of rates, and it turns out that he is the agent for the Michigan Fire and Marine, of Grand Rapids, and the Detroit Fire and Marine, of Detroit, and that acting as an advisor for these two companies sometimes sells his rates to others. He says that his business is advisory merely, and don't know whether Backus' rates had been increased or not. And I read you his testimony, showing its value, at page 52. Bear in mind that we are seeing whether Backus' rates have been increased, and he is called as a witness to show that they are not. Bear that in mind. Of all the companies, also bear in mind of all the companies, also bear in mind, that actually insured, and of all the companies that actuaries who fix the rates and know the insurance, not one single agent is called to show that he knows the actual rates; not one. "For what insurance companies do you act as inspector? A. The organization is maintained by or stands in the name of the Michigan Fire and Marine, of Grand Rapids, and Detroit Fire and Marine, State companies. Q. You do not represent all the fire insurance companies, do you? A. No, sir. Q. You do not know, or do not pretend to state, whether or not Backus' rates had been increased by the insurance companies in which he insured? A. I do not. Q. Does he insure in any of your companies? A. I could not say. Q. Don't you know whether he does or not? A. No, sir, I have nothing to do with that. Q. You have only these insurance companies you have spoken of? A. That is all; we furnish rates to different companies who purchase
them. We furnish rates to a great many other companies.
2845 Q. You don't know whether the Backuses have insured with one of the companies to whom you have furnished rates? A. Yes, I know that they have done so. Q. But you have nothing to do with the fixing of the rates they actually charged them? A. I cannot control that. We make advisory rates. Q. Your business is merely advisory to the insurance companies? A. Yes, sir. Q. Then after that if the insurance companies choose they make their own terms to the insured? A. Yes, sir. Q. What have you to say as to whether or not the cost of the Backus insurance has or has not increased since the building of the road? (And that was the true question.) A. I have no means of knowing. Q. Do you know of the rule by which rates may be increased or the cost of insurance may be increased by compelling the insured to take four-fifths valuation. A. I know there is such a clause in use."

Now that is his testimony, and he has no means of knowing anything else, except that he makes an advisory rate, and he don't know whether his own companies increased Backus' rate or not. His testimony as to the increase or decrease of rates, therefore, is absolutely valueless, and I want to ask if you are going to fix the

rate that Backus is compelled to pay; I want to ask each one of you whether he actually does it, and whether there is an increase, if you can do it on Mr. Chapman's testimony. When he says he has no means of knowing what his own companies charged Backus, and that he does nothing but advise companies, and then they do as they please. They are. I shall show you by Jones, who is very much criticised because he does business for Backus, that the rate is actually increased to Backus to the extent of $3,500 at least. Why? Because there is an increase of $17.50 on the shaving-house which he is compelled to take to the extent he does, and be-
2846 cause, I shall show you by Jones' testimony when I reach the defendants' testimony, not depending upon his word at all, but upon the actual business done, that Backus is injured every day, and the testimony is constant from day to day that he cannot get insurance with this superstructure passing by his door. He testifies that he knows eighty, I think, or twenty who have already cancelled their insurance, and ten more who have notified him not to renew. He says it is absolutely impossible to place $10,000 of that insurance at all. That all these policies have been cancelled since the building of this superstructure, and that he don't know where Backus is to get his insurance. He testifies that by reason of the application of the 80 per cent. clause, which all companies apply on manufacturing property that the rates are generally decreased, while the Backus rates, because of the extra-hazardous risk on account of this superstructure, and Jones says so in so many words, the Backus rate has been held at that old rate, where he says 100 or more of his own neighbors' have been decreased, and the universal rule is to decrease the rate under the 80 per cent. rule. And he says the reason that Backus is so held to this old rate, and it costs him $3,500 a year more than it did, is because of this superstructure. Does he lie? Will you at least take Jones, who knows, as against Chapman, who don't know, and says he don't know and that he has no means of knowing. Especially will you take Jones when the whole town is open with subpœnas of this court to bring every applicant into court to testify to this question, to bring into court the men that do know, and they have not brought one. Now, this 80 per cent. clause, what is there of it? He explains it to you. They must take 80 per cent. under the new general rule, everybody; and how does it work? If you have property worth $100,000, gentlemen of the jury, under this rule you must take $80,000 insurance. If you take $50,000 and
2847 your property is worth $100,000 and you have a loss, you can't get even your $50,000; you only get something like $35,000; that is, if you don't insure up to $80,000 you lose half the amount of the face value that you do insure, or proportion to the whole that the amount you do insure bears to $80,000. If you do insure for $80,000, you get it all in case of a fire. If you insure only for $50,000 and your property is worth $100,000, you only get $35,000 or $36,000. Furthermore, for the $80,000, if you insure $100,000 worth of property, the rate is decreased in this form. It is as plain as a pike-staff. It is the best thing for the community

at large. If you insure for $80,000 you pay about $604 for your insurance; if you insure for $50,000 you pay $400, and you are only getting $35,000, so that the rates are decreased by this method. Backus' are clear up to the top notch; he is charged just as much for his insurance of 80 per cent. as if he took but 20 per cent. Now I think I have made that plain. If I have not, I ask you when you go to your rooms to read over Jones' testimony. The rate is for the benefit of the people at large, and makes the insurance cheaper. They do not charge as much if you take 80 per cent. That is the rule. And they pay you your full loss. If you take less than 80 per cent. you do not get your full loss, but bear the loss of the pro'-tion of the difference between the amount actually insured and 80 per cent. And the rate is made proportionately less if you insure for your 80 per cent. Backus's is not reduced in his rate in accordance with this general rule. Why? Because of the union depot structure, which makes it an extra-hazardous risk, and makes it, therefore, cost him $3,500 more per year than it would have cost him without the union depot company structure.

Now the next testimony they put on was the dust-arrester testimony; the Vortex and the Cyclone. Drummers for these
2848 dust-arresters, commercial travelers, they are all pleasant fellows, and I don't know as "drummers" is a term of reproach, but I will say commercial travelers come forward here to boom their patents before the jury. They all admit there are from 50 to 1,000 dust-arresters. They have got the Vortex and the Cyclone, and Backus, who has invented one, and whose dust-arrester works perfectly, as you can see in his mill, and you didn't see any dust from that fine work upon dry lumber. And that is pursued because the union depot Co. think if he kept his old dust-arrester there when it works perfectly and economically, and does the business, the union depot Co. say that Backus must put in a Vortex or a Cyclone in the place of the one that works perfectly. They want to change his mill around and make him move his machines to the rear, or away from his old front. They want to shave him, cut his hair, and put on a black tie and change him all about. But now as to the value of that testimony. We objected to the dust-arrester testimony. Why? It is as plain as the nose on a man's face that it is of no value unless they show that the Backus dust-arrester itself increases the fire risk and the premium on the insurance. Now, with all the dust-arrester testimony, with the insurance agencies all open to them, with Chapman on the stand, with their actuaries in every insurance office in town, with examinations made by everybody from insurance companies to see whether they would take the risk and why they increased the rate on the dust-room, is a witness put upon the stand, but Chapman to show the increase because he uses his own dust-arrester and because he does not put a Vortex or a Cyclone. Now this dust-arrester testimony was only competent, to be perfectly frank and fair about it, if they could show by reason of his sticking to the dust-arrester that the rate of insurance was increased. If it was increased then their argu-

ment would be proper, it would be perfectly so, if it was ruled in
2849 as proper, if the fire risk was increased or the rate of premium was increased, because Backus kept the Backus dust-arrester in when he should put in the Vortex or the Cyclone, but not an insurance man, not Chapman, who examined the property with the utmost care, was asked if the increase of rate would be the same on the dust-arrester building and the shaving-house, if they put in a Vortex or a Cyclone. So you are to let that out of your minds, you must not consider that, unless they show the value of that testimony to be that the rate of premium were increased. Why, this crowd of men who examined it, Chapman who examined the property and who put the increased rate on, put the rate of 8 % on, why insurance men in addition to Chapman, if he did not know, were not called to show the increased rate, not because of the dust-house, because the dust-house is essential and cannot be dispensed with, but that the rate was increased because it was Backus' instead of some other dust-arrester. Think it over. See the value of that. I am taking their testimony; see what you think of it. Now this testimony of the dust-arrester is all pure and sheer humbug, gentlemen of the jury, because it has no legitimacy in this issue, because they don't attempt to show because of this peculiar dust-arrester the rate of insurance is increased. And you know perfectly well that be it a Cyclone dust-arrester or a Vortex dust-arrester or a Backus dust-arrester, that what goes into the dust-room or the shaving-room must come out, that the doors must be opened, and that the actual fire risk is because of the fire falling into the open room which you cannot keep closed. Who says that because of the burlaps the fire risk is increased? What insurance man, what actuary, what examiner for insurance companies goes upon the stand and says that that rate is increased because Backus chooses to stick to the dust-arrester that does his business perfectly? What fire-
2850 insurance agent can they produce—they have not produced any—who will testify that the increased rate is because of the fire risk, is not because of the dust which goes in and must come out from the open doors, that the shavings go in and must come out through open doors and that the exposure is not in the highest place on the Backus building, on the burlaps, but the exposure is because of the open doors of the shaving-room and the dust-room, and that is why the fire rates are increased?

Now we come to Spitzley and Cramer. I call your attention to the value of Spitzley's testimony, an honest man in a small mill, in this case. By his own testimony he has inventoried but 50 machines in all his testimony, and there is over 100, as you can see by the inventory, item by item. Now he is called as to the value of the machinery, and let me call your attention to his testimony. You know perfectly well that you should be offered the best testimony at first hands, and if Jenks is the best witness as to the value of the machines, then Jenks should be put before you for cross-examination, and not Spitzley on second-hand information from Jenks. Jenks is the agent of the Fay machines, while we buy from O. A. Woods, so that we have got before you through this second-hand

method with no ability to cross examine Jenks, his testimony through Spitzley at second hand. Jenks too, is a rival of Woods in the machine business, and who manufactures, according to the testimony, an inferior class of machines, or who represents a firm who does manufacture an inferior class of machines called the Fay machine, not one of which is in our building. I now call your attention to Spitzley's testimony at page 147, and I have figured up his value of his own testimony. "Q. You can have your list, (handing Spitzley Exhibit "1" to witness); let us see what you saw there in that shop in the way of ma-
2851 chinery that you are so familiar with, you could tell its value without inquiring from anybody. You understand that? A. Yes, sir. Q. Without going to anybody and asking the price, that you are familiar with in your own shop? A. We have one large molder and matcher that I know the price of by our own machine. Q. What did you set it down at? A. $470; and then they got a small one, at $130. Q. That you know of yourself? A. Yes, sir; then there was a band-saw filer; we have one also, $75; then there were 17 rip and cross-cut saws which I know the prices of. Q. What did you put those down at? A. Some at $45 and some at $44 apiece. Q. How many at $45? A. There were six of them. Q. How many at the other price that you knew about yourself? A. Eight at $44. Then there was another saw at $44, and there was a gig-saw, $72. Q. Eagan gig-saw? A. I think it was Eagan. I didn't put down the name of that. Q. Patented on one? A. They are all mostly patented. That was a patented one. Q. Was that an Eagan saw you put down? A. I cannot tell. I didn't put the name of that saw down. There is a machine here—three rip-saws and three more of those cross-cut saws of the same price. Q. What is the price? A. $44 and $45; three of them. Q. What else that you were familiar with? A. There was a couple of cut-off saws, some swing cut-off saws, which I know; we were going to put one up. Q. What was the price? A. $50. Q. Did you inquire about that? A. We have to inquire about all machinery. We get a book or price-list from the different factories; we generally get the prices of these machines. Q. Did you look at them? A. Some of them, yes sir. Q. You think you could get at the price what you put it at, the way the books put it down? A. That is what we call the swing cut-off saw. Q. Did you see how it was set up
2852 by the Backuses? A. I seen where it was put up; yes, sir. Q. Didn't you notice that a table was put on there at right angles with the saw frame, 32 feet long? A. They had some long tables there, but they had nothing to do with the machine itself; wooden tables. Q. The table was in connection with the machine? A. Yes, sir. Q. Did you take that into consideration in estimating its value? A. Not in this price; no, sir. Q. Did you, then, in estimating the values take into consideration the cost of setting up and the material for setting up? A. Yes, sir. Q. I understand you did not take into consideration this table? A. Not this long table. There are about four or five wooden tables, which we generally put up ourselves; don't belong to the machines really. Q. Did you

estimate them separately? A. No, sir. Q. Didn't estimate them at all? A. No, sir. Q. Well, go on with whatever you saw there that you knew something of the value of without making an inquiry."

Now we have it here: "Those were all the machines that I knew the prices of without inquiring. Q. And your estimated value of all the machinery in the shop was how much? A. $16,891. Q. And on that estimate, the only articles in the shop of which you had knowledge yourself without making inquiries you have just stated? A. The other machines, except those I stated just now, I had to inquire about. I went to Jenks and got the prices."

Now he didn't take the pains to figure it out with inquiring of Jenks, and it makes just $1,600. Just 10 per cent. of the total valuation that he put upon these machines in view of his own knowledge, and for every other dollar of estimating, without showing Jenks' machines, the agent of the Fay Company, not a machine of whose is in our shop, where we have machines better in every respect, and costing more, the Woods machine. Not Spitz-
2853 ley's knowledge, not his straight word, which would be honest and straight if he knew, but you have the testimony of Jenks, a man familiar with machines, right here within reach of a subpœna, whom we have been unable to cross-examine. Out of a total valuation which he puts upon 50 machines, and of those 50 he puts a value of $16,000, and who got every one of the valuations except $1,600 worth from Jenks. No doubt about it at all. There it is at page 147 of his testimony.

Now let me call attention to another thing in connection with Spitzley. Spitzley was there, and we waited for him days and days in that shop taking that inventory. He was in and out and staying there. He is a planing-mill man. He knows, if any man knows, the need of light. He knows the effect of passing trains upon light. He knows the effect of smoke coming from passing trains upon the light. He knows the effect of cinders upon the finished material. He knows the effect of passing trains in every respect where they do damage. Did they ask Spitzley a word of what he discovered? Their witness, their only planing-mill witness. Now we can all go into a junk shop, or boiler shop, or either a machine shop or planing mill, we who are not experts in the business, and stand with open-mouthed wonder and not take in the details. You can form about as good an idea of the situation there as you can of what the man in the moon is doing. You don't know the way they work the details of it, what this man is doing or that man is doing. You cannot tell the adjustments, you cannot tell the thousand and one things in any shop in which you take a cursory examination. But Spitzley swears this was one of the best-equipped mills he ever saw; that the machines were in perfect adjustment; that the knives were in excellent condition; that it was a first-class mill, and its product was standard for fine material, as he had known it for years.
2854 Spitzley, who goes down there day after day, is not called on the question as to whether the passing of the trains injures the light, whether the smoke goes in there and injures the light,

whether the cinders fall upon the timber and spoil it, whether the timber is made culls by the falling of soot upon it; whether the lumber is made culls by defects in the knives by reason of cinders nicking them; whether the light is such that it does not interfere with the testing of the product as it comes from the machine. All these things we go into in full detail by disinterested planing-mill men, and Spitzley is not called who is there to observe. Again, we put on a great many disinterested planing-mill men to show the mill has been darkened by the passing of trains. Planing-mill men have been called, and this was one of the great items of damage. No one has been refused access to the mill. They go to Saginaw and they bring the employés of the Flint & Pere Marquette railroad to show how planing mills are in Saginaw valley. They testify as to the passing of trains on railroad tracks by planing mills, but have they brought a single man down from Saginaw to show that cinders and soot do not damage the lumber, or to contradict our planing-mill men? They have not brought planing-mill men, but they have brought the employés of the Flint & Pere Marquette Railroad Co., who have never gone inside of a planing mill. One man actually testified and would have left you to believe if he had not been cross-examined, that a railroad runs through the planing mills there, but he retreated from that. But we have established in this case by disinterested testimony that this thing going by there has made it impracticable to carry on the planing-mill business where the smoke flew, where the cinders came, and where the light was obstructed by the passing of trains, and they never brought a single planing-mill man here to contradict that, and never asked Spitzley a question, neither did they ever send
2855 a man in there to observe and tell whether our witnesses told the truth or not. I am not appealing to your sentiment. I am talking about testimony, and it is a rule of law that in the absence of testimony within reach of a party, shall be taken against him. The fact that he does not produce the best testimony within his reach shall be taken against him. They have sent Spitzley and Finn and Kramer; why, knowing our whole case upon this alleged injury from our expert planing-mill men, sneering at it, laughing at it, condemning it, challenging it by the mouths of counsel, why have they not had a man go in there to ask leave of Backus, if they thought leave was necessary, and it has never been denied them, to observe whether these things did occur, and whether it be true, what Robison and Thompson and all the testimony of the witnesses who were planing-mill men testified to, whether they are right or wrong as to whether this business can be carried on there with this elevator and superstructure there? Expert men who know. Will some of you look in the face of others when you go inside the jury-room and ask of them why, if the testimony of these planing-mill men is to be challenged, they did not ask the question of Spitzley, who is a planing-mill man, and who spent days down there. They only called railroad men as to the appearance of a planing mill on the outside. Now, Spitzley and Kramer and Finn, Mr. Kramer's testimony is before you, and the inventories show

what he has omitted. There isn't any great difference except on the omissions of Spitzley and Kramer. There is no difference with Finn.

And the next witness called was Hill. You remember his testimony, which was merely to show that while the Michigan Central paid on the face of things $3,000 a foot for some land belonging to the Detroit, Lansing & Northern, he was called to show that
2856 was a sort of fixed up, and it didn't truly represent the value of the land. And the next testimony they called was in rebuttal, and wholly in rebuttal, after all our witnesses had been called, and all their Saginaw witnesses, their lawyer, claim agent, the track superintendent, all employés of the Flint & Pere Marquette, who pass over this railroad and who are connected with this union depot company. And they say the testimony is to show nothing more nor less than that a locomotive passing by a lumber yard will not set fires. Hascall (Hatswell) has got a patent. He says that the Pennsylvania road have tried 561 times different things to stop the fire, and they are still trying. He is called to show they have a machine that will stop fire. His machine is a success to a certain degree, but bear in mind these machines have been upon these roads for ten years and the cars still come in this depot loaded with cinders. The cinders still get into the passenger cars to the amount of half a pint on a car clear down four hundred feet away from the engine. Cinders do still fall. And Mr. Sutherland says the thing has not been invented that will stop fire, that fire will fly, and fly 200 feet away to the side. But over and above all this, while this testimony is going on, his pet engine, engine No. 24 of the Flint & Pere Marquette, fully equipped with these devices, goes by on this elevated road and throws cinders and fire until it rattles on the hats of people who go by. It reminds me of the story of the man who said that a balloon filled with certain kinds of gas would not go up. The balloon was up all the time. The balloon sailed away and was lost at sea. He says it can't go up, but the balloon had gone up. They said that locomotives would not set fire along the side of the track, but my old friend Stewart, who had a flour and feed store down there, not on the line of the track at all, but 107 feet away from it on River street, was burned up, body and britches, hat
2857 and boots, with all his stock by fire from the union depot engines on this trestle-work. It did burn. It did set it afire. Theorize as much with your patentees as much as you please. Theorize as much as you please as to the running of engines by lumber piles; it did burn Daniel Stewart's place of business 107 feet away. Theorize as much as you please, it did burn within 48 hours the stove-works property by cinders thrown upon its roof, and set it afire for the second time. Theorize as much as you please; it did burn, and does burn, according to Knapp, the inspector of lumber down there, the lumber though it is 100 feet away. Theorize as much as you please; it did set fire, it has set four fires in that lumber yard, watched as it is by night and day by watchmen which they are compelled to keep by reason of the passage of

these trains. Theorize as much as you please, the locomotives do throw fire and set fire, and you know it. So much for the Saginaw witnesses.

Again, upon negative testimony. We have had these men from the Saginaw valley; but have you seen a man along River street, a railroad man or engineer on that elevated road, I don't care what he is, whether he is a resident on River street, in the pay of the railroad, or friendly *friendly* to the railroad or whatever he is, whether he runs upon locomotives, whether he is a brakeman on the line of trains that run on that elevated structure, or whatever he is—have you seen a single man who knows the fact, who runs along the line, who lives on it, who passes up and down there, railroad man or citizen, storekeeper or saloon-keeper—have they put a man on the stand who has testified they don't throw cinders from the locomotives on this elevated structure, precisely as the Backuses say they do? What do we need of witnesses from Saginaw? The question is not whether they set fires running on the ground
2858 back in the interior of the State on a level grade—the question in these large cities, with hundreds of witnesses, yea, with thousands of witnesses, to the passage of these trains day after day, is there a man called to testify that they do not throw sparks down from this elevated structure as they pass along? Where is the witness? Are they as accessible as Saginaw witnesses? Is there an engineer who will come on this stand from one of the union depot company's locomotives and say that his engine does not pour sparks and cinders and black smoke as they come up that grade? Maybe they are not as accessible as the Saginaw witnesses. Is there any doubt about it? I am commenting on their testimony in the absence of testimony. Men who have been through the tri-l before, know what they have to meet, come here to theorize from Saginaw that locomotives don't throw sparks and cinders and black smoke over Backus' property; where are your engineers and your firemen and your trackmen, who will testify that they don't throw cinders and black smoke over Backus' property as they come up that grade? Where is your answer to such a man as James Dwyer? Is he a liar and a perjurer? A man who modestly comes here and says he had rather give them $10,000 in addition to the damage they have received than had that street closed up, that cinders poured upon him, that smoke came in upon him, and that the Backus property, in his opinion, was ruined as a manufacturing site. Call an engineer, call one, call a fireman who will testify that he can keep his fire-box closed and not throw out smoke when he pulls a load up that grade. Think of it. Think of it in connection with the sneers thrown upon Backus' testimony and of the witnesses who have not a particle of interest, who have testified to these things. Think of it also in connection with the testimony of Dwyer and Henkel, because the wind does not blow sparks from the Michigan Central, from the northeast, when the pre-
2859 vailing winds are from the south in the summer time according to Dwyer and Henkel and the other witnesses, that this superstructure has practically destroyed the front on River street.

Haven't they a single witness that they can trust along that entire line of River street, railroad men or whatever, that that street is still used, or that their old viaduct is used? Is there a man to answer that class of testimony which is to the effect that River street is practically closed, and that we are practically without a front on any street? Dwyer says that his front is closed, that the street is no longer used, and that his customers no longer come down there and ship from there. Dwyer swears that Backus' front is destroyed. Henkel swears that Backus' front is destroyed. The witnesses all swear that the front on River street is destroyed for street purposes, and is no longer used. Can't they find a man who lives down there or does business down there, or walks up and down that street to testify that this street is still used? It is important. We claim that our retail trade is driven away from there. That it used to be very good, worth from two to four thousand dollars a year; that it is practically driven away, because the people won't come down there and trade, purchase this imperfect lumber, and we have it stacked up in the storehouse because we can't sell it as we used to sell it. Can't they find somebody down there who did business there or lived there and knew the people could come under there to swear that it is not practically closed? Why, gentlemen of the jury, it may be true that where a line of elevated road, if it is a light passenger service, passenger trains as on the New York elevated structures, passes along, the hor-es get accustomed to it; horses are accustomed to it from day to day, day in and day out, and they may get so they will not run away, or man may get accustomed to it, but he does not get accustomed to it in
2860 going three or four blocks and because he is there so seldom. The horses do not have occasion to become accustomed to this elevated structure. So, if it is not practically destroyed, some resident, some business man, some man who was familiar with the locality, some Michigan Central man, somebody could have been called to say that this is nonsense, that this street is used as it was before, horses do not run away. People can just as well come down there as before, they do come; there is nothing in this part of the case. But they have brought no such witnesses.

Gentlemen, I have finished the list of witnesses on the other side and have called your attention to every one of them. I have also called your attention to the absence of testimony within their reach on the insurance and on damages. I have called your marked attention to the fact that these people who know what these things are, are not called, and that people who do not know what this thing does and are called, and from a remote distance. I have called your attention to the fact that within their reach are men who carry on the planing-mill business and know the effect of this thing upon it, who would be frank and disinterested, and they are not called. I have gone over with you name by name, except the body of Saginaw witnesses, that were called for one purpose, and have finished the examination of their testimony, and the court is to tell you, and you must find your verdict according to the testimony produced before you.

I now take up the defendant's witnesses, and we have endeavored in this matter, gentlemen of the jury, to give you men who are not interested particularly except so far as is necessary when we called our own employees; we have called men who have good standing in the community, mostly men who are known to you, men in good standing, not interested, but competitors of ours in the business, and we have selected them and subpenaed them with
2861 considerable care in presenting to you the truth upon the issues before us. We challenge your attention to the character of the witnesses we have called indiscriminately. Men engaged in the business as competitors of our own and from personal observation, going down there and examining the mill as to what effect this thing has upon the business. We have also added the testimony of our employees as to whether they are troubled, as alleged by the witnesses on behalf of the Backuses, by these cinders and by the smoke and the darkening of the mill by the passing trains and smoke of passing trains. We have called these witnesses, and I submit to you there is not one of them that can be impeached successfully. That they stand up under cross-examination and tell you the reason of their testimony and the whys and wherefores, so that their testimony must be taken as the truth, especially must it be so taken when they are not impeached in any way, when non-interest is shown, and above all, when within the reach of our friends may have witnesses to contradict them, if they are mistaken as to the effect of these things upon the property, and when those men who do contradict them are not called, when they are within reach.

In the first place, in order that you should know, not from one day's observation, but taking one day with another for a month or two, just what was done on that mill by the passing of the trains, at my suggestion as appears by the testimony, a disinterested man, a friend of Backus, but who was unoccupied at the time, as it happened, was asked to take observations of the passing trains, and the effect of smoke and cinders upon the Backueses, and these various things did damage to the mill. And we call those special observers who observed through the months of September and October and give you a table. We give you Mr. Griswold,
2862 Mr. Roach and assistant, Walter H. Youngs, another assistant, and William B. Knapp, upon a question of whether during those two months, how many trains passed, whether they threw smoke or cinders, whether the cinders did go upon the dressed lumber, whether the cinders did get upon the coarse lumber, whether the smoke did come in and darken the mill, whether the fire-boxes were left open, whether in going up that grade they puffed and threw dense volumes of smoke, and all the rest of it. Daily observations. From day to day. By reputed witnesses and continuously, when one was not there the other was, so that they could tell you accurately for two months. That list will be handed to you as testified to, carefully prepared from the daily journals, a summary of it day after day, to the effect that day after day, take it one day with another, some days not so bad, some days not

hardly perceptible, but the great majority of days threw black smoke into that mill, so that it darkened the works and the men had to stop. That it threw cinders in upon the dressed lumber as it was in process of transshipment and ruined it. That it threw fire at night. That they switched out there at night, and while upon that let me call your attention to this. It is true that pending this hearing or up to now, if you please, they do not do switching right in front of Backus' except they switch and make up trains at night, but the switches are there, and the condemnation is for all purposes, enabling them to switch there; there is no agreement they shall not switch there from early morning until dewy eve in the daytime. They have the right to do switching right there in front of Backus' on these double switches. Do you suppose after this trial is finished, they will not use their switches to the top of their bent? They did some in September, not at all in October except at night. What if they did not? They can do it,
2863 and you are here to give us damages as if they did it, if they can do it. The switches are there to be used. They are condemning the right to use switches in front of there every day as well as every night, and when the trial is over, and it is convenient to their business, don't you suppose they will stand their cars on this track and keep them there to suit their sweet will, if they condemn the right to do it, and you give us damages for what they may do or have the power to do? That is what they are asking for. Not to switch alone at night, but the privilege to stand and switch in front of Backus' mill every hour in 24 if they saw fit.

Those observers then were put there, and was it not reasonable and proper for us to show you how it was for two months? It was not improper for us to give you this testimony. It was our duty to give you the best, and not take hearsay observations, but the accurate daily journal of disinterested witnesses. It was our duty to put them in, and challenge the attention of the other side to them, and let them contradict it if they can with their engineers and firemen. The testimony is in unchallenged and undisputed, of Mr. Griswold and these witnesses as to the effect of the passing of these trains. Now, we called Knapp—we called upon Mr. Baker in the meantime, for the admission of the grade in front of the Backus mill, and he admits at page 300 that the grade there is 20 feet to the mile, and up to River street it is fifty-two and a half feet to the mile. The average length of a train according to Sutherland is from eight to ten cars, some longer, some shorter, of from 40 to 70 feet in length. Some of the big sleepers are 70 feet in length, making a train of eight cars say 480 feet long, or of ten cars, 600 feet long, and these cars coming up in front of Backus' mill on a 20-foot grade would be pulling the tail end of the train up the fifty-two and a half foot grade, and the testimony of all the witnesses
2864 is that if an engine or locomotive is loaded and coming up a grade, it belches great quantities of black smoke. It must exhaust and does exhaust, and throws cinders and soot, and there is the Backus property over which it sends its cinders and soot.

There is no grade in front of the stove works. None whatever. No grade in front of the match factory, or any other business property there, and no switches. Bear that in mind. This is peculiar to the Backus property. Here are switches in front; here is a grade of 20 feet to the mile in front of it up which a loaded train must travel, and here is a grade, 400 feet away, of fifty-two and a half feet to the mile, up which the trains travel and get in front of the Backus property.

Knapp is the lumber inspector at the lumber yard. He says the cinders are upon the lumber down there, and they extend to 150 feet away on the lumber pile. A great many are on the lumber piles 150 feet away. They permeate the piles of lumber in that vicinity. At 40 feet away he found the lumber burned by cinders, and charred in through the lumber. He says that in an open car coming in on the Flint & Pere Marquette he has taken a quart of cinders out, that they throw the same kind of cinders now that they always did, and Knapp is back and forth at that mill day after day, in there and out, and he swears that the smoke comes into that mill and darkens it, and he says that the cinders come down upon the dressed lumber and spoil it, that the cinders do get upon the lumber and they find it in the knives, and it nicks the knives. That they never had any trouble with nicks in the knives before this elevated structure was built, and Knapp has been with them for 15 years. Friend Robison says it must come from the Michigan Central. If you will observe, on the Michigan Central side there is a high sheet-iron shield in the first place, and in the next place the prevailing winds in the summer time, when the windows
2865 are open and there is any exposure, are from the south and southwest. And furthermore, the trains run below the grade of the mill. They are not upon an elevation throwing cinders and sparks down by the natural law of gravitation, but they throw them from a smokestack the engine of which is below the grade of the mill, and if they blow them in the direction of the mill they fly against the sheet-iron shield, both those sheds. The outside of them, if you observe, is of corrugated or sheet iron. At all events, Knapp testifies they never had cinders or smoke from those engines, and never were troubled in this way before the elevated structure came by there.

Peter Henkel. Well, a pretty respectable citizen ordinarily until Robison got after him. No one ever dreamed that Peter Henkel would tell a wrong story for anybody or was very much of a crank, but a pretty solid, substantial citizen. He is long known here as an enterprising man who has added to the growth and wealth of the town, built a handsome business place, doing business in a building he is not ashamed of, a handsome building architecturally. Now they are sneering at Peter Henkel. He says this thing along River street amounts to a confiscation of the Backus property. Is not that right? It confirms and corroborates the testimony of Dwyer that this is so. He has a front on River street and it is absolutely destroyed, it is their only front. The stove works have a front on Fort street, but the Backus front, with all their light,

comes from their River Street front. It is built for that. And Henkel says he esteems that plant for manufacturing purposes, that site as it was before that elevated road, as worth $100,000 or over. A pretty good judge. Do you think he is going to lie for Backus? Has he any prejudices? Where does his prejudice come in? He says the Wabash throws cinders on his yard. Southeasterly
2866 winds will blow cinders there. And he is a crank because he says the Michigan Central did not do it, and the Wabash does do it, running in front of him. Now, Henkel goes into the mill and looks over and observes it as he should do before coming here and giving in his testimony, and he swears of his own knowledge. I have seen the smoke darken that mill and I saw where the cinders had spoiled fine lumber. Are you going to set aside Henkel's testimony. If it is destroying fine lumber, it is doing what Backus says in ruining his trade. And if the smoke comes in there and interferes with the light, it is destroying his trade. If these things be true, then the testimony of the planing-mill men, of Thompson and Dupont and De Mann, is no longer fit, as they swear from personal observation, for planing-mill sites, and that they would not build it, they would not take it as a gift if they were compelled to put a planing mill upon it, and they all swear that the Backus mill is the most successful in the town in the trade, and doing the most perfect work and doing it the most economically. Now, they do testify to that. They would not build a mill there. They would not have a mill there. They would not put an investment in a mill there. He says that he would not buy that property for any fine manufacturing business. He has been there and looked it over and observed it. One of the jurors asked the question if Backus could not take the estimated value of the property and from the returns buy another site, if he could not do as well on another site. The question is not what he can do on another site, the question is, what damage to him is the plant, according to the decision of the supreme court, the injury to his business? Now, if it be true, gentlemen of the jury, that this thing damages him 50 per cent., if he cannot carry on the planing-mill business there, if no plan-
ing-mill men would buy a planing-mill equipment or buy
2867 it for a manufacturing site, if the value is injured, Backus must get his investment out of it before he can buy another site, and his investment is there with which he could buy another site, but how is he going to get it. If it has depreciated in value, as the witnesses all testify, if it is unsalable, how can he get his money out of it, how is he going to get his money to buy another site? True, if the elevated road ever made a proposition or suggestion that they would buy another site equally as good as upon this street, then we would say, let us move and take our old property. That would be another thing. But what are we to do? Are you to take into consideration the fact that we might get another site when our whole investment is there, amounting to the sum which Backus says, or the witnesses say it amounts to, when the witnesses testify that it is so impaired in value that it won't sell? Where shall we get our money to buy another site so that

we may move? Are we bound to move at all? Are you not bound, Mr. Union Depot Company, if you stop our planing-mill business, according to this constitution of ours and these decisions of the supreme court of our State to pay us every dollar of damages that you do to our property, and if you stop our planing-mill business, pay us for it, and we will sell to some railroad or something else at the depreciated value, if you pay us the difference. Under these decisions and under the constitution of the State to which you are sworn to uphold, you cannot permit us to be damaged in one dollar or you fail in your duty. And if these witnesses testified truly, our property is not worth what it was and our business is gone. They say that Mr. Backus would not tell what his earnings —, that he was losing money there. A concern which has carried its credit high since 1873, and proud of it, doing the business of this magnitude and investing in lumber, and working along as best
2868 they can in the hopes that something might happen that they might find a way out, when their credit stands A1 in these depressed times, when credit is crying for money, when credit everywhere is at its lowest ebb, when men are on the verge of bankruptcy, during these depressed days and long-pending legislation, when men are trying their best, with despair in their hearts, when men are paying nothing of their debts and men have nothing to pay, when bank credits are withheld, shall Backus come upon the stand and swear that he is doing a bankrupt business, that he is going into bankruptcy and has made losses, that his business is no longer successful? He says it is a losing business. That he cannot make anything there. He tells you that the fine work out of which the profits came cannot be done there. He tells you, and disinterested witnesses tell you, that the fine work that he previously did and which sold at the largest profits, is turned into culls by soot and mars from the knives, and sells for culls instead of first-class material. Do you want more testimony as to the unsuccessful character of the business? Do you want him to swear that he is doing business at a loss day after day, when he tells you that his business consisted of his finest work on which were the largest profits, and his box factory was only to work up the odds and ends, that he was economizing and working up everything that he could, that could be turned into money, and his profit was in the fine work which he no longer does because he can't do it. And Henkel says that the rental value of that property, observing it as he has, being in and out there, has decreased at least one-half.

Now, George W. Robinson, who is a planing-mill man and knows the Backus mill, says that it is a perfect mill, that the situation is the most eligible that he knows of, that it is the best mill he ever saw, before this superstructure was put up. That it was first class in
2869 every respect, that the goods of Backus were standard. He says furthermore that competition is very sharp and that success in that business depends upon the great volume done and upon the strictest economy in utilizing everything, otherwise it is a losing instead of a paying business. And that small defects, faults, marks, discolorations, makes of good lumber culls, and that

culls can only be sold for what the consignee will give for them. That they are a loss although the actual utility of them in the working of them is not destroyed, they could be used for the purpose they are designed for, yet because they have the marks or flaws on them their values for this fancy work is destroyed and they must be sold as culls. I can illustrate that: You go into a shoe shop to buy a pair of shoes, will you take a pair that is scratched or has one single spot upon it. You don't want it, you don't want shop-worn articles, although a little scratch will not interfere with its utility. You go into a furniture store and will you take a chair that has a scratch on the varnish? You won't take a chair with a knot-hole in it, although it will sit just as well, but you won't buy it will you? You won't have it. Although you have the utility of the article perfectly, you won't see it if you see a defect in it, as, for instance, the molding around the support here if it is out of proportion to the other, if it strikes the eye, you won't have that chair although perhaps you can buy it at 50 per cent. discount; you will not buy it although you can get it much cheaper; you will always be ashamed of it. And it is so with everything. Speaking of competition, there is one house, that of Macey & Co., that sells twenty-five, yes, thirty millions of goods a year, and do you know what profits they make? One-fourth of one per cent. on their goods, and yet they make money even at a quarter of one per cent. Thirty millions a year—it may be fifty millions, and
2870 the most successful business in New York with a quarter of one per cent. profit. Now, you let a stream of water trickle down on the goods, make one spot on the handkerchiefs, or discoloration upon anything, and those articles on which they make one-quarter of one per cent. profit will become 50 per cent. loss at once, and that which was a paying concern becomes a dead failure, because the profit is so narrow that you cannot afford to have the slightest discount from your standard of values. You cannot afford it. Your profit being narrow, in this planing-mill business, as for instance it may be one per cent., it is very small at all events, two and a half per cent. on many things and depends upon the immense volume of business. If it is two and a half per cent. profit and you get a flaw upon an article which you would sell at only two and a half per cent. over cost, and you have instead of your two and a half per cent. profit on that business, you have a loss of 50 or 75 per cent. How long does it take to make that a bankrupt concern instead of a successful one? That is the way it works, and that is just the way it works with Mr. Backus with a capacity in his mill of 300,000 feet a day. Compare it with the Spitzley mill. Spitzley's mill is something like 30,000 a week. Backus' mill has a capacity of 30,000 feet a day and how long will it take from the moment it begins to work so that he loses by reason of becoming culls 50 per cent. on one thousand, 50 per cent. on another thousand or 5 per cent. upon another thousand, where is his two and a half profit gone? So that business which makes at a small profit, his rent, if you please, of $18,000, and his $16,000 besides, net $34,000, and they were his figures, the mill which does that in one

year on two and a half per cent. profit might the next year on 50 per cent. loss with the same expenses, as the expenses are the same whether it is run at a profit or a loss, wipe out his profits for years.

Mr. Robinson testifies that he would not take the site
2871 as a gift on the condition that I should build a planing mill there. And I will read his testimony briefly at page 360. You remember Robinson's testimony and I do not believe a man of you will believe that Robinson would, for the sake of a friend, much less a competitor, try to mislead the jury, and he is an expert planing-mill man and knows the business, and deals in the finished product. If he is not in the active business, he knows the goods when he sees it and knows how it is made. I will read from page 359. "Q. A think that has a small defect in it, it does not hurt the surface of the goods, the actual utility of the goods, but does it not take off a percentage of from 25 to 50 per cent. in the salable market value? A. Yes, sir. Q. Although the utility of it may not be injured by the blemish? A. It may be perfectly good for painted work when it is not good for oil finish. The greater part of good material is used for oil finish today. Q. Have you any interest in the Backus matter? A. Not a cent. Q. Have you seen the workings of this superstructure, and the railroad going up there? A. Yes. I have seen them. Q. In your judgment does it affect the mill for the purpose for which it was carried on prior to the building of the superstructure and these railroads running by there upon this trestle? A. If it was my own individual matter, I feel confident that I would try to move out. Q. You would not attempt to carry on that kind of business that Mr. Backus had carried on there? A. I would not unless really compelled to. I would not with a view of thinking that there was or there could possibly be a profit in conducting a business hampered by the railroad as that is at present. Q. Now, as a planing-mill man, engaged in planing-mill business, or in this fine wood-work, such as is carried on there, would you, in looking for a site for the purpose of building a planing mill

to compete with your brethren in that kind of business in
2872 the markets of the United States, erect a mill on this place, on this superstructure? A. No, sir. Q. If this were given to you, if you could have the property or the site there and desired to erect a planing mill, would you take it if you were compelled to build a planing mill upon it? A. No, sir, I would not. Q. To do this fine work such as they do there? A. No, sir, I would not. Q. How was it before this structure was put up there? A. As far as I could see there was not anything to hinder them from doing a profitable business. The docks were not away so far but what they could haul at a reasonable expense, and the street was open so that customers could come in and get what they might wish, and people would have access to the mill, whereas at present all those advantages, except the nearness of the dock, are done away with, and I think if I were wanting to buy any lumber I would not drive around on the River road underneath that structure, nor undertake to go and see a man or firm, no matter how much I would wish to deal with them. I would not go in there to purchase lumber, that

is annoying in a great many respects, and particularly to a person going in there; it is almost impossible to hear a conversation when the trains are passing. An ordinary tone of voice cannot be heard in the confusion. Q. You have observed the smoke, and the pouring of the smoke down in the windows there at times from the passing trains? A. In cloudy weather on a great many days the smoke falls; it not only falls but it makes it cloudy and dark. Q. What have you to say as to the need of light in this fine planing-mill business? A. In order to do good work you must have good light. Q. Is it an absolute essential? A. It is absolutely necessary. You must have light or you can't do your work right in a planing mill. Q. In this case of light and steady light, are they not, in setting the gauges, liable to make a mistake and make these flaws in the work? A. They
2873 are, and a machine may get out of order, as a machine will occasionally in running, and if the light is not good enough to detect it, quite a quantity of lumber may be destroyed before it is observed. Q. That is, make these blemishes to which you have referred? A. Yes, sir, a machine may get out of its proper gauge a very little or may be off the center or from anything that may be on a piece of board, there may be a chip, and if it is dark that may not be observed until several boards or pieces may be run through the machine, and just as many of those as are run through with that flaw in the planing-machine knife are spoiled and they must be sent back and made into something else or thrown away. It may be such a class of lumber or moldings that cannot well be made over and they are culls instead of first class in such a case. Q. Well, the moment there is any considerable quantity of that, with the narrowness of margins and the competition in the trade I suppose it takes off the profits and makes it a losing instead of a paying business? A. It takes but a short while to take the profit off from 1,000 feet of lumber. Q. And make out of a large business a losing one instead of a paying business? Relatively, what is the proportion of profit made in molding as compared with other coarser lumber, correct and perfect molding? A. Well, the percentage is much higher. I can hardly say what would be a correct estimate. I will say this, that that is where the profits of a business of that kind come in, where a large part of the profits come in, as in the manufacturing of those moldings and fine work. It is not in the coarser lumber. Q. Running the ordinary business of a planing mill, without this additional instance of fine work in molding, is there any profit now in the condition of trade? A. It is so very small we can hardly discern it. Q. But in making fine work, I suppose, there are other pieces that come off that are used
2874 for culls or in coarser business? A. Yes, that is correct. We may, if we have proper machinery, and proper facilities, and what might be quite a common board, or even what we term a cull board, we may take from one side of it a piece that would be worth more than the entire board when it was manufactured into a piece of molding or casing that would sell at a higher price."

Then he goes on and tells how the cinders come in on the cars.

The invariable rule is to clean off the cinders. There is hardly a car that comes in but what has cinders on it. He says that these machines are worth far more than new ones. He says the cost of the equipment should be added to the value of its cost. He states his own estimate of the valuation before the railroad came there at $450 per foot because of the admirable location, its relations to the Michigan Central, the extent of its frontage, its two ground floors, and its nearness to the business center for trade.

Now, E. L. Thompson. He is now actively engaged in the planing-mill business, having the next largest planing mill to Backus' in the country, and does all kinds of fine work, including sash, doors and blinds. He says light is not only a convenience but essential, and he says ample light, there must be no restriction of the light. He says any nick in the knives will make the product unmarketable. Again at page 386 he states that any defect upon this fine inside work makes of the lumber culls and will not sell for half and may not for 25 per cent. He says he would not have this site at all, that the impairment in his opinion is 40 per cent., and that is sufficient to ruin the business entirely.

Now, Geo. Sutherland, on the question of cinders. A Michigan Central man who has been with them 44 years. He has examined in that time the Flint & Pere Marquette cars and the De-
2875 troit, Lansing & Northern cars, as they came in there prior to their going to this depot. He says there are cinders on all closed cars, half a pint on each, they will average. All locomotives have devices for arresting cinders, yet they have never done it.

Now, we come to the men in the mill. You remember Kronbach, the foreman below. Kronbach swears that cinders come in there, get on the lumber, get in the machines and nicks the knives. And he is the foreman. What are you going to do with it. Set it aside? He says that soot does get on the finished lumber, passing trains, and spoils it. And he is the foreman. He says that the bad light caused by the passing trains on very bright days makes their light bad. It is owing to the condition of the atmosphere, but these passing locomotives throwing large volumes of smoke makes the light so they cannot see. It is the passing trains that interferes with the light more than anything else, although you can see that the structure does itself interfere with the light of the lower story. He tells the jury of the care and fine adjustment necessary to run those machines, and to keep them adjusted, and the necessity of light therefor. He says further, that he had charge of the retail trade there and that trade is destroyed. That it did come there, I don't care whether it is a whim, or whatever it is, the trade did come there, and it is gone, and the trade on that class of goods was worth from three to four thousand dollars a year. And it is gone because the people will not come down by this elevated structure. That testimony is corroborated with other disinterested testimony, by the obstruction of that street as a front, or a street for the passage and repassage of teams. They do not come there any more. I read in a New York paper of yesterday—to illustrate how trade may be taken away—as an explanation of the failure of a man over in

Newark, N. J. The building of a public building in Newark,
2876 such as we are erecting here, had necessitated the occupation of the street, and this man had a fancy dry goods store to which ladies went, and the Government were building this structure for two or three years, just as we are building the Detroit post-office, and he had carried his business through these two years, and then this depressed season came on and he failed, and it is ascribed to the fact that the lady customers would not go there and pass over that debris of a great Government building going up there. I don't care what it is if the trade don't come there, and if it is driven away, the cause of it is responsible. And this trade does not go there, and this superstructure has driven it away? How would you like, any of you, to have a superstructure in front of your house. Take it home to yourselves. Or in front of your place of business, a superstructure. Not a passenger train, not a passenger elevated road, but a great thundering trunk-line road that switches, and with a steep grade, with the puffing, exhausting and the rolling of the engines running by, carrying great stones or great machinery, running by your door, with the most powerful trunk-line locomotive built, running by your door and exhausting, how would you like it. Put yourself in our place, neighbors. A jury of neighbors. How would you like its effect on your business, if you have one, grocery business, or a shore business, I don't care what it is, if you have anything to sell, let it run by your place only for three blocks, and see if you would like its effect on your trade. Take it home to yourselves. That is the proper rule. Just think how you would like it. You know it affects trade, and the trade came down to River street, they will not go under that superstructure, they will go somewhere else, and the amount of that trade stands uncontradicted at a minimum of $2,000 a year. That is lost. Christopher Kraus, another witness to the same effect as Kronbach, that the cinders never did get into the knives
2877 before the elevated road, that the smoke did not get in and darken the rooms before the elevated road, that the shade from the passing trains did not exist to obstruct the light before the elevated road, that a large retail trade was there before the elevated road was built, and that the fine lumber never was affected by soot before the elevated road. Burean was the engineer. I will not comment upon his testimony except to say he testifies that smoke and cinders came in the engine-room door, and that he has been burned by cinders coming from the engines from the elevated road. He has seen the smoke settle down and sweep into the mill over and over again. If it is not so, that which all this cloud of witnesses have testified to, and you are to give a verdict according to the testimony, if it is not so, where is the engineer who will come here, who passes over that structure, and tell you that he does not come up that grade throwing a great cloud of smoke into that place? Where is the engineer that will tell you that with a south wind, or no wind, he does not throw fire and cinders in there as Mr. Sutherland testifies? Where is the fireman that will so testify? And Standley, a foreman in the cutting-up department. It was

through Standley's statement that the light was so affected by the passing of trains and the smoke coming into the mill, that the men could not see the chip or the defect referred to by Robinson which I have read. He swears that the light is so defective that these things occur, that they do not notice the defects in the thicknesses of the two boards that should go together from the rip-saw and through the planing mill. He testifies that the smoke and cinders do come in on the finished lumber in course of transit to the storehouse. He testifies that the smoke and soot comes in there and darkens the rooms where they work so that they cannot see the defects. He says that 2,000 feet a week of this fine planing-
2878 mill work has been thrown out and become waste from this cause alone. 2,000 feet a week that could be sold at two and a half per cent. profit, sold and become a waste, with the same amount of labor put upon them that is required to be put on a piece of work to make two and a half per cent. profit and becomes 50 or 60 or 75 per cent. loss. And Sontag was a mill hand, a planer, the German, you remember, whom we had some difficulty in making understand the questions. He swore to the smoke and cinders coming in.

James Dwyer, I have commented upon. He says that the street was formerly used as one of their fronts, that customers came there, and that since this structure was built no customers purchase on that side. That the structure was, or, to use his own language, "Since that structure has been put there we have not used it at all. That is, we do not drive out that way with our goods, nor do our customers come for goods in that way." This structure has caused a discontinuance of the street. That the Backus' only front is River street for their factory. If the street facilities are destroyed, the testimony of Mr. Kronbach, the foreman, is entirely corroborated that his custom-work at the mill is gone. Something has been said about whether this custom-work has been carried up to the storehouse, but the storehouse has been in operation ever since the fire of 1882, and this custom at the mill on River street under the charge of the foreman, has been going on concurrently with the custom at the storehouse since 1882, and it existed to the amount of $2,000 to $4,000 a year profit up to the time of the building of the superstructure, and there can be no manner of doubt, unless this foreman is a liar, and A. Backus in his old age has got to be a liar, and Henry Backus has become crazy or a liar, but what this trade has gone. They all swear to it. I will allude to Backus now. You saw him upon the stand. If there was anything he did not know
2879 about, he would not swear to it to save his case or to save his mill. Now, Mr. Baker never cross-examined him, but sneered at him, and the intimation was from Mr. Baker that this question of rent was fictitious, that Backus did not get it, and so he asked him. Well, Mr. Backus, you haven't drawn all your rent. No, no; I have not. Well, how much have you drawn? Well, I don't know. Well, haven't drawn much of it. Drawn what I wanted. Can you tell how much you have drawn? No, sir. Well, give us

some idea. I can't. Well, now, why could not he say, if he was preparing his testimony, that he had drawn pretty nearly all of it. You could not get him to swear to it, because he didn't know, he hadn't looked at the books to see. There was no call for the books, and it turned out, gentlemen of the jury, and the impression rested upon your minds—I looked in your faces and saw it—you thought that was a fictitious thing, and he hadn't had his rents, and there was talk of his manufacturing testimony. That was the impression in your mind as Backus sat there and did not answer. He could not be made to answer something that he didn't know; when it turns out on the examination of the books by the book-keeper from actual testimony that he has drawn all but two years, and he has let that in, about $36,000, about the period covered by the erection of this obstruction. That he has not taken out. There is about $50,000 credit, and only that. The last rent credited to him the 1st of September, credited to him every year. That the total to his credit was $50,000, of which about $16,000 had been credited to him for lumber from his mill upon the Lake Shore. Now, Mr. Dwyer says, that his light is obstructed seriously, and that smoke and cinders pour upon him there and come in his nickel-plating room.

He says that Mr. Backus' property is not desirable for manu-
2880 facturing purposes now. That it was very desirable before, and was worth $350 per foot because of its relative situation, the size of it, and its railroad connections. He says this over and over again on cross-examination and on direct examination, and there is no doubt about it.

Now we come to Daniel Stewart. He says that street is closed up and ruined, that it is no longer used under there. That it is destroyed. Now, these men say that this valuable piece of property, built with reference to a street with light upon it, with the use of a street that has a whole front that that street is destroyed. They bring that out. I did not. I proved by Stewart that these trains as they pass throw smoke and cinders upon the buildings, corroborating the testimony of these planing-mill men, and they cross-examine Stewart, and they find that the railroad passes about seven feet away from the corner, that there are two lots between him and the corner, making him 107 feet away from the railroad; they cross-examined him as to what he knows about throwing cinders and smoke. Well, he says, they threw fire on my place and burned up my store where I have been thirty years, and burned my stock of grain, of flour and feed, making it a total loss. So he happens to know it does throw fire, and they brought it out. Now, we call in addition to these planing-mill men that I have been over, Mr. De Mann. We have called before you, gentlemen of the jury, every planing-mill man we could get our hands on, every one of them. When we found there were two others that we would call, and these were Huyett and De Mann. And De Mann gives practically the testimony that Robinson and the other planing-mill men give. No interest in it, but a practical planing-mill man, and he testifies as to having examined the Backus mill thoroughly, and he says that in his judgment it is the best mill I have seen any-

where, and I have seen a great many. Now, De Mann did not know the Backuses, and we had him go down and
2881 take a look. I have seen a great many mills, he says, and everything is put up in first-class style, without exception. Everything in it that I can see, and I have examined it lately, is as good as it can be. Of the light he says it is absolutely essential. And he says as to cleanliness, the presence of grit or soot on the lumber is very important indeed; it must be cleaned off. Mr. Huyett gives substantially the same testimony, that the mill business cannot be carried on there successfully. We also called Mr. Dupont, a man who had been engaged in that business, and is still engaged in the building business, and runs a shop, and knows the machinery there. He testified that it is the best he ever saw for fine work, with the finest tools of all kinds for molding, and he has been there repeatedly, and has seen the lumber spoiled by soot; that he has seen the cinders come down on the lumber there, and the soot upon the lumber in course of transportation, that he has seen the trains go by and the place darkened with smoke so as to materially interfere with a man's work.

That closes the testimony for the respondents, except the testimony of the insurance man, to which I now call your attention and except the testimony as to the burning of the stove works. Now, Jones testifies he writes from three to four millions of insurance per year. It is a pretty good business for a man to be engaged in, who will go into a conspiracy, into collusion with property-owners or with a customer whose property is very difficult to insure to increase his risk to enable him to get some damages from a jury. I will read you what he says of that, and see whether he tells the truth: "Q. Will you please tell the jury the amount of increased rate, if any, by reason of the passing of the superstructure in front of their property? A. Seventeen and a half per thousand,
2882 lacking, it may be, a few cents less than that, but in that neighborhood. Q. Is that the increase? A. That is the increase in premium. Their average rate before that structure was built was $51, and today it is $68.50, or very near that. Q. Why has that been put upon the property? A. They are afraid of the sparks of the passing engines on the elevated railroad. Q. And on how many thousand has that increased to? A. It makes an increase of their insurance premiums of about $3.500 per annum. Q. Do you state that is wholly by reason of this superstructure? A. Yes, sir."

Do they show a single witness that it is not so. They have called only one witness on this point, Chapman, but he does not know. "Now, if you please, will you tell us the amount of insurance they are obliged to carry on their buildings? A. They are carrying $30,000 on the factory proper, $68,000 on the machinery, $15,000 on the stock, $7,000 on the power building and $10,000 on the machines, engines, boilers, etc. I think that figures up $130,000." You will observe that is fixed at 80 per cent., so that the estimate of his own examiners as to the value of the property, the value of the plant according to the low estimates of underwriters, putting on 80 per cent., is $162,000, in round numbers, as the total estimate of

the plant. And there should be deducted from that, to be entirely fair, the $15,000 on the stock. So their estimate of the value of the property would be about $156,000. "A. The rate would have been probably reduced instead of increased, if it had not been for that structure." There is no doubt but that Backus is compelled to carry more insurance than he ever was before. As he stood he was willing to take the balance of the risk himself. Now he is required to pay insurance on $50,000 more than he ever did before. That rule of the insurance companies applying the 80 per cent. clause is made acceptable by the reduction in the rates. The rates are cut down. The gen-
2883 eral rule is under the 80 per cent. clause, more insurance and less rate. But they have considered this an exceptional risk, to which the rule did not apply. "Q. By reason of what. A. By reason of the elevated road. Q. Then in addition do they have to pay by reason of the elevated road, under that 80 per cent. clause, more for insurance than they would have to pay if the road would not have been constructed? A. They probably would have saved from four thousand to four thousand five hundred per annum, including the reduction and the increase. Q. The net loss to them now is something like $4,000 a year on account of the railroad being there? A. $4,000 a year would be a fair estimate. Q. Whatever there is of this insurance, you did not take it all in your company? A. No, sir; I place about one-third of it only." How is it that the rest of the companies, if a conspiracy exists to put on the increased rates, should have the same thing. "Q. You place it in your office? A. I do not place all in my office. I place about one-third of it, and the rest of it is placed with different agents. Mr. Margagh has about one-third of it, and Bierce & Sage have one-third of it." You see he gives the names, Margagh and Bierce & Sage. "Q. Do you find it difficult to place insurance on the Backus property? A. It is a difficult matter to place it. About one company out of every four declines it."

You can readily see, gentlemen of the jury, in this case that is the effect of this superstructure. They never declined the insurance before. It never was canceled before. Something has come there by which insurance is difficult to get. They cannot get up to their 80 per cent. limit, try as they will, and their policies are constantly being canceled, and constantly being refused.

Then comes the cross-examination, some parts of which I
2884 wish to call your attention to. "Q. Do you swear that Mr. Chapman has increased the rate on the mill? A. On the power-house, and it increases the rate on the whole thing, and it makes $17.50 increase on every thousand. Q. That is, when they increase the rate on one building that would increase it on another? A. The average policy is increased from $55 to $68. Q. Don't you know the only increase he has made is on the shaving-house? A. On the warehouse. Q. It is all one? A. Yes, sir. Q. Now, that is the only increase that he has made, is it not? A. That is the only one. Q. Is that the only increase you have made? A. Yes, sir. Q. Every policy carries the same rate, so that it all arises from that

power-house? A. Yes, sir. Q. But you don't increase the rate on the rest of it? A. No, sir, there is no increase on the mill, only the increase on the power-house brings the whole up to about $17.50. Q. How much insurance have you got on that power-house? A. There are $7,000 on the building, and $10,000 on the boilers and engines. Q. How much have you got on the mill proper? A. $68,000 on the machinery, $30,000 on the buildings, and $75,000 on the stock in the mill. I do not have it all. Q. How much is in one company? A. $3,000. Q. Is it not a fact on a large risk as that, they divide it up in small amounts, into just as many companies as they can? A. Certainly. Q. And the most in one company is $3,000? A. I think so. Q. And that is distributed over the different parts of the plant? A. Yes, sir. Q. What did they pay before the elevated road was built? A. Four and a half per cent. Q. How much did you carry there? A. $4,000 altogether. Q. And now they have increased that to how much? A. To $17,000. Q. Before the railroad was built they carried $4,000 on it and now they carry $17,000 on it? A. Yes, sir, they have to carry it now. They could not get a single dollar of insurance from any company unless they carried that amount on it. Q. Do you mean to say
2885 these companies insist upon having so much insurance? A. Yes, sir, you could not get a dollar of insurance on it without it. Q. Then they are anxious to insure it? A. They want it so that in case of partial loss they won't be stuck for the whole sum." And now I come to the part of the cross-examination where he says as to the refusal and cancel-ation of policies. He says the reduction can be pointed out in a hundred different instances. He gives the reasons for their cancel-ation. He says at page 538 there are 100 of them that he knows of where the rates are reduced. There is no conspiracy about this. No agent has been called to contradict it. No agent has been called to testify that Jones has not told the truth. No one has been called — that Jones has not told the truth. No one has been called that knows anything about the rates actually paid upon the mill, and Jones has nothing whatever to do with anything but one-third of the insurance. He don't even place the other two-thirds, or get it placed. "Q. What is the total amount of insurance they carry there? A. $130,000. Q. And you say that it $10,000 less than what they want? A. They have not been able to place this. They have not been able to place only about $120,000. They are trying to place the rest. Q. They are trying to carry $130,000? A. They are carrying it now. Several companies have declined to reissue 80 per cent. of the value and some of the companies within the last few months, after examining the property and after carrying it for six or eight months, have canceled their policies." So there you have the testimony of Mr. Jones, with the names of the other agents. He takes one-third of it. Here are 20 or 30 policies canceled already. No one knows when they will cancel the rest.

Further argument in this case was then adjourned to 9 a. m. next day.

2886 NOVEMBER 4, 1893—9 a. m.

Mr. DICKINSON: A word more, may it please your honor, as to our views on the question of damages, on your honor's suggestion of yesterday as to speculative profits. The rule undoubtedly is, upon contract or the sale of property, that profits are speculative, as for instance goods; profits are considered speculative because it is assumed (and that is the reason always given by the courts) that in buying goods in that way he may go into the market and replace the goods, although he must always have the market value at the time and place of delivery, if that is increased or has been reduced. It is also true that in actions of trover that although the jury may give damages for a special wrong and injury, the measure of damages for the goods will be the market value at the time and place, and at what the man could have sold them for, or what profit he could have made in carrying on the business in selling the goods is not to be taken into consideration; but as we have shown, I think, by the decision of the supreme court, the rule in these cases is entirely different. Where a special business is carried on the rule is precisely like the rule, if your honor please, for the sale of a race-horse where the earning capacity of the horse is taken into consideration and is shown. It is not the market value of the horse or any other horse or any other race-horse, but the especial earning capacity of the horse may be shown, and so as to any special business which is taken without the will of the owner, and without the element of contract upon it, or of any earning capacity whatever; the earning capacity is considered and the analogous case, strictly analogous case, would be the rule of damages in case of the injury or death of a man by the negligence of the company, or whatever the company is liable for the death. Your honor knows that the rule of damages universally is that the earning capacity of a

2887 man is taken into consideration and it is strictly competent, and always shown that he was capable of and did earn theretofore a certain amount as bearing upon the future earning capacity, and this is then capitalized by the jury and the capital is given by way of damages.

The COURT: No real distinction, and what I might say an intelligible rule, has ever been formulated upon that question.

Mr. DICKINSON: That is left with the judgment of the jury, as to what his earning capacity is; that the courts have said, from the Supreme Court of the United States down. They do take into consideration in determining the earning capacity of a man and what he will in the future earn, the probability of his life or the length of his life, and that is always a question for the jury in estimating the probability and the total capitalization of his earning capacity, rating the amount that he is earning from year to year, is taken as the basis or measure of damages. I do not care to elaborate that.

The COURT: Using your first illustration of a race-horse, the way I look at it, the speed of the race-horse is one of the things which adds to the value of the horse, and the speed makes the horse more valuable, as a business may make a plant more valuable.

Mr. DICKINSON: It is always competent, in bringing damages, for a race-horse to show what he is earning on the track, and to show his capacity in that direction. That is the analogy. Now, then, take this business; it is a special business, its value is shown and it- earning capacity is shown: That it is a special business has been clearly shown, and that it is the best of its kind and earns so much money; you cannot injure that earning capacity as it stands.

The COURT: The earning capacity is a very important factor as far as the value of the plant is concerned.

2888 Mr. DICKINSON: But that must be taken into consideration, may it please your honor, in estimating the loss to the mill as it is situated, what it has been earning. It is not like a case of buying goods, because if you impair the earning capacity and the value of the investment as it stands, there can be no going outside to purchase again. It is a special business, it is an earning thing, as a man is; but my learned friend (Col. Atkinson) would elaborate this, and I have just called your honor's attention to it. I desire to give Col. Atkinson the utmost time that can be permitted, and shall close by the time the hand reaches the half hour.

Now, gentlemen of the jury, something has been said by my friend Robison, in connection with this statement, that Mr. Backus has no interest and that he will get his land anyway. I think the court will agree, at our suggestion, that that cannot be taken into consideration by you. The impairment of the earning capacity is to be taken into consideration, and the impairment of the rental value of the property is to be taken into consideration, without regard to whether he has a lease running fifteen or twenty years, because if the testimony of the respondent in this case be true, the rental value is destroyed and it is worth but fifty per cent. And there is no testimony on the other side, not a word, and you have on this side the testimony of George L. Robinson, E. L. Thompson, Mr. Dwyer, Mr. De Mann, Mr. Dupont, Mr. Henkie, and Mr. Stewart. Mr. Joy is not asked. No other witness is called, no other planing-mill testimony is in, th re is no testimony here except the testimony which we have carefully selected and put in from disinterested men, that the rental value of this property is decreased, this whole plant is decreased fifty per cent. What becomes then of the statement of Mr. Robison that Mr. Backus is entitled to no damages because he is going to get a rent of $18,000

2889 a year? If it is destroyed or the mill is burned down, the rents would cease. After the business had stopped or impaired so as to become bankrupt, the concern that pays the rent becomes bankrupt, and Mr. Backus is not obliged to take the promise of anybody to pay him his income. He is entitled in case of impairment, in case of destruction, or in case of injury to his tenants, to have that considered, and when it is shown to you that the capacity is impaired so that this rent cannot be paid, he is entitled to that damage. Now, another thing, this mill is put up for a planing mill and it is equipped for nothing else, so that the brick and mortar and lumber and timber in that mill are gone, are they not, and all the investment is gone, if he is compelled to move?

Is that true? Are the brick and morter and lumber in the mill worth anything more than he would sell the old building for? In other words, is it worth anything to a railroad if it buys the property? No, you could not get anything for that building as it stands. It is built for a planing mill and for nothing else, it is regulated for a planing mill, adjusted for a planing mill, and it is good for nothing else than a planing mill except for what brick and mortar there are in it, or what it will bring, so that he will lose the investment in the brick and mortar and lumber upon his being compelled to move, because he would erect a new planing mill—he might take the brick and mortar for what they are worth—but he would lose all his sewerage and excavation on that part of his investment absolutely. I call your attention also, gentlemen of the jury, to the comparison in prices. You can take the list and see that Mr. Backus has accurately represented the Spitzley machines by the number that Mr. Spitzley has estimated upon his list. You will have the testimony to compare it, and you will find Mr. Spitzley giving all
2890 the numbers of the machines he appraises in the last page of his testimony, in the exhibit. You will find that Mr. Spitzley actually inventories, and therefore only appraises, fifty out of over one hundred machines. And while his appraisals of those machines in some cases corresponds with Mr. Backus', the Backus appraisal generally increa-es by reason of the equipment, which adds to the value and cost of the machine justly and properly, according to the testimony of the disinterested planing-mill witnesses. And in the Spitzley estimate of $16,891, he has estimated less than half of the machines, and besides that, you have got the Jencks uncross-examined testimony as to all but $1,600 of it. Now is there any dispute as to the fact that there is no testimony as to the depreciation of this property except our own? Mr. Joy is not asked but as to the real estate. Frank Adams has not been in the mill or looked it over since the structure was put up, he has passed by it once, he says he does not know the present situation, and he does not presume to put an estimate on the depreciation by reason of the superstructure. He is not asked what the percentage of depreciation is at all, nor is any one of their witnesses. So that the sworn testimony before you is universal, that the depreciation upon this plant is fifty per cent. No one puts it lower except Mr. Thompson, who says it is thirty or forty per cent. That is the only break in the universality of the testimony that the depreciation of this plant is 50 per cent., that the depreciation of the rental value is 50 per cent. But, for instance, if the planing-mill investment cannot be carried on, what is the value of that investment on Fort street except the bare ground? Of course the earning capacity of the lumber yard is impaired if the planing mill is injured. There is no doubt about that, although the lumber yard is worth more comparatively to sell again on the river front than any of the rest of
2891 the property, because it is river front; but the earning capacity in connection with the plant, and its value in this plant which you should consider, is notably and necessarily depreciated. And the mill itself, that is impaired to the extent they

say it is, that all the witnesses agree it is, becomes a loss and an unsuccessful instead of a successful concern, and cannot be carried on. There is no doubt whatever, gentlemen, that this mill must be moved if the planing-mill business is carried. Will you tell me what it is worth? The testimony of Thompson and Robinson and of De Maun is that the machinery taken out would not sell in the market for anything but second rate, and the value would be merely nominal, but it is possible, Thompson says, that you could not get and it would not be worth to exceed 50 per cent., because it must be set up again, that building must come down and the machinery must come out and you have nothing there but the shell. It is only built for a planing mill, and arranged for a planing mill, and you cannot sell it except for old brick and mortar and lumber. Then you have to take that new site and set up your new plant. The supreme court has said, as I have read to you, in the case of a tenant, merely the case of a tenant and not of the owner in fee, that the tenant is entitled to all damages which the railroad does by compelling him to move his place, and he is entitled to damages to his lucrative business. Here we have a case where you have a planing mill, and you cannot go outside like that tenant and rent a planing mill for Mr. Backus. It is a special business. Mr. Backus must build according to his ways in order to replace this, and according to the decision of the supreme court, the man whose property is taken for the public benefit must be placed in as good a position exactly without the abatement of a dollar as he was before. And that is your duty. Now, upon the valuation of the property, you will
2892 have Mr. Spitzley on one side of this sheet and you will have Mr. Backus upon the other. You will have corroborative of Mr. Backus the testimony of all these witnesses, and you will have the testimony before you.

Now, to estimate the loss for insurance, you know that now Mr. Backus pays, in round numbers, enough for insurance to make you or I feel pretty rich. He pays 8 per cent. on $17,000 as it stands, and he pays five and a quarter on the entire balance of $130,000. That is exactly what he pays. He pays 8 per cent. on the power-house and 8 per cent. on the dust-room, and five and a quarter per cent. on the entire balance of $130,000, which makes the total cost of his insurance between eight and nine thousand dollars, a very comfortable income on which you and I could keep our houses and live very nicely. That is what he has to pay out for insurance and, bear in mind, that at that rate he is only entitled if he has a loss, to 80 per cent. of his entire loss, and he is taking the risk all the time on his own shoulders of 20 per cent. of his entire property, and the fact is now before you that he cannot get insurance, that he is unable to make up his $130,000, so that he cannot possibly get even his 80 per cent. He will only get his proportion of 80 per cent. in case of loss if a fire occurs tonight, and these policies continue to be cancelled as they have been, especially in view of these fires along there, and if a loss occurs by fire, Mr. Backus will have just so much risk and just so much total loss as he fails in getting insurance. And it is uncontradicted. They have not put an insurance man on to show

that this risk will be taken, not one of the hundreds in Detroit, although this insurance is carried in every agency in this city. The conspirator Jones puts upon it the same rate put upon it by the other agents, and there is not a witness called to show that this failure to get insurance can be overcome. Now, in estimating the increase of
2893 insurance and what he has to pay, you are to take into consideration, if his increase and his actual cost of insurance is $3,500, that that goes on year after year, his insurance continues and you are to capitalize the loss. Now upon that point, if he has to pay a thousand dollars more for insurance, the capitalization of one thousand dollars (for you must consider the future and not one year) is $25,000 at 4 per cent., $20,000 at 5 per cent., and $16,666.67 at 6 per cent. Every additional five hundred dollars is 4 per cent. on $12,500, 5 per cent. on $10,000 and 6 per cent. on $8,333.33. Every additional thousand dollars adds to this capitalization just so much as the first thousand dollars adds, and is the earning capacity which is necessary to earn the increase of the cost. And so you are to estimate depreciation of the profits, or the earning capacity. For instance, in the property on River street there, if the retail trade is gone to the extent of two to four thousand dollars, take it at two thousand dollars, you are to estimate by the earning capacity which would make the two thousand dollars, and that is loss. The capitalization is the loss. I give you these suggestions in estimating the way that damages are given, as in the case of any injury to earning capacity. You cannot take it for a year. We are not suing for damages heretofore, we are bringing no suit at all. They are coming into court and saying, I will pay you for anything that may occur in all the future, that will occur to you by reason of our occupying River street and running these trains by there. That is the situation, and the difference between a suit for damages for past injuries and the other, is the situation of this case, where they come into court and say for all future time you are to be paid, and put in the position that you would be if we did not build our structure.

Now, upon the value of the real estate and the injury to
2894 it, you are entitled to take into consideration—of course the sworn testimony of the witnesses would stand uncontradicted, and you are to take that testimony into consideration in this connection. Take the case of the Michigan Central railroad on the opposite side of the street; I do not speak of the flour shed for which they got $1,660, but I speak of the opposite side of the street to Backus'. They have a larger front, it is true, than Backus has, but what is the injury of carrying on the same business along the Michigan Central railroad. It is not a matter of sentiment between two railroad corporations, and they have given the Michigan Central railroad for the closing of this street in this way, or whatever it is of damages, that you can guess at; for destroying the street or injuring the street to this extent, $28,500—$1,660 of which only is for the front of the flour shed. All the rest is for that frontage opposite Backus, making $28,500. If the Michigan Central is injured $28,500 for carrying on a railroad business there, for goodness' sake

what is Backus injured, where the smoke and cinders pour into his lumber mill, and he carries on a business especially subjected to the dangers from fire, and where the soot and cinders destroy his business.

Now, gentlemen of the jury, I have done. I have been through three trials of this case. This is the last trial under the law and under the statute that can be had. Responsibility is with you. It is for you to clear your consciences in your treatment of your neighbor; you are chosen as neighbors to see to it that this man who has his life's work in your hands and who believes fairly that it is gone from him with this structure there—you are to see to it that he does not lose one dot or tit-le of his investment or of the future earning capacity of his property. He has gathered it with infinite pains. He has improved it every day, he commenced with
2895 his own hands, he inherited nothing. I do not appeal to you or ask of you one dollar because of any sentimental feeling, but I do say to you that you must do your duties as American citizens under the constitution of your State and of your nation. There is no avoiding it. You must do it and you must put this man in the position that he would have been if that railroad did not run along there. You must do it, you are sworn to do it, and if you do not do it, you have violated your duty as American citizens, and you have violated your oaths. I do not care if the sum be large, you must do it, and I never have had any doubt in my own mind, from the beginning of this case to the end, since I have investigated it, and I have been very much interested, that Backus, with his entire plant, with its earning capacity, cannot come out of this matter with this railroad running by there at a loss one penny less than $250,000. The decision and determination of it is for you and for no one else. No court takes the responsibility upon this question, no legislature no common council, no other body of citizens except you. The great lawyer and eminent patriot Rufus Choate, than whom no more public-spirited man ever lived, when the railroads entered Boston, said for the property-owners of Boston although he was first and foremost in favor of railroads to that city, that on this question of the taking of property for public use, no citizen must lose one dollar more than the taxes he paid with his neighbor, whose property was not taken, and rather than to abate this rule, rather than to reduce one degree the cast-iron character of this rule imbedded in our fundamental law, so that one single individual unit, one citizen of this Republic should lose one dollar by the public good that railroads did more than his neighbor to whom it was doing good, it were better that the city of Boston should
2896 have no railroads, because it goes to the foundation of the Government that the individual citizen shall not be mulcted for the public good more than his neighbor, that the Constitution guarantees him his property, guarantees that it shall not be taken for private use, shall not be taken for any other business unless he sees fit to sell it, and when this guaranty is taken from him for the good of his friends and neighbors, he shall suffer not one penny more than his neighbor.

The responsibility is with you, gentlemen of the jury, and I leave it, and for the last time under the law of the State my ability to address upon this question the neighbors of these respondents.

Argument of Colonel Atkinson.

May it please your honor and gentlemen of the jury: I feel that in this case I am occupying a place which prudence would have forbid, and that instead of adding to the strength of the very able argument which has been addressed to you, I run the risk of taking from it. This, however, is a matter of such great importance to these respondents that they desire the case presented from every possible standpoint so as to secure your favorable attention and your careful attention to what they consider an irretrievable loss in their business. Now, Mr. Dickinson has said to you that your decision in this case is to be final. Under the laws of this State there is an appeal from the first jury that tries a case of this kind, but under the same law the decision of the second jury is absolute and final. There is no appeal to the Supreme Court, no appeal to anybody. Your decision absolutely settles this question so that you can see how important it is that you make no mistake in dealing between these parties. Now, the learned counsel who has addressed you on behalf of the petitioners in this case (Mr. Robison) commenced his
2897 argument by referring to a number of matters that were not in the record. He told you of the struggles of the Detroit, Lansing & Northern railroad to build a road to compete with the Michigan Central to Grand Rapids, and that as soon as they had surveyed their line from Grand Ledge to Grand Rapids, that the Michigan Central immediately raised their rent from $10,000 to $40,000 a year. He then gave you a good many matters which may possibly be considered as local history. I do not wish to criticise him particularly for alluding to them, because in one sense they may be said to be within the knowledge of every citizen living in the community. That a large number of roads combine with the Detroit, Lansing & Northern to build this depot and bring their trains into the city. You have one illustration in the dealings between the Michigan Central and the Detroit, Lansing and Northern; if the Michigan Central, to prevent competition willfully raised the rent of the Detroit, Lansing & Northern from $10,000 to $40,000 it is one of those object lessons that we should all take to ourselves, teaching us that railroad companies exact the last farthing which they can from the public and from those who compete with them in business. Now there is an appeal made to you here on behalf of public improvements, to take these men's property because the public wants it, and to pay a low price because it will do the public some good. We are all a part of the public, gentlemen. We have loaned to these railroad companies what is called the power of eminent domain. In every sovereign State the title to land comes from the sovereignty. In this State the title to land comes from the United States or from the State of Michigan through the United States. The State always reserves the right, in case it needs that property

again, to take it back from the citizen. It makes no difference how beautiful a house we may erect upon a hill, if in time of war
2898 we need the hill for a fort, down comes the house and up goes the fort for the common good. And so if it is needed for a court-house or a post-office or any public building where all the people are interested, the right to take back the property from the individual is vested in the Government; but the constitution provides that it shall not be taken from him unless a jury first finds that it is necessary, and second, fixes compensation, which means absolute payment for all the loss that may be incurred by taking it. Now, railroad companies have been loaned this power which the State originally had for itself. They are permitted to condemn lands on the theory that railroads are for the general good and for the general convenience, and although the profits do not come to the public but are taken by the stockholders and promoters, yet the State steps in and on behalf of these companies, and on account of the impossibilities of agreeing with so many people for the purchase of lands which they may need, permits them to condemn land, but only on the same condition that the State could condemn it itself, that a jury shall say it is absolutely necessary to take that land for the public good, and that they shall make compensation. And I want to let that word compensation sink into your hearts. It is not to pay the market value, it is not to pay any particular valuation that may be put upon it, but the idea of our law is that the party shall be compensated, that he shall be put in as good a position as he was before the public improvement is made. And what you should do, if you do justice in this case, is to place yourselves in the situation of Backus & Sons. Put yourselves in their situation just as nearly as you can and say to yourselves, now what sum would compensate me if I occupied that position for the injury that is done me. The learned counsel who addressed you on behalf of the railroad company said to you that you ought to give something more than the value, that a man ought to have something for having his plans
2899 of life broken up, for having his scheme for making a living and providing for those whom he loves and who are to succeed him, entirely destroyed. And this is perfectly natural. Under the English law, if a railroad company wanted this property, Mr. Backus would have a right to say to them, You cannot have a part of the property but you may have all if you wish to pay a fair valuation. The railroad company would be compelled to take this entire plant if they wanted to use a part of it, if Mr. Backus saw fit; and, in addition to the value, the English statute requires the payment of ten per cent. for forcing a man to change his line of business, compelling him to give up that which he has established and to go into something else. Now, that too, is only just and equitable. If a man has established a newspaper and he is compelled to give up the plant which he has fitted up, especially for his own work—he has arranged his presses, he has arranged his cases, he has arranged his editorial room, everything exactly to suit himself, little by little and day by day one little convenience is

added to another until it exactly suits him, and some one comes along and wants that property for the public and it is so situated that he cannot supply himself with other property anywhere else, so that he has to go out of his selected calling and change his entire plan of life, he ought not to recover merely the money value of what there is around him to somebody else, but he ought to be compensated, compensated for the property, compensated for the loss, compensated for the change that he is compelled to undertake, and especially if he is old when changes come hard and are seldom successful.

Now, gentlemen of the jury, you ought in this case to consider what ownership of land means. Absalom Backus owns all this land. He has acquired it by purchase from persons who originally, by mesne conveyances, acquired it from the United States.
2900 He had no power of eminent domain to help him acquire it. He found this land occupied by a great many owners, little pieces, and he cast his eye over it. Here is a location on the side of this bluff with the Michigan Central sweeping in, across, around and away from it and yet bringing to it every convenience that railroads can bring to property, but it belongs to a great many people; to establish a plant of this kind there I would have to have so much land. Now, he had not the power to go into court and have a jury say to any one of those who owned a little piece there, I want that to establish a planing mill for the public good and you must let me have it at what a jury thinks it is worth. He had to go to the owners and agree with them on terms, he could not enter upon an inch of that land without first obtaining the right to do so from the owner, and no matter what the owner asked, he was compelled to pay; until, by putting piece and piece together, he acquired this large plant for his particular purpose. He had been in this business from boyhood. He had commenced in the old way of planing lumber on a bench; he had seen its successive stages, he was at the birth of the art you might say and lived through all its developments until he could tell as he looked over this piece of ground where every wheel would turn, where every knife would cut, where steam would be applied, where shavings would be taken away, and where dust could be carried away, and in his mind's eye grasping it all, he commenced these negotiations. But his plan was broader than that. He knew that a planing mill must be supplied with lumber and he knew where the source of supply was. He had spent years in our Northern forests, he had spent years in the manufacture of product which must be brought to this mill for the purpose of utililizing it, and he knew how that was brought here by vessel and by rail. The source of supply at the time he made this purchase was almost entirely secured subject to water car-
2901 riage, and so, in addition to this mill, he found a lot of small property owners down on the river owning a large piece of property which is now known as the Backus lumber yard. Here again he was compelled to enter into negotiations with the owner—no power of eminent domain to help Absalom Backus acquire it, but by buying piece after piece, he finally secured that large tract of

land which today is the key to the future of Detroit, the only spot where any railroad can come in and reach our river without first paying tribute to some company that may come into competition with it, and, according to the evidence here, treat it in a most harsh and heartless way in fixing its price for the accommodation. Now, he secured that. Originally there was a good deal of profit in this business for the man who first invented machines, but machines were multiplied so that competition became sharp and it became a question how every possible thing could be saved. Why, I can remember when I was a boy at Port Huron the great problem of the mill-owners was how to get rid of their sawdust. There was scarcely a street in the city that was not three or four feet deep with sawdust; it was the way our roads were built. If any of you have been at Alpena until within very recent years, you will remember it was called a sawdust city, and you would see hundreds of teams coming out from the mills, disposing of their sawdust here and there, and with the sawdust the finer dust that will always be worked up in any establishment of that kind. Now, competition became so sharp that this article of sawdust instead of being something to be thrown upon the streets and got rid of and burned up, as you would often see along by the mill great fires burning to consume it, became an article of commerce. It must be saved. The very fine dust that naturally flew into the air and spread itself over the surrounding country became an article of commerce that was worth sav-
2902 ing. The original culls that were not used at all twenty-five years ago in this State, except by somebody who would come and carry them away from the mill without charge, perhaps to build a fence in the country or something of that kind, were carefully selected; every good piece of board had to be saved, every piece that could be used for anything had to be used; and Absalom Backus, becoming familiar with all these things, had arranged this plant to do this kind of work. I submit it to you, gentlemen, you viewed this property and you cannot place your finger upon a single thing that is wasted that can be saved. Not one thing that can be saved by the ingenuity of man is wasted at the Backus mill. Then the smoke that issues from the fires is again burned so that what carbon remains in it is utilized in giving power to that machinery. Every grain of sawdust that can possibly be secured is secured and sold, every particle of dust that descends after it is blown up into those burlap chambers comes back and is loaded onto wagons and becomes an article of commerce. Every cull board that has a good side or a good piece in it is split and cut and divided until that good piece is saved. And when they have an order for any quantity of lumber so that there is a little remnant left, there is a great warehouse established on Fort street into which it is taken and it is piled there in pigeon-holes as carefully as a lawyer would file his papers, so as to be kept until somebody needs it and then sold. There is absolutely no waste. It is almost a perfect plant of its kind. Now, what has this plant cost? It has cost a great deal of money; the particular amount is in dispute, but there is an element of cost that entered into that property which no one

disputes and no man can gainsay. Here is this young man (Mr. Henry Backus), still young, forty years of age. He has devoted himself from his boyhood to that business until he comes before you to testify to the work of his life with pale and blanched
2903 cheek, having devoted every power which God has given him of body and of mind, in developing this vast property, that he might secure the wealth for which we are all seeking in this commercial age. Here is this old man at sixty (Mr. Absalom Backus). God gave him an active brain and active body. His inventive genius, his industry, his hands and his thoughts have all been devoted to this business. Here is Newton Backus in the office. They have divided up their work; the old man is buying lumber in the North in his old familiar fields, the young man is in the mill watching every wheel as it turns and every knife as it cuts; the other is in the office watching the financial end of the concern, and these three men have coined their brain and blood and power until it has burned into this plant as a money-producing concern. Now, gentlemen of the jury, the man that would say this is only worth the dollars and cents which are represented by the brick and mortar and timber there would show a lack of heart, a lack of consideration, a lack of knowledge of human nature which I would be sorry to suspect in any of the men I am now addressing. Now, then, they own this plant, and what does the ownership of land mean? It means the right to use it to the center of the earth if we see fit, it means the right to use it to the sky if he can build so high, it means the right to have the air, which is the common property of all, come free and uncontaminated, so that he may have its benefits; it means the right to have the light which is the common property of all, and the beneficent gift of our Father to us, come unobstructed without windows so that we may have it to do what we please by it, to utilize it as one of the heirs of such a great inheritance. If this property was adjoining to another on River street, if some other private owner, as Mr. Robison tells you, then that private owner might build upon it and you might be
2904 left in the dark, and just for that reason, Mr. Backus selected a place where some private owner could not darken his windows, could not obstruct his light, and he paid what we always pay for street frontage, a higher price, so that he might have the advantage of the street. Now, what right has he in the street you will ask me. The man who builds upon a street has a right to have it continue forever open. He has a right to it for air, he has a right to it for light, he has a right to it for use. He has not only the right to use it himself, but he has a right to have an unobstructed way left there so that if people wish to come to him for friendship sake, they may come unobstructed. It is worth money to have a clear way for your friends to reach you, to have those who wish to deal with you to come unobstructed for the purpose of dealing so that you may establish a business if you see fit, or a dwelling or anything that suits you, and may always have the conveniences of this street. This frontage is practically all there is of value, as Peter Henkle tells you. Suppose somebody built up on

this street here today and closed this building in and built on the other street in front of it and closed it in, what value would this property have if access to the street is gone? Every city lot is made to front on a street, because without that frontage it is absolutely valueless. Now, gentlemen of the jury, just bear in mind these facts. The Backuses own this property. They own this land, they own it with the rights which I have spoken of, they own the plant which they have built there at a certain cost in money and at a certain cost of time and work and thought on their own part. As Mr. Henry Backus, who has been charged with being insane in this case, remarked pathetically to you, I cannot give you the exact figures on that property, we were our own architects, we were our own millwrights, we were our own supervisors when it went up so that every nail and every beam and every post and every stone that there is in that
2905 building went there under the supervising eye of these men to establish just such a property as they saw fit and as they wanted. Now, gentlemen of the jury, what is this property to be considered? Is it to be considered as three properties or as one property? Was it acquired for three purposes or was it acquired for one? Now, upon this I need only call your attention to a very familiar rule of law and an equally familiar rule of morals, that the testimony is uncontradicted, that it was all acquired for one connected purpose. The three pieces are parts of the whole, and if you take one or destroy one, you have practically destroyed the others. This is the legal rule. The testimony, I say, is undisputed, and in the law you are bound by your oaths to follow undisputed testimony. No man has a right to say, without any testimony upon it to base his judgment: My brother has sworn falsely and I will not believe him. You are compelled to believe him if you act according to the laws of your country, unless there is something to contradict his statement or something inherently improbable in it. I say is this not only law, but it is founded on a rule of morals, it is an insult to the Creator of your fellow-man to disbelieve him when he is in no way contradicted, and should he state a fact to you of which he is supposed to have personal knowledge. Now, then, these three properties were acquired for one purpose. If you take out of the chain that is acquired to do a certain work the middle link, what is there left of the chain? Now, there is one of the jurymen here, if he will pardon me for alluding to him in matters personal to himself, who has been left as trustee of a certain business. He is left the trustee of a steamboat having a dock in Detroit and having an island terminus at the other end. If you take away the steamboat the island would be useless and the dock, so far as he is concerned would be useless, because the way of using both would be absolutely gone. If you
2906 take away the island so that there is no terminus to run to, the steamboat line would be of no use; and if you take away the dock privilege in Detroit where those who embark upon that steamer have to land and take the steamer again, you destroy the property. You destroy it all by destroying any of the essential

links of which it is made up. In this case, gentlemen of the jury, you not only destroy the mill by this structure, but you lessen the value of the lumber yard and you lessen the value of the warehouse. You lessen the value of all this vast property a certain percentage, and it would be a narrow and unjust view on your part to say, we will simply give the compensation for the injury which we do to the mill, regardless of the other property in connection with which it is used. It would be unjust; it would not be compensation. The Backuses would not be in the same place after you gave them that award that they would if their property was left undisturbed. Compensation, remember, is the thing that you are to make. You are not buying property to sell again. You are not buying it in an ordinary way, but you are going to a man and saying, I am ready to compensate you so that when you go out with this award you will go out with something in every way as good as what we have taken from you.

Now, gentlemen, with reference to the value of this property, I need not spend much time. My learned associate has gone over it so fully that I need scarcely say a word to you. I want next, though, before I get to the value of the real estate, to call your attention to what business means, as well as real estate. What is a business? This corporation, the respondent here Backus & Sons, represent the business of that concern. Absalom Backus owns the real estate. They own the business. They have built that large warehouse into which some of us went the other day when
2907 we started to view the property. They have built the mill; they have erected certain buildings down in the mill yard and they have an established business there. Before this structure came they had a retail trade on River street. Their foreman sold lumber which averaged them a profit of from two to four thousand dollars a year, down on River street. They had a retail trade with the whole city. They also had a trade in fine work like moldings and hardwood-work throughout the country. They had their customers all over the land, so that this great mill with all its machinery was kept constantly busy, and their names were known to sufficient numbers of customers so that the orders came to them for their products as rapidly as they could produce them; and on every order that came there was a profit, because business is done for profit, and not for a sanitary purpose merely. Now, what is an established business like that worth? You have heard the expression, the good will of a business. Suppose somebody wanted to start a dry-goods store here, or a store like Newcomb, Endicott & Co.'s. How much would they give in addition to the ordinary rent to be allowed to step right in and have the use of Newcomb, Endicott & Company's name to go on in business with? I can remember when they moved up there; I can remember how the gossips of the city said this great concern has gone out of the ordinary avenues of trade and they never can succeed up there; and I don't know whether true or not, but it was generally reported that for two or three years they did business at a loss until they made people accustomed to go to that particular center, until they changed by

their own industry and pluck and perseverance the lines of travel and made their great store one of the centers of trade, which everybody supported who had anything to buy in their line. Now, what would the good will of such a business as that be worth?
2908 Suppose one of the partners wanted to withdraw, do you think he would simply take an inventory of the goods that were on the counters and on the shelves? The others want him to go out, and he says, "I am satisfied with this business; I am perfectly willing to remain here; I can go home and rest; I have organized this business so that clerks can do it; I can take a trip to Europe; I can be gone for months, but this machinery, this organism which my brain has produced, will keep on earning me money." Do you think the man would simply take the price of his goods? Why, not at all. Infinitely greater than the goods themselves would be the price of the good will of the business which he had with it up there. He has accustomed the world to deal at that particular spot, and that custom represents dollars and cents to him, and he is entitled to his share of it. And so Backus & Sons, by long years of toil, by long years of perseverance, by doing business at the same place and in the same name, have accustomed the country to deal with them and buy their goods; and the value of the good will of their business is a great deal more than the value of the brick and mortar in their walls, or the timber by which that brick and mortar may be connected. Now, remember that they have a business there, and remember, gentlemen of the jury, that that business is to be broken up and destroyed, or if not broken up and destroyed it is to be carried on under such adverse circumstances that the profits hereafter will be very problematical and the losses more than probable.

Now, then, let us look at the value of this property. I will not attempt to go over the witnesses in detail, as Mr. Dickinson has done, because he must have impressed you with the figures given by each, and you have only to refer to the testimony to verify every figure which he has given you. We have the testimony of
2909 many people in regard to the value of that real estate. We have the testimony of Mr. Henry Backus as to the value of the property down there on River street. He estimated it. He said it was worth $2,000 a foot; and then he corrected that so as to say it was worth $600,000. Well, gentlemen of the jury, he may be large in his estimate of that property down there, but it is a hard piece of property to get. It is a hard piece of property to acquire in Detroit. Detroit has been wasteful and lavish in giving away its water front. Of all this beautiful river and the stretch of this city along it from away in the east down to the Grand Trunk depot, and again from Third street away down to the extreme city limits, there is not a free access to a single citizen of Detroit to the river. We had a great river in front of us, and for the most part we have impounded our people so that they cannot get to it without crossing dangerous railway crossings built on the grade. If any of you have ever been in the city of London, you have walked along the Thames embankment; in the very heart of the city there for a mile and a

half is a great stone dock built along the bank of the Thames. It is kept there for the public use, that people may walk on it, may enjoy the advantages of seeing the river and breathing the air from the river. How much do you suppose it would take in money to obtain from the city of London the right of a railroad to go in there and occupy that river front? It has cost them millions and millions to reclaim it; but they found that the river front, which belonged to the people originally, was almost absolutely necessary as a breathing place for the people as the city became dense and populous. Now, in Detroit, I say, we have been lavish and wasteful in giving away our river front. We practically have only about half a mile left in the center of the city, and then, both ways,
2910 east and west, children cannot reach the river, women cannot reach the river, we cannot reach it ourselves without crossing these dangerous places occupied by railroads. Now, mark you, I am not arguing against the railroads. I believe in railroads as much as any of you, but if we had been wise we would have put them in places where the public sacrifice would not have been so severe, where the losses to us would not be so great.

Now, gentlemen of the jury, with reference to the value of this property. Mr. Backus values that mill property at $125,000. He values the warehouse at $25,000, and he values the mill yard below at $300,000, although it is not for sale and he says he would not take for it a cent less than $600,000. There are many things we have in life we do not want to sell. A man may have a horse that is not worth $50, and yet he wants to keep him, and he would not take $100 for it; he would not take $150 for it; won't put a price on him at all, although he has no money value that would represent more than $50. But Mr. Backus gives you a good reason for his valuation. He is getting $12,000 a year rent for that property. It is worth that for the rental; it pays that rental in connection with the mill, and because he has a mill to use in connection with he gets $5,000 more for the mill, and because he has a warehouse plant or real estate to use in connection with the mill he is able to get another thousand dollars there. Now, Mr. Backus values this property upon a very conservative basis. He thinks this property is worth what the rental represents at 4 per cent. Now, Mr. Joy was on the stand. He values this mill property at $150 a foot on each street. Francis Adams, I think, had valued the whole of it at about $15,000. Poor Francis Adams! For twenty years the walking witness—or nearly twenty years—the walking witness of this combination, can never see any value in
2911 anything that is left, because in the early days of this combination he sold his own property to the railroad company at a less price, and he seems to be determined that no neighbor shall ever gain anything by what he retains. Mr. Joy values this at $150 on each street, you remember, but Mr. Joy said if real estate will pay 4 per cent. net then it is a good investment, so that we have Mr. Joy's own testimony confirming Mr. Backus that this real estate is worth nearly $450,000 in all, because it is paying $18,000 in rent, and $18,000 represents 4 per cent. on $450,000. Mr. Joy owns a

large amount of real estate. Mr. Joy has been an enterprising sagacious man. He has been able to see in advance the march of public improvements, and sees real estate here and there and elsewhere where it would be likely to increase in value. He knows the value, according to his own testimony, as well as any man in the city of Detroit, and he testifies to you, gentlemen, that real estate that will pay 4 per cent. net is a remarkably good investment. Now, does this pay 4 per cent. net? It is answered by our learned brothers on the other side that this rental was not correctly arranged. What difference does it make, they will say, whether Absalom Backus gets his rent or whether the others get it? It would make no difference. Now, gentlemen, if this arrangement had been made after this improvement was contemplated, there might be a great deal in that argument. Dealings between relatives are always scrutinized carefully. They are always examined with some little of suspicion, especially if any one is likely to gain any advantage over a third party by the dealing that they are indulging in. But remember that there was nobody else interested but the Backuses themselves. They had no creditor to defraud, they had no company to bleed, there was nothing to consider except their own business and what
2912 would be just and equitable between themselves. It was long before this union depot was thought of. We had supposed—we had taken Mr. Joy's word for it—that there was to be a grand union depot down on Twelfth street. I remember with what eloquence he told upon the board of trade of the grand architectural beauties of the building that he was going to put up there, at the time he was acquiring property down there. I remember that I suggested that possibly this building might not be put up after the land was acquired, and Mr. Magnus Butzel, one of our leading citizens, replied that he was perfectly astonished that any lawyer, any good citizen of Detroit, should have the impudence to doubt Mr. Joy's word, that a permanent and beautiful depot was to be constructed on Twelfth street that would be an ornament to the city for all time. The lawyer, as usual, was compelled to take a back seat, the position of a doubting Thomas, where everybody else was full of faith. The years have vindicated his suspicions, if not his judgment. I say that at the time these rentals were fixed these men supposed the union depot would always be there at Twelfth street. They had no reason to suspect that there were grand schemes of ambition running through the minds of great men in the railroad world, that would bring this depot up to Third street and finally acquire the property which they were building up for its uses. So they fixed the rental among themselves, what they thought was just and equitable. Now, I ask you, gentlemen of the jury, did the old man run a hard bargain with his boys, or didn't he let them fix it pretty much as they saw fit themselves? He owned the property. He had acquired it. It was the product of his life's work. But they were his heirs; they were the apples of his eye. Now, I leave it to you. Most of you are old enough to be fathers, and I presume you have attended to your

duties during your lives, and I think you will say with
2913 me that the probability is that the father indulged the sons and made a favorable bargain with them, rather than grinding them down and that the 4 per cent. which he exacted would be something less than he would exact from a stranger. And they could well afford to pay. Why, what had this business been doing at the time this rent was fixed? This business in 1881 and 1882, according to the testimony, had run up so that it paid one year as high as $70,000! And was running along at pretty near that rate. For thirteen years last past this business had paid $34,000 per year. That has come out of it. They have not dealt with that exactness between themselves that they might if they were dealing with strangers, but they know this came out of it because they know it has gone in somewhere else, and they have the property purchased with it to show it. Now, an $18,000 rental where there was a profit of $34,000 and a salray to each of these partners of $3,000 besides, was not an extraordinary rent. The property was worth it. It was producing it. And, as I say, they had no reason to fix this rent higher than it should be. So that they actually fixed it on a low valuation of the property, $450,000. Now, I need not go further than Mr. Joy to confirm that estimate of that value. But, gentlemen of the jury, if you are going to exercise your own judgment, I defy any man in the city of Detroit to present to you or to me for purchase today three properties with the advantages of these three pieces before this railroad was built, for $450,000. It cannot be done. I know something of real estate myself, and I know that three such properties cannot be acquired for any such sum of money. You might acquire as much property; you might go down Fort street, for instance, as was suggested by Mr. (Foreman) Baker. You might acquire an entire block on Fort street, perhaps, but when
you do it you would have no railroad to run its side tracks
2914 into your yard as the Michigan Central does with this property; you would have no such connection; it would not be worth anything like what this property is worth. It would probably cost you a dollar for every car, if you were enabled to get a side track across the street after you had worked your way through the common council and put it there.

Mr. DICKINSON: Across the street and up the hill.

Col. ATKINSON: Across the street and up the hill and into your building—it would probably cost you a dollar or a dollar and a half or possibly two dollars for switching every car of lumber that you brought there and every car that you sent out, while this is so situated that the engines of the Michigan Central simply kick the cars into the place as they are passing, and they have no extra charge for transportation of that kind. Now, it only takes a small percentage to take away the entire profit of a business in this age of fierce and almost cruel competition. The man who has to pay a dollar a car on his lumber more than his competitor is lost. The man who has to put on an extra team to do cartage of the same amount of lumber as his competitor is being eaten into by the cost of this single team every day until the profits grow smaller year

by year and finally diminish. So that there is no place which has been pointed out to you where these people can go and do business with the same advantages. Now let me call your attention, as Mr. Dickinson has called it, to the absence of testimony on other points and the absence of testimony on this. That question was put by the juror, Mr. Baker. The attention of this railroad company was challenged to the fact that the jury had in mind that if these people could get another location equally advantageous, the price at which they could get it would have some influence on your minds. Have they brought you any witness to show where such a location can be
2915 got. The real-estate dealers of this city are not having very much to do just now, except a little in politics. They could have been brought here. Who has the property for sale? Where can it be acquired? This company with all its mighty power and influence, with its ability through hired agents to work from year to year, with all its vast staff to gather up testimony, has been unable to present a single witness who could say to you, We have found a place where Backus can do his business, with equal advantage to the one from which we are driving them, and it can be got at so much money. Now, gentlemen, they want you to help them out. They want you as they want me and as they want every one, to become their agents and advocates so that we will work for them, and that you will exercise your ingenuity to guess at some location which no man dared to swear to. Now see the injustice, gentlemen, if you attempt to do anything of that kind. No witness was upon the stand; the arguments that might be made against it cannot be suggested because we know nothing of what is passing silently in the juror's mind. Unless Mr. Dickinson and myself can rely upon this case being disposed of on the testimony, then we are absolutely in the dark as to what may influence your judgment; we have a right to rely upon the testimony, we have a right more than the testimony to rely upon the absence of testimony which might be produced if the contention of our opponents was just or fair. Now, I say that no one has been able to point out how these people can be compensated by giving them other property, by giving them another place to do business. Even if it broke them up for a year or two, that would be a serious break in their business. Suppose their business runs badly for a year and customer after customer goes elsewhere while they are rebuilding, that would be a great break and a serious injury even if they
2916 could get as good a location afterward, and there is no one who has had the temerity to come here and say there is any such location that can be got for them. Now, do you think it was because Mr. Baker was careless? Who ever heard of Fred. Baker making a slip or being careless in a lawsuit? Do you think it was because Mr. Robison was so much given to humor that he had no time for the serious affairs of life? There is always a serious edge to the wit of George Robison, and if it were possible to rake with a fine-tooth comb a witness who would testify to anything of this kind, the railroad company would have him here. They would have him here if they had to sit up Saturday nights and

run special trains on Sunday with the whole staff on board to get them. No one ever came, no one exists. And it is just as absolutely proven to you as anything can be proven to twelve honest men that there is no place in all this city where you can transfer Backus' business and have them in an equally eligible situation to the one which they now occupy. Now, speaking of values, George Robison says he knows that you are not going to believe the Backuses about the value of their property. Indeed! George knows almost everything, but it has been said that even the Almighty sometimes does not exactly understand what would be passing in the minds of jurors. He says he knows you will not believe him, and why? Because he testifies to it? What do you know about the value of that property down there? Do you know it, do you think, better than Backus? There are other men who might swear to it. There are the property-owners all along the line there. There are several who might be brought here if Mr. Backus is wild on the value of his property. Not one of them is brought.

He stands here, so far as the lumber-yard property is concerned, uncontradicted. There is not a single witness on the opposite side asked a single question as to the valuation of the lumber
2917 yard or the valuation of the warehouse. The whole force of the testimony so far as it has been introduced, if I remember right, is simply on the valuation of the mill. I think I am right about that. It is uncontradicted. And it would be madness on your part or mine, gentlemen of the jury, to attempt to say that these men who know the uses this property could be put to, these men who are using that property, know nothing of its value, and we living in other parts of the city and in other parts of the county, are more competent than they to put a valuation on in the absence of all testimony to assist us, if they are wrong. Now then I have called your attention to the value of this real estate, and I have called your attention to the value of the good will of a business of this kind. What is it worth to have something that will bring you a certain income every year? This business seems to have been of that character.

Now, there is a good deal of conflict here as to the value of that mill and the value of the machinery. Mr. Spitzley values this machinery and mill, including Mr. Finn's estimate and Mr. Kramer's estimate, at $96,137.17. Henry N. Backus values the same property—not exactly the same property, I will call your attention to the discrepancy in a moment—at $193,407.46. Upon the cross-examination of Mr. Spitzley he stated to us that he did not estimate two out of three rip-saws, he overlooked them. He didn't estimate any trucks, on which you saw lumber being brought up there and moved about, he didn't estimate the lock-corner machine, the Rogers rounding machine, the extra knives, the extra pieces of machinery to provide for breaking and so forth, the grinding stones, the picket machine for heading pickets, the scales, the knife-balancing scales, the extra saws, furniture in office, electric bells, two out of
2918 four matching machines, brazing machine that is used for welding saws or something of that kind, one of the pony

planers he overlooked, he overlooked eight matching machines, he overlooked three hundred saws, he put no value on the water pipes, he put no value at all or failed to see a Wood & Backus break-pressure surfacer, four mule stands, mill pipe and sewers, and pavement. Before you get through Spitzley's cross-examination you will find that all these things are omitted. What valuation would be put upon them if he had seen them is a matter that we will never know. Now then when he comes to the valuation he is away astray. For instance, he values five saws at $45 each. Mr. Backus brings you the proof that these saws cost him when they were bought $250 each. He values the Preston improved saw—it is a machine, I think—at $90, and we have the proof before you that it actually cost $200. He values a Wood molder at $175 which Backus paid $1,200 for on the cars at Boston. He values the Huntington molder at $130, which Backus paid for in Newark $550 on the car. He values two pony planers at $135 and $80 respectively. There are three pony planers. One of them was omitted entirely by him, and the three cost Backus $1,050, without any charge for setting them up or without any charge for bringing them here. He values eight matching machines out of ten—no, he omits eight out of ten and values two, and those omitted are shown by Mr. Backus to have cost $2,000, or $250 apiece. The sewers Mr. Backus paid $1,000 for making. The pavement cost them $1,800. Now, the attention of some of you was called to what is known as a Chicago siding machine when you where down there the last time. You must have seen that it was a complicated machine, with a great many complicated parts and adjustments connected with it. Mr. Spitzley valued it at $44. It cost Mr. Backus to buy it $500, and $44 any man with any judgment must see would scarcely have
2919 paid for the old iron which was in it. Why, you can go into any man's mill and make it appear almost worthless by adopting such a valuation as that. Mr. Spitzley's entire valuation of the machinery is less than one-third of the amount for which it is insured today. This property is insured upon a valuation by the insurance companies and by the Backuses themselves, which is supposed to represent 80 per cent. of its value, at more than three times the entire value put upon it by Mr. Spitzley. Now, I don't care how high Mr. Spitzley stands. There is an appeal made to you, gentlemen of the jury, apparently on the theory that some of you are friends of Mr. Spitzley. I have no attack to make upon Mr. Spitzley. He has gone in there, and in the hurry that he was in he has made such an inventory as he could, unassisted. He had no clerk to jot down or check his figures. He was there by himself trying to make an inventory of that great mill, and he admitted to you that many of the machines he was unacquainted with, and the only way he could do was to run up to a rival house, a man selling Fay's machines instead of Wood's, and get him to put a value upon his opponent's goods.

Mr. DICKINSON: Without seeing them.

Col. ATKINSON: Without seeing them. He described something that he did not understand fully, he described it to a man who was

competing with Wood, and whose goods sell for 25 per cent. less than Wood's, and he got that man to put a valuation on. Now, to take such a valuation as that is simply to play with people's rights and commit a great crime that you may oblige this company. Now, Henry Backus says this plant and property, not that it is worth, but that it has cost $193,000. On the former trial Absalon Backus valued this property at $150,000. Their estimate on the value for insurance up there would make it $147,000.

2920 Mr. DICKINSON: Without the dry kilns and without the office.

Col. ATKINSON: That is without the dry kilns and without the office, and labor, estimated at $147,000. Now, Mr. Backus was perfectly honest when on the last trial he valued this property at $150,000. Suppose I ask you Mr. (Foreman) Baker, what is the value of the furniture in your parlor? You might possibly remember what the carpets cost, you might remember what the table and the chairs and the large articles cost; but what you have bought for Christmas, what you have brought home on Thanksgiving, what has come down to you every year, the little articles that are put away in the corners and on the mantels and in a hundred places in your dwelling-house, would never recur to your mind at all; and remember that you are dealing here with the accumulations of a lifetime. These men have put a certain amount of money into this new structure, but they also had saved every brick they could from the old one, they had saved every pound of iron they could from the old one, every machine, everything that could be utilized, and all these went in without any very accurate account, because they were only dealing with themselves and they kept no particular account of it; so that Absalom Backus might have in his mind the net amount of money which it cost him, $150,000, and yet there might be there the $193,000 which is shown by the figures in the inventory of Mr. Henry Backus. But, gentlemen of the jury, is this all? Mr. H. N Backus has laid before you his sheets and valuations. You have had planing-mill men brought here on his behalf who might be asked as to these values, because when a witness is put on for one purpose he may be examined under our system as to all. He has given you an inventory, he has given you a separate valuation of every article, and there is not a witness called to show

2921 that he has put one cent more on any one of these machines than its actual value. Now, all that question was open to them in rebuttal, they could have brought witness after witness to show that some part of this was overvalued, but not one single witness is called. Mr. Spitzley admits a great many omissions, but even Mr. Spitzley is not called again to show that these particular values placed upon machines by Mr. Backus are too high. You remember the instance given of a certain number of cupboards, I think. Mr. Spitzley values eight, if I remember right, at $54, and one of the eight he made himself and sold to Mr. Backus for $40, leaving only $14 to pay for the other seven just like it. I may not be right about its being cupboards; anyway it was some article like that. It is pointed out by Mr. Backus that there is real estate there

worth $450,000 involved in this plant, and personal property in the neighborhood of $200,000. Has Mr. Backus stated anything that is not there? Why, if he put in a machine that was not there then when you went down, your attention would have been called to it, for you would be asked to look for it. Some of their witnesses could have had this inventory and gone over it, the mill has been open to them through all this trial for the purpose of making such an investigation if they saw fit. So I take it that there is nothing better established than that every article he has in that inventory is there. There are undoubtedly still many articles omitted by Henry Backus which even his careful inventory would not take, but he has put nothing on that does not exist and that is not worth the money that he asks for it. Need I argue to you, gentlemen, the cost of setting these machines up? No one has attempted to contradict him on that subject. He tells you how the foundations have to be made. You know how rigidly those machines have to be held in place. You know how great excavations are made
2922 under each for the purpose of piling in masonry until the foundation is perfectly solid on which these machines rest, for the slightest vibration will not only destroy the machine, but render the product of it worthless, and he tells you that the cost of these machines originally is comparatively small compared with the cost of putting them in their places, trying and testing them, supplying new pieces where there were faulty pieces, until they have a machine in perfect working order. I need not talk to you about the character of this machinery. We have the undisputed testimony of every man who understands it, that here is one of the best equipped mills in the United States. Mr. Robison thinks it is not quite so large as some he saw in Saginaw, but a man sometimes sees things larger than they are after spending Saturday night in traveling. There is no mill in the city, there is no mill anywhere that is shown to be better equipped than this. It is one after another, all these stories working in absolute harmony. You see the lumber pass automatically almost from one story to another, so that they not only use the broad surface in the basement, as Mr. Robison calls it, but that is multiplied by the stories as the building rises. And we have no proof of any such mill anywhere, or one so well equipped. And the very opponents of Mr. Backus, those who are opposed to him in trade, those who are competing with him, come here and tell you that it is the best mill they ever saw. Why shouldn't it be? I say, why shouldn't it be the best mill? Don't these men want the best to do their work with? If there is a better law book on any subject that Mr. Dickinson has to treat than the one that is in his library, do you think he would hesitate for a moment to send out and get it? And just so with these men. If there was a better machine than the one they had then they wanted it and they got it, until in their line they stand at the very head. Others
2923 may be as good; none better. None as good in the great city in which we live. Now then, there is their plant and there is their business. There is real estate worth $450,000. There is a plant worth $193,000, according to the actual inventory, from

which you well know that some things may be omitted. So that we have in round numbers $650,000 invested to be affected by this structure. Not only that, gentlemen, but we have the good will of the business of which I have spoken to you and which it is hard to value, a business which brings a profit from year to year. If one of these men is called away it is so organized that it will keep on running and earning him money. Then is their custom all through the country; and custom means a good deal. If you should go down to one of the newspaper offices here today and tell them you could deliver them a thousand new customers and a thousand new subscribers, they would give you one thousand dollars for the list. And they would run the risk of those men discontinuing their paper afterward, if they would only subscribe for a short time so that they could get them started. So every customer that a man has in business costs him something. You get them one way and you get them another. One gets them by his affable manner, another by his great industry, and another by advertising. What do all these great boards around our city with Hudson and Mabley's signs mean? Every board and every sign costs them a great deal of money; it is simply that they may increase their list of customers; in other words, add to the good will of their business. Now, then, we have all that property to be affected, remember, that real estate, that plant, that good will, and it becomes a question for us then to examine and see how it is affected. Is this property really injured.

Now, we had Mr. Robison testifying. He says that he does
2924 not think it is really going to be injured. It is going to be just as good afterward as it was before. Well, he does not know as much about that as his namesake, he does not know as much about it as De Mann or Dupont. All these men swear positively that this property is so affected that the business cannot be carried on successfully in it. What are you going to do with the testimony? Are you going to say, Well, they are in the planing-mill business to be sure, but then we are a jury and we know more about it than they do? I would not like to discuss that with yourselves, but you will discuss it in your own consciences, you will discuss it as to whether you know more about this business than they do. Besides, you have viewed that property twice. You have the undisputed testimony that heretofore they were doing nice work in hardwood. They were making bannisters for stairs, they were making fine molding and all that kind of thing in that mill. Have you seen any being made? They are pegging away now at the boxes. They are doing the best they can. They have not abandoned their business. They have not left their mill to be shut up or anything of that kind, but they have been forced, as they answered you, Mr. (Foreman) Baker, to go into the box trade, rather than treat it as an incident as it formerly was in their trade. There is Mr. Dupont. Up to the time this structure was there he used to go down and get his hardwood for oil finish, and since then he has bought nothing but flooring from them, and he goes elsewhere to get this that will not be soiled that will take an oil finish. In other words, their custom has departed, and H. N. Backus has told

you that he has not solicited that trade because he knew he could not do it right, and there is a good deal in that, gentlemen. If you take a lawyer like Mr. Baker, who has been at the bar for fifteen or twenty years, and you come in and offer him a case and he says to himself, in view of my engagements I won't
2925 be able to give that case the attention it deserves, do you think he would take it? Not at all. He would like to have as many cases as possible, but as an honest man he will say, I am not going to be able to give your case the attention it requires, and consequently I will decline the business. And so with Mr. Backus. He has a reputation for fine work, and when he finds he is not in a situation to do fine work, he no longer solicits orders for it. That is honest. That is manly, and that is what he should do. Now then, how is this property injured? We claim that it is injured by being deprived of part of the light from the street. But they tell us that our mill is back forty feet from the street, and if we could believe the arguments of counsel, it rather helps the sun to have this roadway between it and the mill. Backus has a right to build up to his line, hasn't he? That vacant space is his, not theirs. Has he got to always stay forty feet back from the street so that he may not be darkened by this structure? Why, if they are taking that forty feet from him, if that is there to supply the want of the street, then he ought to be paid for the forty feet, even if the light is as good as it was before. Now, is the light as good as it was before? There is a structure that has fourteen feet clear below. And then when you get up to the rail it is twenty-five feet from the ground, so that there is nine feet of material there between the bottom of that structure and the rail above. The stories are eleven feet in height. So that while the bottom of the structure is about three feet above the ceiling of the first story, the top of the structure is three feet above the top of the second story. I may be wrong in the figures, but practically that, so that it stands in front of the two stories of the building and affects the third. Now, the ordinance of the city of Detroit requires that under each of those tracks there shall
2926 be solid metallic pans. They have not put them in yet, because they wanted the light to come down between the ties when you were viewing the property down there, yet the ordinance of the city requires that they shall have to put solid metallic pans so as to catch the coals and the dropping oil and all that kind of thing before they comply with the ordinance under which they are allowed to occupy that street, and when they have done that they will have absolutely darkened the street below. Because in the course of time they will use that superstructure to carry every car that it is capable of. Railroad business is only in its infancy. There are four roads coming in there now. Probably in the future there may be twenty, there may be thirty, until like the great Liverpool station in London, there is an express train leaving it every five minutes of the twenty-four hours, and I presume in the New York Central depot that there is a train going out on an average every five minutes of the day. So that they will eventually occupy this with all the railroad tracks that they can, until the metal shields beneath them

practically cover the whole affair. Now, if you believe that a superstructure can be thrown across this street fourteen feet from the ground below and then standing up with solid sides, the way that it is, nine feet more—more than that, eleven feet more (I think it is twenty-five feet to the track because that is what the plans show)—if you believe that that can be thrown across the street the whole width of the street there, and that it will not darken the bottom of this building, then it is useless for me to reason with you. Why, put an awning on that window. Will it lessen the light that comes in here? It may not make it so dark that you cannot see or anything of that kind, but it will lessen the light. And we have the undisputed testimony of all the people who are in the business with the Backuses here, that unimpeded light is absolutely neces-
2927 sary to their business. If I am a tailor and you make the light just bad enough so that I cannot thread the needle, although I may sew if I get it threaded, you spoil my business. And it only makes a little difference when a man can thread a needle and when he cannot. He can do it at 40, and at 42 he has to call his wife in to do it for him. His eyes have failed a little, very little, but if he is in that business where the needle has got to be threaded, it is spoiled by the want of eyesight or the want of light. And in this business the testimony is overwhelming that it cannot be carried on without the very best of light, the most accurate light. It is all nonsense to talk about it. Mr. Robison said there is a little shed there that shuts out the light forty times as much as the superstructure. Why, you remember the shed, there is a board fence about that high, and there is a roof about that wide to cover the rip-saw, and Mr. Robison in his exaggeration and in his absolute enslavement to this company has the temerity to tell you that that little thing there is forty times as bad as this structure which goes across the whole street, and which eventually will be absolutely sealed with these metallic pans beneath it. Now, who knows whether that is darkened or not? We are not depending upon Mr. Backus' testimony. We are depending upon the testimeny of the men who come in here without any interest. We have brought you the foreman from every floor. We have brought you the engineer. We have brought you those that are actually engaged in work. We have brought you a disinterested man like Mr. Griswold who has seen men stop until trains would pass so that they could get a better view for setting their gauges, or for doing whatever work they might be at. Now, we have brought you overwhelming testimony on that. Every man that knows has testified; that is, the superintendents of departments. Are these honest,
2928 reliable men? Why, you say they have been a long time in Backus' employ. That is true, but the man that comes here as foreman and tells you that he has had the same job for eighteen years, that day in and day out he has been at his post, and that during all that time he has been able to suit his employers, comes with a pretty good certificate of character. He must be a pretty good man or he would not be kept, and these men are men who have been there from thirteen to eighteen years, they have worked

out the proof of their own good character by their long term of service; and are you going to say that men who have been so faithful to their masters here would be so unfaithful to their Master in Heaven as to swear to a willful falsehood for the purpose of misleading? This is the kind of testimony that is presented, and upon this testimony we rely. We have a right to rely upon it. We do not present it with apologies, but with confidence that it must carry conviction to twelve honest men. Now then, we presented on this witness-stand one of the oldest and most respectable business men of this city, Peter Henkel. Has he any interest in misstating these things? He is the owner of a pleasant and very beautiful home on Fort street. If any of you have ever passed it, you can see the good taste of the owner in its surroundings. The building is low and spacious. There is nothing wasted in cornices or domes or towers, but around it there is a large plat of land with beautiful trees and everything that could make it inviting to the eye. Peter Henkel says he went there, I think, some thirty years ago, perhaps not quite so long; that in the early days, although the Michigan Central was running 1,500 feet from him before this railroad came, they hung their clothes out and could take them in at night unsoiled by dust, uncontaminated by smoke, absolutely clean as they were placed upon the line. And then he tells you that in
2929 those days and up to the time this railroad came, they had good fruit in the garden and everything went on as it had been, but when the railroad came, with its smoke and soot, they could no longer hang clothes out even at Peter Henkel's residence, which is six or seven hundred feet from this railroad; their fruit was destroyed by the constant falling of soot and cinders, even at that distance, so that he tells you that his property where he lives is damaged at least fifty per cent. Mr. Robison would have us, by his cross-examination, believe that Peter Henkel is some æsthetic gentleman whose eye was merely offended by the clouds of smoke that he saw in the distance and whose ear was hurt by the rattle of the engine, the opposer of progress, the man of ideas rather than the man of business. Well, if all the lawyers in this case put together had the capacity of Peter Henkel, then we would not be wasting our lives talking to you here, but would be amassing fortunes by a genius which could be made much more lucrative. Peter Henkel is one of our leading business men. He is a man who is known to everybody; he has no interest in this; he goes down and looks at Backus' property on his daily walk or daily ride and has seen it for years. He has watched its progress, he has watched its growth, he watched it when it was first built and he watched it when it was in cinders after the fire of 1882; he watched it as it again arose from its ashes and he was watching the trade and went there almost every Sunday, walking around as a man will among his neighbors and viewing the property that is in his vicinity, and he tells you when you take the front which a property has you practically confiscate it. And that is true. If you take the front from the Russell house today, the Russell house would be of no value. It is only its frontage that gives it its value. He tells

you that the injury to this property is at least 50 per cent.
2930 Fifty per cent.! $650,000 they have there. Is it injured 50 per cent.? Why, gentlemen, the only thing about this case that appals one is the feeling of the tremendous injury done to these people, and I sympathize with Henry Backus when he says, I am completely broken up, I don't know what to do, I don't know where to turn. He feels that he cannot impress upon anybody the injury that is going to be done him there, and that this company is about to rob him of his business, of his life's work, and pay him with some miserable pittance that may be demanded by its lawyers from a jury. Now, I say that my brother Dickinson has gone away down on the verge of modesty when he has stated to you that $250,000 would be the least possible amount that would compensate these people. That is $100,000 less than the testimony of Peter Henkel. It is $100,000 less than the testimony of every planing-mill man that has been put on the stand with the one exception that Mr. Dickinson mentioned, who put the loss at from 30 to 40 per cent. Now, gentlemen, are you going to rob these people because you want to help the union depot company? Is this an orphan that is appealing to you? James F. Joy has made a reputation in this country for a man of stamina, a man of grit and a man who asks no odds of anybody, and James F. Joy knew when he gave birth to this great enterprise that he had to come in here and compensate every man whose property he took for the purpose of bringing it here. He calculated upon all these things and do you think that if he thought it would not pay that he would bring it. Now, we all love Mr. Joy. It has been one of the things that we have had to consider since this trial has been going on, the bereavements that have befallen him, and I have not an unkind word or an unkind thought of the grand old man who walks through our streets, a credit to the city and a credit to the State. But does he build railroad depots for the public good or to increase
2931 his own fortune? He builds them because they will pay. And he built this one and he enlisted capital, others have gone in with him, and notwithstanding the fact of compensating everybody for his losses, they believe there would still be very large returns. And, remember he has started a great property that is to last forever. Men come, men go, men die, men are born, but this union depot corporation is to last forever. It has an eternity before it, an eternity of undisturbed possession, and even though the returns may be small for a hundred years, it can afford to wait like nature to recoup in the far-off centuries, if necessary, any losses it may incur at the beginning. That is what the law does for it. Every stockholder may die, every one who is interested in it now will pass away, but their work, their stock, passes undisturbed to their heirs and successors, and goes on forever. And forever and forever the smoke will enter the windows that are reared on Backus' property, the dust will fly from their engines no matter what improvements they bring there, this property will be subjected to whatever annoyances there are, and you have put a lien upon it and you have done an injury to it that is to last for all time, not for

thirty years, not for twenty years, not for 100 years, but to last as far as we can see into the future. Now, is Peter Henkel wild in his testimony? Why should he misjudge it? Do any of you live as near to the property as Peter Henkel; do any of you know as well the injury that is done? Are any of you better judges of business property than Peter Henkel? Why should you set aside this man's testimony and give these men less than the injury which Peter Henkel swears to. But take the other testimony to which Mr. Dickinson has adverted, and they all agree with him. There is no contradiction, no one is called. Even Mr. Spitzley they do not ask,
what injury do you think is done to this property, is it in-
2932 jured one-half? He is a planing-mill man; he was there for
ten days taking that inventory. They probably were not on their guard all the time as they were when you went down, to shut off the engines while he was there. Now and then some raw engineer would come in who had not received his instructions for the day's performance and as the engine would come struggling up there, in all probabilities the cinders came down and the smoke came in just as it had been sworn to by the men who are there from day to day. But they do not ask Mr. Spitzley what the injury is. He knows what a planing mill is, he knows the light that is necessary—although they have had him there ten days on the ground they never ventured to ask him what the injury was that was done to that property. Now, I do not know how you judge it but if they had come to me with their case, I would say, who has taken observations of their property to see whether it is injured, what witnesses swear to it and if they answered, we had not done it, and as far as Mr. Spitzley is concerned, my next question would be, what did Mr. Spitzley say? and if they had not asked him, I would send for him at once and ask what he thought of it, and if his answer was favorable to me I would put him on the stand, but if he said they are injured as much as they claim, then I would pursue precisely the same tactics as Mr. Baker and Mr. Robison. That is exactly where they are. I can hear as plainly as though I were present at the conversation the talk between counsel and Mr. Spitzley, and his confirmation of the testimony brought by these respondents, so that they concluded, as prudent and able counsel as they are, that they would not ask him the question. Now, then, all these men swear to the injury, they swear to the smoke and dust and cinders. You have examined the property; I don't know how it strikes you. If you looked for cinders where the lumber was all covered up
and the cinders could not get in, of course you could not
2933 find any. If you looked for cinders on the loaded lumber
that stood outside, you would have seen them on the top. Yesterday was a bright day; there were only two engines passed so long as I remained there. I do not know how long you remained. One was shut down and was running light without any cars, and another was running with three empty cars. Now, the testimony is, I think, that 150 trains go over that in a day, and do you think they all go over in that shape? Mr. Dickinson had asked his honor to instruct Mr. Baker not to let the company know when you were

going down there, so that you might see these engines just as they go by in their natural state, but the case took a turn so that the papers announced in the morning that you were going to go down in the afternoon and examine the premises. Court was adjourned on account of the sad death of Judge Swift, with the understanding at noon that you should assemble at two o'clock the next —noon and go down and view the property, so that there was the notice given and they were on their good behavior. It may possibly be a sample of the way they are doing business. I noticed the Central locomotive as it came out. The Central had no interest in suppressing cinders and one of your number, I think, stood with me on the bridge while the Central train passed under it, and if I should ever want any one to prove that there were some cinders from the Michigan Central locomotive, I think he would be able to furnish the proof, if he would allow us to take his hat, if it has not been brushed off since. But they had no interest in suppressing cinders on the Michigan Central at the time and it may be that the other had. I don't know, I do not wish to make any charges against them, but I really think myself that they were running the road to do as little injury as possible to Backus at that particular time. Now, gentlemen, these are the injuries that have been inflicted upon these
2934 people. What does Absalom Backus lose in this case? Mr. Robison says that he has rented this property for twenty-three years, so that he is going to get his rent whether it is good for anything or not. Is that true, gentlemen? He has rented this property to his sons; they are his heirs as well as his sons. If he gets his rent regularly from them in all probability in the course of years it will come back to the sons again after his death. If they struggle on, meeting losses from year to year and still pay him his rent, what satisfaction is that to him? When he gets it he knows that his sons are paying him a rent for a thing that is no longer worth what it is rented at. It was worth it when he rented it, but it is no longer worth it and it has been rendered worthless by this structure, and are they going to be able to pay rent right along if their business is destroyed? Are they going to be able to pay it, and it does not make much difference how much your contract is with a man provided he is not able to keep it, there is no profit in it. If I agree to give one of you an income of ten thousand dollars a year and cannot pay ten cents, what is the good of my agreement? Now, can these young men go on with that business, pay for the stock which they have purchased of their father, and at the same time pay this rent and struggle against the injuries done them by this union depot? But remember, they are taking Absalom Backus' property forever, as I have already called your attention. What is the tiny space of twenty-three years compared with all time to come for which they are to injure or destroy this property? It is not always going to be a planing mill Mr. Robison says. That is true. This property may be wanted for warehouses for a wholesale trade. In the changes of our city it may be wanted for many purposes, it may be wanted as a place to store silks where a single speck of soot would destroy

the entire web. It ought to be left to these parties to use
2935 it for whatever they please. You are going to make it second or third rate property at best by allowing this structure to pass before it. You are changing its character forever so that the uses which it could be put to it can no longer be put to. There may be a time when they would want to use the upper stories there with a view of the river for one purpose or another, but it is forever darkened by the smoke, forever darkened by the soot, forever darkened by the cinders, forever rendered uncomfortable, forever rendered of less value than it is now. It is not at all likely that it will always be used for a planing mill. They are destroying one business now, but in the years to come if they are to enjoy this property, they destroy it for every other business to which it might naturally be put. Other railroads will want that ground, they will pay a high price for it if they could get in there. These people have blocked the way so that they have destroyed the possibility of selling it for anything of that kind. And, remember, they have not added in any way to the conveniences of these people, they have no more railroad facilities now than they had before. This improvement does not do them any good. They cannot reach it. If they build a side track from it, it would be only to darken the windows on another story if that were possible. So that they get no advantage. They have not the advantage that the rest of us have; they may ride out on it, but because they adjoin it they have none, they cannot ship a car by those roads from their mill, they have no access to it as they have to the Michigan Central; their property is so built that they do not have the connection with it that they do with the Michigan Central, so that they get nothing for all the injury that is done them and which is to last for all time to come.

Now, one of the advantages of owning real estate, one of
2936 the pleasant things about it, is to feel that it is yours forever, as our deeds read, to have and to hold forever to him and to his heirs and to his assigns. It is a little bit of God's earth that man has the exclusive right to. He has the right to sell it if he will, and to say to the man whom he puts in possession, "This is yours for all eternity; yours and your heirs' and your assigns'." If he does not want to sell it, it is pleasant to know that it will pass down to his children and to their children, and that the people of his blood may enjoy it for all years that are to come. But this property is to be injured during all that time. It is to be rendered second or third class, just as if you ran a railroad in front of the Russell house today and changed it from the very best property in the city to property that would be worth no more than if it were down on Franklin street or on Woodbridge street. And that was to last for all time, remember, because these incorporations are perpetual. They are incorporated for 999 years, according to their articles, but the statute very kindly provides that they may renew the corporation for other like periods as those run out. So that it is practically a perpetual menace to this property—a perpetual injury—and these people must either sell it or must work at it under the disadvantages that are proven to exist. Now, let us sup-

pose for a moment. Suppose this property had a retail trade worth two thousand dollars a year. How much is a retail trade that brings $2,000 a year net profit worth, in round figures, to begin with? What sum invested, say at 5 per cent., will produce the $2,000 a year? Suppose you want to get $2,000 a year, and you want to put money enough in a bank—in the People's savings bank, or the Peninsular, or the State—to pay to some favorite child $2,000 a year. They will give you 4 per cent. on it, and you will have to pile in there $50,000 to produce for that child $2,000 a year.

Now, here is a business down there that brings these
2937 people $2,000 a year for their retail trade. It is going to be destroyed; that trade is going to be gone. Have they injured them $50,000 or $40,000 or $30,000 by taking away that trade, or have they not? And remember that it is to be lost for all time, and the only way you can estimate with the eternity that lies before you in the injury is to say, what sum placed out at interest will bring this income? Suppose you make it 5 per cent., then you have got to take $40,000 into the bank and deposit it there to make up for your retail trade. Suppose the fire risk is increased $3,000 a year; how much have you got to deposit to provide against that increase? Suppose this union depot company says, "Very well, we have increased your fire risk, and we will deposit in the bank so that you may draw the interest on it every year enough to make up for your loss." They will have to carry into the bank $60,000 and deposit it at 5 per cent., if they could get 5, to provide for that $3,000 increase in the fire risk. And the testimony is undisputed. There would be $40,000 at 5 per cent. to pay for the retail trade, and $60,000 to pay for the increase in the fire risk; but is there any increase in the fire risk? Why, gentlemen, suppose that mill took fire today, how can they get an engine or a hook and ladder down River street to put out the fire? Talk about the electric wires making it impossible to protect property in this city, why, the building of this property on its face has destroyed all the utility of the fire department to all that river front. How can they get in there? A ladder cannot be raised. They can run into a hole and that is about all, with their engine, but as Mr. Dickinson has pointed out to you, the increase in the fire risk is placed beyond all peradventure. These people are paying it, they have to pay it. Dare they go without in-

surance at the present time, when every train that is passing
2938 is in danger of setting them on fire, and don't they get their insurance as cheaply as they can? Why, they get it at the rates which Mr. Chapman fixed. They are not paying more than Mr. Chapman's rates, as I understand it. They are getting it as cheaply as they can, and they are compelled to carry a large insurance, not according to their wishes, but because they cannot avoid it, and they are compelled to insure themselves practically for twenty per cent. of the property; they are now carrying 30 per cent., or nearly that. Now, what amount invested will bring back that $3,000, putting it at the minimum? Mr. Jones says it is from three to four thousand dollars net loss every year in insurance. Take it as $3,000. It will take $60,000 at 5 per cent. to provide for it,

$40,000 to provide for the retail trade. Now, then, take the land. Suppose these young men are able to pay the rent for twenty-three years. The rent for twenty-three years that are yet to run of that lease it would — testimony of every witness who has been asked is that the land today is worth one-half less than it was before this structure went there, and the rent is worth half. There is $9,000 a year which that property is worth less to these young men and to this company. Now, what sum placed at interest will produce that amount? You can figure it out for yourselves, gentlemen, in twenty-three years that are yet to run of that lease i- would amount to $207,000, but you are not counting twenty-three years. For two whole years this whole concern has been kept busy trying to defend their rights and to get some price for their property. Trial after trial has been forced upon them, until, as you must know from your experience as business men, this very litigation must have cost them far more than this company is now willing to pay. If a man comes and wants your property for himself, you can bargain with him a little while, but if you find you cannot agree, you can say, "I have not
2939 time to talk about it." But the Backuses cannot stop. They are forced to keep on negotiating before a jury so that for two whole years their time has been practically absorbed by this company trying to compel them to take a less price for their property than they think it is worth. Ought you to compensate them for that? This company has them by the throat. It has the same power over them that the robber would have, although it has the law back of it, all society, the whole State, I may say, has come up and taken Backus by the throat and said, "We are going to make you sell to the union depot company; you got to sit here while we fix the price." One jury gives them a certain amount, an appeal is taken and it is brought back, but still they are held in this iron grasp of the State for this company. Now, these are all elements of damages, and you ought to consider them all. What you are bound to do is to compensate these people. You are not bound by what another jury did. When the other jury sat in this case this structure was not up. There could be no witnesses then to testify that it darkened Backus' mill; no cinders had come in from its engines; no soot had settled on the lumber; all these things have come around by demonstration since that time. There were no switches in front of Backus' then, and no reason to expect that there would be switches in front of Backus'. These things have been built since that time, and they have stood up there so that we have been able to collect the evidence of this injury now, and it is infinitely larger than any witness thought it would be before the structure was actually raised. All these elements of damage were conjectural before; all of them now have become a matter of demonstration and absolute proof. Now, then, suppose you put a value on the good will of this business; suppose you put a value on the injury done to the real estate; when you have destroyed this mill,
2940 what are they going to lease their lumber yard for, their great warehouse? What will they use their warehouse for, what are they going to do? They know no other business. Suppose

today the courts of this State should say to me, we will no longer permit you to follow your profession, and at 53 I am compelled to abandon the business to which I have devoted myself since I was a boy of fifteen years. What else can I do, what can I turn to, what do I know? There are other and more profitable avenues open. A jury might say to me, why, become a builder of railroads, become a merchant prince, go and develop mines; but I do not know how to build railroads, I do not know how to sell goods, I do not know how to develop mines. I have devoted my life to one thing, and if I am shut off from that I am shut off from everything. This old man has devoted his sixty years, you might say, or fifty of the sixty years, because he brings you the picture of a boy of eleven years entering upon this business.

Mr. DICKINSON: He is in his 70th year; he was 69 his last birthday.

Col. ATKINSON: He is practically sixty years in his business, he has seen it all these years, he has seen its growth and he knows nothing else. What can Absalom Backus do? What can Henry Backus do, who is forty years of age? At forty a man is in his prime to do what he has learned to do, but he is too old to learn anything else. He has crossed the meridian where all things were possible to the place where only one thing can be done; and these men are to be thrown out; all their plans of life are to be changed; they are to be seen going around town, as Mr. Robison says, to see where they can locate and what they can do; they are to turn their warehouse into blacksmith shops; they are to turn their lumber yard to some other use or to some other kind of trade. And
2941 all this trade is new to them. Now remember, that of every one hundred men who engage in trade in this country, ninety-five fail. When you get a man who has made a magnificent success, when you get a man who has commenced away down at the lowest round of the ladder and scaled it until he is almost upon the topmost round, you have one who has shown that he has devoted time, industry and ability, for which he ought to be paid. God has been good to him. Shall his fellow-men become his despoilers and rob him of the blessings which have been given? Now, I say, you are about to break up not only a business, but you practically break up three lives when you take this property. Oh, gentlemen of the jury, how small after all are the dollars and cents which can be given in compensation for all these things. Men have pride; they have pride in a successful career. That career is to be cut off. They are better for being active. They can only be active and successful at the same time in the career for which they have prepared themselves. They are better to be at work than idlers. It would be no blessing to these young men to give them money that would place them in idleness for the rest of their days. They had better be at work, but where can they work safely, where can they work prudently, where can they invest their money with the expectation of getting it back except in the business they have run, the business they have devoted their time to, to learn and know all about? So that you practically break up these lives, you break up

this business, you destroy the combinations which it took Absalom Backus years and years to bring about, of these properties separated and yet dependent on each other; separated a short distance, but still all the links in one chain, which brought him large profits in money from year to year. Now, there are many ways of estimating this damage. They will occur to yourselves, but what I
2942 beg of you is this: Do not, under the idea that you are doing some great public good, do this man or these men an irretrievable injury. No one is asking you to do it. The great and generous Commonwealth in which we live, which has loaned its mighty power of eminent domain to this company, has said to you, Guard the man who may be subjected to this power. The State is warning you, we have loaned this power to aid in acquiring property, but we have not loaned it for the purpose of oppression or the purpose of robbery. And it would be an abuse of one of the most extraordinary powers as well as one of the most sacred offices which man can possess, to give this property which belongs to the Backuses to this railroad company for one penny less than actual compensation. And compensation means a covering of every possible loss.

Recess till 2 p. m.

Mr. Baker's Argument.

2.30 P. M.

Mr. BAKER: If the court please, before proceeding with the argument to the jury, I desire to call your honor's attention to certain questions of law relating to damages, or compensation that may be awarded in this case. And I disagree with my brethren as to the extent to which the respondents in the case are entitled to recover damages, and I have formulated my theories in regard to the damages in certain requests to charge. Brother Dickinson relies with a great deal of confidence upon the case of Weiden *vs.* Grand Rapids & Indiana R. R. Co., in the 70 Mich. But if your honor will examine that case you will see that it is a case where the entire property was taken by the railroad company, where it necessitated in and of itself a removal of the business of the respondents from the
2943 property upon which they were carrying on business, and it was a physical fact if the railroad company took the property, the business had to go to some other place. In that case Judge Campbell, in speaking of the rights of the property-owners, held that this interference with his business in compelling a removal of it was something to be considered in estimating the damages, but his remarks must be construed with reference to the case before him. In the case at bar we do not take any of the land that belongs to Mr. Backus or his sons, we merely go in front of it on the public highway, and the damages that he sustains are incidental damages. That is, they are such damages that occur to the property because this superstructure is built in front of it. If it was not on a public street, if that was private property, as explained by Brother Robison, he could not recover any damage, not a cent's worth of damage be-

cause whoever owns adjoining property has a right to make any legitimate use of it. So that when we come to consider this question of damages with reference to his business it depends, in my judgment, entirely upon the question of whether or not it is necessary or advisable, in view of the situation down there to remove his business to some other location, and I have requested your honor to instruct this jury that if the jury find the injury to the property is not so great as to make it necessary or advisable to remove the planing-mill and box business therefrom to another location then the——

And in support of this doctrine I call your honor's attention to a number of decisions. A leading case upon that subject is found in the 107 Pa. State, 461. This is where a railroad company took a part of a lumber yard and a part of a wharf in Allegheny City, opposite Pittsburg. They have occasion in this case to consider the question of how far sales in the immediate locality should influence the jury or should be considered as evidence of value. In
2944 other words, if the court please, the question as to what business is carried on there, and as to how profitable an institution it might be is merely an element to be considered in establishing the market value of the property.

The COURT: In other words, if a profitable business is carried on in connection with a certain site, the profitableness of the business itself must be taken into consideration by the jury in estimating the value?

Mr. BAKER: Certainly, and that is all, and that is all there is to figure on. The figuring on profits to continue forever is simply ridiculous. That property is worth a certain amount of money before this railroad was built, and it is worth a certain amount of money since, and the difference is the proper measure of value.

And now, gentlemen of the jury, I desire as briefly and as concisely as possible to lay before you the view of the petitioner in this case as to what the award should be to the respondents for building this elevated road in front of their property on River street. And we have heard in this case a great deal about the constitutional rights of the owner of private property in this country. They have gone to England, they have gone to Germany, but I know of no civilized country on earth at the present time where the owner of private property is not paid a compensation for his property when it is taken by the Government or by any corporation that performs a quasi public function, or that represents the public. There is undoubtedly no difference between the law of Germany in that respect and the law of England, and the law of America. In all civilized countries there is such a thing as the right of the government to take private property. It is called, to express it briefly, the right of eminent domain. That is the right of the people at large, whether they are
2945 represented by a sovereign, by a king, or by a parliament, or by a congress and a president to take private property when it is necessary for the public good, and that no owner of private property through caprice or undue attachment to his property can stand in the way of it. As has been said by my friends upon the other side, a railroad company in this country is permitted to con-

demn property to the public use, and is expressed by Judge Campbell, in the very case they cite, because they could not exist otherwise. We could not have these improvements were it otherwise. It would be utterly impossible, gentlemen of the jury, to ever build a railroad, or to lay out a public highway, or an ordinary private way, or anything of that kind if every individual property-owner through which you should run would have a right to stop it by asking any price that he saw fit, in order to acquire his property. And while private ownership is protected, and rights are protected under the Constitution and laws of this country, at the same time a man cannot through caprice or because he thinks his property is worth ten or fifteen or a hundred times more than it is really worth, stop any such an enterprise. So that when you come to look at this, and when you come to see that while the Constitution protects the private ownership, protects the private owner in the ownership of his property and in the right to his property, there are limitations to it, to which he must submit for the public good. And this principle is very well illustrated in this case. Suppose the union depot company had to pay to Absalom Backus, Jr., & Sons whatever they saw fit to ask for that property? Suppose they were compelled to raise money and pay it out to satisfy their ideas, their ideas as to what their property is worth, and as to what their property is damaged in this case? Is there a corporation, is there an enterprise of this character in this city, either the Michigan Cen-
2946 tral R. R. Co., the Detroit & Milwaukee Co. or the union depot Co., that could stand such a drain upon its treasury? Especially if all the property-owners along the line of River street had a right to boost their property, to elevate the value of it, and to insist upon being paid just exactly what they thought it was worth, without regard to right, justice, equity or good conscience, or anything of that kind. So that when Brother Dickinson comes in here and claims there is something about the constitution of Michigan that is peculiar to this country, that there is something in the doctrine of State rights that is peculiar in this country, that would protect a private owner, why he is simply making himself ridiculous. I undertake to say that the Constitution of the United States protects this private ownership just as much as the constitution of Michigan, and the State of Massachusetts, and a great many of the thirteen original States refuse to ratify the Constitution of the United States until they put in a provision that the Government of the United States should not take private property without making compensation. But that was at once not only a limitation upon the power of the Government, but it was a recognition of the necessities, of the necessity, gentlemen of the jury, of exercising this power of eminent domain as the public good required it. What would we do if every man could stop these enterprises, what would the Government do, what would the country do if every man had a right to say: Here, you cannot go by this property, you cannot take this property, I am so attached to it I won't sell it. I won't do anything about it. You can't have it. And that is what my learned friend rings the changes upon here hour after hour trying to

influence you and make you believe that there is something so dear and sacred in that planing-mill property down there that a railroad must not come within 40 miles of it. Now, gen-
2947 tlemen of the jury, when we come to look at the situation here, what do we find? We find that it was thought best, the money could be raised—probably could not be under present conditions—if the money could be raised to put this depot in the central part of the city. It is true they thought they could have a passenger depot at Twelfth street, and they have alluded to the thought that existed in 1882, that it would be possible to have a passenger depot at Twelfth street, but it proved false. It is no place for a depot to accommodate the public. It is no place for a depot to accommodate the people of this city, and the people who desire to do business with this city, and instead of building a passenger-house down there, they desired to put it up nearer the city, where it would furnish facilities to the traveling public, and it was thought best to go along River street. They would have you believe under the testimony of Peter Henkel and others that that is a street especially adapted for residence purposes, that that is a street where property-owners are especially interested in having a view of Detroit river. That that is the street that is sacred and must not be used for public purposes, but when we go down there, gentlemen of the jury, we find a street that is lined upon one side, from beginning to end, with railroad property, with a great railroad yard. We go upon the other side of the property and we find nothing but manufacturing institutions and old residences that existed there years ago along the north side of River street from Twelfth street to the railroad, practically abandoned property years and years ago long before the elevated railroad and the union depot was thought of. A locality, gentlemen of the jury, where the manufacturing institutions and the railroad transport boats fill that atmosphere with smoke, with a cloud of cinders and soot and smoke, and make it just ex-
2948 actly what it was long before the union depot was thought of, a manufacturing locality, and a railroad locality. They had crossed that street right east of Mr. Backus' property, and a railroad crossing with some thirteen tracks, with the immense traffic of the Michigan Central going by there daily and nightly year in and year out, rendering that street at times impassable until travel had been diverted up Fort street and over a bridge there constructed for the public use. Now, that was the situation of this property when this enterprise was started. Why had Absalom Backus located his planing mill and box factory upon that street? He located it there because he wanted railroad facilities. He located it there because it was a manufacturing locality. He located it there because it was a proper place, as he thought, for his business to exist. He built up that factory, that institution, he had a lumber yard below, and he bought a storehouse above, so that he was reasonably well situated. Now, what use could he make of River street? Of what benefit was River street to him? And he had the same rights in that street that every other man has in the street in front of his property. What is a street for, gentlemen of the

jury? In the first place a street furnishes you ingress and egress to your property. In the next place a street furnishes a frontage where you can secure light. In the next place it furnishes you a means by which you can have gas pipes or water pipes laid to your property. In the next place it is a means by which you can use your property. Generally you can make use of this property, but his rights down there in that street were no different than the rights of the owner of any other property in this city. While in a technical sense he may own to the center of the street, yet all he has a right to do is to use that street in connection with his property. He has it in front of his premises. It is located there so that he can use it, and when the public desires to divert that
2949 street to some other use, when any one desires to acquire that property for any other purpose, the question- to what extent, how much is he interfer*ing* with in the enjoyment of that street, and such things—connected with it. Now, you can conceive but two or three things of interest to him in that respect. As I say he has a right of ingress and egress. That is saved to him. My brothers would try to make out that it would be a great deal better if this road ran along the surface, but if they went along the surface it would destroy the use of that street. He would be deprived of the use of it, in hauling his lumber from his yard below to the mill. Is that interfered with? They come in her- and undertake to say that his draft horses and teams that he uses there are interfered with by this superstructure, but Mr. Backus himself admits on the stand that does not amount to very much. When we go down there to look at that property we see people driving along under that viaduct and, as I said during the examination of a witness in this case, once in a while you will get a rattle-headed horse that cannot learn anything and you cannot accustom him to any such place, but those are rare exceptions. Ordinarily a horse soon becomes accustomed to it, especially the kind of horses he uses, so that when we come right down to it, Absalom Backus and his sons can go on and use that street today just as much as they ever did. There is no perceptible influence upon it. There is no reason why he should not take loads of lumber or loads of hay or anything else and drive under that superstructure, because there is no perceptible difference in it. In fact, if you will look at the cross-beams over his gate you will notice it is not as high as the elevated road is, so that when you come down to the frightening of horses it is not true as a matter of fact, that it is any serious inconvenience to him.
2950 It does not amount to anything, it is of no consequence in this case.

What other rights has he there? He has the right to the light. And Brother Atkinson in his argument in this case assumed that the other jurymen who sat in this case were at a disadvantage because they could not see the superstructure. They could not see it—now, you can imagine the condition of this case, gentlemen of the jury, when it all depended upon inference, and the testimony of witnesses as to what was going to be there, as to what obstruction to the light was going to be there. Now, we have been there. This

jury have been there. You have looked at that property. You have seen trains passing by there. You have seen to what extent it hinders the light on that property. You know for yourselves. You don't have to take the testimony of Mr. Backus or his sons or any one else with regard to it, and you all know, as every sane man must know who has looked at the property, that that superstructure and the passing of trains has no perceptible effect on the light on those premises. Has no perceptible effect, no effect that would interfere with any workman on those premises, and in any spot or place on those premises. They talk about the drippings, the drippings and the oil, and they get up all sorts of stories as to how people would be interfered with in going over that property, and you can go from one end of that viaduct to the other and you cannot find a grease spot as big as a ten-cent piece, gentlemen of the jury. And traffic is going on there all day long, and at all hours, and still they say our light is obstructed and our lumber is covered with grease and with soot and cinders to such an extent that we cannot do business there. And they expect that 12 intelligent gentlemen who go down there and look at that property will be fools enough to believe that kind of a story. They have called attention to the fact that the
2951 union depot company has not put those pans under there. That was something that was put in by the common council just at the last stages of the enterprise. If any one wants those pans under there, they can be put under. If there is any occasion to put them there the union depot company will be only too glad, but we would like to have some call from somebody along that street showing that it is necessary or advisable to do it, and when you come to look at the ordinance in regard to the pan, you will find it is a pan to go right under the rails of the railroad track. They have been omitted from there, because there has never been any occasion for them, because there has been no dripping from them, not enough dripping to affect a load of Absalom Backus' lumber in a thousand years, not in a thousand years, to make one cent's worth of damage. Now, gentlemen of the jury, they say there is a great interference with that property because of an increase of a fire risk, and they find fault with me because I do not swear all the insurance agents and all the planing-mill people in this country with regard to it. Now, when I get the evidence according to the truth and according to the facts before the jury, I don't usually spend any further time in regard to it, and I just simply want to call your attention to what appears in evidence before you, by the undisputed testimony of Mr. Jones, and of Mr. Chapman, and the other witnesses in the case, and see whether there is anything in this insurance and in this fire-risk contention. A locomotive undoubtedly will throw cinders. A locomotive undoubtedly, if you open the fire-box and dump the fire-box on that structure, will throw fire. You have all noticed locomotives when in exertion, that the sparks will be lighted. That is, you can see them for some distance from the smokestack, but the farther away

they are the less you can see them. Not that the sparks are
2952 not there, not that the cinders are not there, but that they have gone out. And of course if you maintain inflammable material right alongside of a railroad, that a spark might possibly get into it occasionally, there is no doubt but what it would increase the fire risk, and ought to increase the fire risk. There can be no question about that. But it depends altogether, gentlemen of the jury, on what you have got alongside the railroad track. It all depends, gentlemen of the jury, on the nature of your structure, and how you take care of it, and what it consists of. Now, look at this property they have. They have a dust-arrester, and they have an open yard there, and in spite of the evidence that must be furnished to them by their own senses, they insist upon keeping it there. They insist upon keeping a sawdust vault there with two doors to it, one opening against a fence right close to and right under the elevated road so that when you stand upon the elevated road you can look right into it. They insist upon keeping another one that opens into a little yard, and insist upon hauling the sawdust and shavings out of there, and they keep it there, although that mill is liable to be burned up any day just simply because they expect if it is burned up before this matter is adjusted they can simply swell their damages, they can get their insurance and the old mill is gone anyway. When, if they had a particle of regard for their property they would go to work and see if they could not do something to avoid that fire risk, to avoid what they say necessitates a very large annual expenditure for increased insurance. Now, gentlemen of the jury, let me call your attention to this fact: When Mr. Jones went upon the stand he had to admit, just as we contend is the truth, that the fire risk upon the planing mill and all the other property there has not been increased on account of this, that is, it is not, so far as the actual risk is concerned, it is not increased. Mr. Chapman says that he does not know what the former rate was upon
2953 the shaving-house, but he goes down there and fixes a rate upon it for eight per cent. And is it any wonder, gentlemen of the jury, that left there as it is that nobody takes insurance upon that property? And we have a practical illustration of it, and I suppose my brethren thought they would stampede this jury with the fire that occurred down there. They had an old mansard roof, about 25 or 30 feet high, on a level with the passing trains so that sparks will blow right into that mansard roof. Now, the Peninsular Stove Company has probably learned something by that fire, and they will take some of the money they got from the union depot company and they will make corrections. They will not have this old mansard roof made of shingles and tin. They will have no such thing as that any longer. You can gamble on that. And of course Mr. Backus insists upon having this dust-arrester of his there in place of a better one, and having a sawdust vault and keeping it open so that it is on a direct line from the smokestack, he can expect a fire, and he can expect to pay an increased insurance, and he can expect sooner or later that mill will be consumed by fire. But

is there any difficulty in avoiding that risk, is there any difficulty in getting that insurance rate down to what it was before this structure was built there? Is there any doubt about it on earth, gentlemen of the jury, when you consider the testimony in this case and the state of the art in regard to dust-arresters? You have heard the testimony in this case, and it appears that in 1882 Mr. Backus invented his dust-arrester, and his apparatus there, and that in 1885 or 1886 some ingenious individual invented this centrifugal-acting dust-arrester, and they can talk as much as they see fit about their dust-arrester, they have only succeeded in showing that three of them are in use in this city, although here is where the
2954 owner of the patent lives, here is the best living example of his dust-arrester, in this city with all the manufacturing institutions here, scattered over the Milwaukee road and the Michigan Central, around the city, and Delray and the Rouge, and there is not a single one of the large manufacturing institutions that use it. Not a single one. Go to the Saginaw valley, where there is nothing but planing mills and lumbering institutions, and wood-working institutions from one end of the valley to the other, and not one of them, with hardly an exception, but what uses this metallic dust-arrester that does its work as it ought to be, and as far as any outside exposure is concerned, is absolutely fireproof, because all you have to do is to make your shaving vault of a brick wall or of iron or of slate, and to put your centrifugal dust-arrester in it, and as far as any outside exposure is concerned, it is impossible to set it on fire. Now this means something, gentlemen of the jury, it means something when the entire trade, when all the men engaged in the business, when all the manufacturing institutions in the country practically, from Maine to Texas, make use of a device and Absalom Backus refuses to adopt it. And when you go down there and look at this dust-arrester, you will see it is on top of his property. He has got a sawdust vault on the south end of it, there is no pretense that he feeds his boilers, his fire-boxes under his boilers, with that at all. North of that he has a dust-arrester, gentlemen of the jury, that is for shavings, and there is a connection between his vault and the boiler-house so that they can draw shavings from it and feed the fires under the boilers. Did anybody tell you, or did you see down there, how they got shavings out of that big vault? They go on and tell you how they use that space, and how the wind, when it blows, fills it right up full, thirty or forty feet long, and fifteen or twenty feet across. Did they tell you how they got those
2955 shavings out of there so as to feed them to the fire-boxes? They didn't bring that man out of that hole with an old shell hat on, and who goes up on top and tries to keep those burlaps on the outside clean. No, they didn't bring that out, but if you were down there looking at that property, and going around that property, you will see or did see how they operated it, how in the wall of that vault they have an opening through which they draw these shavings as to feed them to the fire-boxes. How do all these shavings get away over from the other side so they can feed them? Is that sensible, when we have the uncontradicted testimony

in this case that it is perfectly feasible to take one of these centrifugal-acting dust-arresters and by simply having a pipe right from the bottom of that dust-arrester right into the fire-box to feed it automatically. It is necessary to have a vault to take your refuse, and you can put that refuse in that vault and you don't need to burn the whole of them, you can burn any part of them you see fit, and from any part of your premises you see fit. It is only a question of a little more pipe. And if you haven't got fan power enough, all you have to do is to put — another fan and have another little engine, costing four or five hundred dollars perhaps, and have it operate that fan so as to blow this refuse a little further. But no, their dust-arrester is such a perfect one, and it works so magnificently, that they are bound to stick to it, although it increases the fire risk, although it increases the insurance rates, and it is just as plain to a man as anything can be that sooner or later, if they don't do something, that property will burn up. Now, gentlemen of the jury, cinders, of course, if they are hot and afire, and if they catch in the right sort of substance, will ignite, but they will not set fire against the brick wall, they will not set fire against glass,
they will not set fire against corrugated iron. They don't
2956 do anything of the kind. As a matter of fact, most of the
cinders go out the minute they strike anything. Most of the cinders expire before they do strike anything in the air. So that when you come down to that it is perfectly easy to fix that River Street property so as to reduce the fire risk to a minimum and not cause any increase in the rates of insurance in any shape or manner, because all they have to do—and I have a little map made of this property that you can use, and you will find that there is a dust-arrester here up on River street running back to their boiler-house, with the shaving vault right over the boiler-house, but you find they carry their kindling wood over their kilns, they carry their kindling wood by a carrier over the dry kiln, to a kindling-wood room that is between the office and the shed back of the office and the dry kilns. That is where they load their kindling wood, and in addition to that they have a large open space and a shed on the west side of their property, I don't know whether any of the jurymen went around there, but upon the west side of the property there is a shed and a large open space where it would be perfectly feasible to put all the refuse, sawdust and shavings they may have, there. Now, we found out upon the witness-stand what an apparatus of this kind can be put in there for. It would cost about $1,300 for the apparatus itself, and if he were to raise his walls it would be something more. $2,000 would cover the entire thing, and take this combustible apparatus away from there and put it out of danger. There is no doubt about it. We have it verified completely when we examine the history of Mr. Backus in regard to this subject. We find in 1882 he started to make these dust-arresters and put in a number of them, and they were adopted to some extent, when this new invention came out in 1885, and was introduced, it
drove him out of the business and he has been out of it ever
2957 since, and will be out of it for all time. You may as well

ask a man if he were building a store or a nice house in the city of Detroit to put in old tallow candles and use them for lighting his premises as to ask a man building a planing mill today to use one of his dust-arresters. And he insists upon adhering to it, and he takes particular pains when the jury are down there to have those doors open when it is a risk every time he does it. And more than that, he goes down there and takes first-class lumber and puts it on River street so you can see it. Is that a place where he stores that kind of stuff? What are the facts in regard to the transaction of his business down there? The facts are he takes the lumber from his yard and hauls it up by teams just as they showed us, and they back their teams in that mill and they are dumped there and the lumber goes through the mill. He stores some of his uncut lumber in the fourth story and he takes it down and manufactures it and it goes out in that cart on his Fort Street front or it goes out on the Michigan Central side through those open sh[illegible]s into the cars, and that is all he has to do in his mill. He does n[illegible] use it as a place for storing lumber, that is worth fifty or sixty dollars a thousand, and he takes his overflow and refuse and sends it up on Fort street and puts it in their storehouse. Now, where, during the transaction of that business, where is the point that a large quantity of his product or of his lumber either dressed or undressed is exposed to the soot or cinders of the elevated road? There is no point in the transaction of this business where it occurs, gentlemen of the jury. If any cinders get upon his lumber they get upon it when it is in the lumber yard. We find that he piles his lumber right along the railroad track just as they do in the Saginaw valley, and does not even put up a tight board fence to keep off the cinders. It cannot be very much damage to him, gentlemen
2958 of the jury, if he does not even build an eight-foot fence alongside of that roadway in order to protect this lumber.

It is true, if a very live coal fell on a piece of dry lumber it might scorch it, but that it makes any perceptible effect upon his lumber is ridiculous. If that were true, that live cinders fell upon the lumber, you could not have a lumber yard alongside of a railroad yard, and he would not pile lumber as he does within a few feet of this right of way where the railroad is running through there every hour, year in and year out. So that when you come to look at this matter of the cinders, you can see they build up a great fictitious fabric of theory that has no support as matter of fact. It has no foundation if it is true that all he has to do is to take his lumber up there and push it through his planing machines and take it into his mill and out on the other side, and he goes on with his business now in the same way just as he did before this railroad was built. And they talk about the interference of the retail trade down there. And they build upon this fact that they have a foreman down there by the name of Krombach and some of his friends who came down there and bought of him personally. Suppose Krombach dies, what will became of that business? And they would have you believe, gentlemen of the jury, that they lose two or three thousand dollars a year on that trade. Do you believe any such thing as

that? If men want to buy that material of Absalom Backus or his sons won't they go down there and inquire at the office or at the mill just the same as before? Is it reasonable to believe that trade could be diverted from that mill by the existence of this superstructure on River street, when it must be conceded that upon the situation of his property and his lumber yard, the principal and main use of his River Street front is simply a place to take in lumber to feed his mill with? There is no retail trade,
2959 there is no purchaser that would insist on going down there on River street and seeing Krombach, and all he had to do was to stop on Fort street before he got down to the mill at all and buy it there before he got in front of that property; and if any man did go down to see Krombach, it was some of his friends or relatives, and it is a mere incidental thing; and still upon that they try to make this jury believe they lose two or three thousand dollars a year. But I noticed Mr. Absalom Backus, Jr., said he had no personal knowledge of the loss of any such business, so that where is this damage, gentlemen of the jury, where is this damage they talk about? Where do you find, as a matter of fact, there is any such interference with this property as to compel them to abandon that as a planing mill? And they have questioned me, that is, they have questioned my conduct in this case because I didn't swear witnesses. But, gentlemen of the jury, I have got twelve witnesses in this case that went down there and looked at that property; I have got twelve witnesses that went down and looked at that property before me this moment, and is it necessary to swear witnesses as to what is plain to the common sense and the eyes and the ears of the jury themselves? And I am only too glad, I am only too well pleased that it is not all in the fiction and in the brains of witnesses, but I have got a jury that have gone down there and looked at the property; they have seen that superstructure, they have seen that mill, and you can pass judgment upon it just as well as the most expert witnesses they can produce here. And it will be for you, gentlemen of the jury, to figure out how there is any such enormous damage and such great detriment to this property as they try to make out. It is for you to look at this testimony and see how far it is fictitious, to see how far it has any founda-
2960 tion in point of fact. The law authorizes you to go and look at the property, and it is upon that I rely. You have seen that superstructure there, and Col. Atkinson, in order to avoid the effect of the practical demonstration by your eyes, tries to make out there was something going on in this railroad company to prevent any demonstration before you; but you saw the business transacted there as it is ordinarily transacted. Many of you have seen it transacted there a long time before this trial commenced. Many of you have rode over that superstructure; many of you have passed along under that superstructure long before you were called as jurymen in this case, and you know as matter of fact, as every sensible man must know, that you saw business, when you went down as jurymen, transacted substantially as it is transacted every day. And I assert before you, because I know you are twelve men who have

eyes and who have ears, that when a train of cars passes by on that superstructure it has no effect whatever upon the light in that yard or upon that mill. It is absolutely without any effect, and the simple reason of it is, gentlemen of the jury, that there is too much broad daylight between the mill and the superstructure. They say the train passing by it obscures the view, and, that is all there is of it, and perhaps they are entitled to recover in this case because a train goes by and they cannot see the blue waters of the Detroit river quite as frequently or quite as pleasantly as they could before. But so far as a train of cars passing along that superstructure is concerned, it does not affect the light in any way, shape or manner. Now, gentlemen of the jury, you go into that mill and you will see how much light they have got, and they have introduced witness after witness to show how much light they need. They have got a contradiction of all their testimony right before your own eyes. They put their planing machines in a
2961 basement, in a room where the only accession to the property is through the open doorways where they unload lumber. There are on the west side the openings in the alley, some windows; upon the other side are covered sheds, gentlemen of the jury, where they store their finished product and load it into cars on the Michigan Central road, and so far as that basement is concerned there is no light there except what comes through two or three open doorways where they back in the lumber and unload it. And yet, with all the years that mill property has been there Absalom Backus & Sons have never opened an area in that wall on the north part of that building. And if you remember the wall, the north wall of that mill property where they have those gas jets burning, you will remember an open yard in front, and there would not be any trouble in putting an area down there four or five feet and putting in a window at any time. Still it has been there all these years since 1882, and they have never dreamed of such a thing as lighting the front part of that mill, when there is not a basement in the business part of the city of Detroit, hardly, but what is lighted in that way. And there they have plenty of space in which to do it. So that when they talk about this question of light, it is not true that they need such an infernal lot of light in order to operate these machines, and it is not true that they cannot have it at a very small expense if the elevated railroad had any effect upon it, and it is not true that the elevated road affects those machines or the light around those machines to any perceptible extent whatever. And still they build up before you a fabric that would lead you to believe that they were in Ethiopian darkness, in that basement, on account of that superstructure, but they are located so that a section of the Rocky mountains would not darken it more, or Mount Shasti itself, casting its dark shadow on that
2962 mill and affecting the light in that property. Now, gentlemen of the jury, you can take a piece of property and build up a high building and you go a reasonable distance from it and you can build up another high building, and you get plenty of broad daylight between the two, the open broad daylight of the

blue canopy of heaven above you and within reasonable view on either side, and one structure will not perceptibly darken the light in the other. And Colonel Atkinson claims it is perfectly dark under this superstructure. He builds up a wall 25 feet high there. Now you see it. You saw how dark it is under that. The superstructure itself is not solid. The ties are open, the sides are open, and it is broad daylight under there as long as it is broad daylight anywhere. And as Brother Robison says, if there is anything that shuts off their light it is not the superstructure; it is this shed they built themselves, and the only light they have for the basement is the light that comes through the open doorways through which they pass the lumber. Now, gentlemen of the jury, we have heard a great deal about the dust and soot and cinders upon this lumber, but I have shown to you there is no spot from the transit of that lumber from the lumber yard below to the storehouse above where it is stored, where it can be subjected to any such thing, unless they put it on there on purpose to deceive somebody. And we have a complete contradiction of it, gentlemen of the jury, in the fact that they have constructed their shed, the place where they put their lumber before putting it on the cars, we find it an open shed without any sides at all upon the Michigan side of that property, and as we went down there the other day, we went over the Fort Street bridge and we could see those sidings, and we went under that shed, and we found some of their finished product, some two weeks' stuff piled up there, and those sheds exposed to
2963 the Michigan Central yards. There is a long distance, quite a number of feet, where they have got nothing under heavens alongside of the Michigan Central property but a roof, with trains passing right by there, but Mr. Backus would have you believe, that the wind always blows from the west; that we do not have any east wind or any wind that would blow from the Michigan Central track. They don't do any harm there; they don't throw any cinders that can affect the product they have there. It all comes from the elevated road and nothing else. It is a wonder that the jury going down there and looking at the property—that such an argument could be made to you; that such a contention could be made here; that this elevated road is so utterly dangerous to this property, that they would have to move away from there, although they have been doing business right along with the same kind of exposure and they have purposely built their store-sheds where they pile the finished produce, open, they put in these sheds until they can get a freight car, and these sheds are open. It may be well enough, gentlemen of the jury, to make all these arguments, and we certainly, as far as the company is concerned, we would be in a hole here, or we would be laboring under great difficulty if you could not see this property.

Mr. DICKINSON: Did you see any finished lumber under those sheds?

Mr. BAKER: Yes, sir; there is a pile of two-inch square pickets or something of that kind piled up there. And it is a place made for them. Mr. Backus testified that is the place they do ship from,

that is the only place they have got to ship from. There is no other place where they can load on a freight car. Oh, no, no, they can put it out there alongside of the Michigan Central, the place where they have made for it, and it won't be injured, but if they just pass under this elevated road, and into that saw-mill, it
2964 is ruined. They have got to abandon it. They can't do it.

When it don't stop under the elevated road; it don't stop in that cart between the shed and the mill; they just simply drive in there and shove it off the hind end of these trucks and it is passed through those machines. Will somebody tell me where this elevated road injures this lumber? Where is their finished product exposed to anything except the Michigan Central? Where does the lumber stop so that the elevated road could injure it? Where it there anything that interferes with the management of this business or the conduct of this business? If there is any such thing it is not open to the senses. It is not to be seen there. So that when you come right down to it, it is hard to determine just exactly what Mr. Backus' damages do consist of. He has got this property there. He may some time or other want to make something else out of it and it may be possibly that one of these posts or supports to the superstructure along the curb may be in his way, but I notice those posts when they were put there were put there so that they do not interfere with his gate or the approaches to his gate. So that he can drive in there just the same as he ever could. Is not this a good deal of a bugbear, a good deal of a nightmare to Absalom Backus and his sons? Have they tried, gentlemen of the jury, to lessen this injury, or to avoid the risk incident to this? And after this litigation is over, after this matter is settled, how long will it take the ingenious brain of Absalom Backus and his sons there to go to work and fix this property so they would not burn in a thousand years, as far as the railroad is concerned. Any good mechanic, any man with a clever head in that sort of thing knows it can be done. To avoid every risk it is not necessary to have a mansard roof strung along there. It is not necessary to have a burlap arrester. It is not necessary to have sawdust scattered
2965 around that yard, and underneath that superstructure there, to ignite whenever a spark or cinder or something falls from that elevated road. It is not necessary to have this dust-apparatus in that part of the yard at all. And still, because he has got it there, they come in and one counsel claims $250,000, about twice or three times what the entire property is worth, and the other counsel says that is not enough, they ought to have $500,000, ought to have twice that amount. And they expect you are going to believe, and that you are going to render them some such verdict.

Now, gentlemen of the jury, a few words about the value of that property. It is not very important in this case, because the injury to it would be about the same whether it is worth $250,000 or whether it is worth $100,000, but they are anxious to have it appear in this case about what the property was worth as a matter of comparison, as being of some little assistance to the jury. The jury could see how utterly absurd it would be to give them any very

great amount of money in this case. Because if you take the testimony and look at it carefully, you will find in the first place, according to the best testimony we can get, the real estate itself as it is situated there is worth from 45 to 50 thousand dollars and it is a very liberal estimate. There are 238 feet of it on River street and 75 feet of it on Fort street. Now, the Fort Street frontage runs back only halfway. Certainly $150 a foot is a good estimate for that, and $150 a foot is a good estimate for the other, and when you figure that up it is something like $46,000. Now, you can buy a pretty good piece of real estate for that amount of money, and as far as the Michigan Central crossing is concerned, why Michigan Central connections you can get anywhere. You can get railroad facilities any place around this city or down in Wyandotte. Any quantity of sidings will be put in for you and all you have
2966 to do is to build their plant and ask for them. And I notice Mr. Huyett, when he located, located right in the line of railroad, right in an angle of two roads. When Mr. Thompson located he located on the Michigan Central so that their main line runs adjacent to his property 100 feet and on the line of a navigable stream, the River Rouge. So that when you come down to railroad connections, it is the cheapest kind of a thing and there is any quantity of real estate all around this city where you can obtain these facilities. There is no question about it and there is no occasion to swear witnesses about it because any man with common sense knows it. Now, gentlemen of the jury, what is the plant worth there, as they have built it up and the machinery? Of course we could not go down there and take a perfectly accurate estimate, but we showed that property could be duplicated, brand new, according to the judgment of the men we sent there, for about $100,000, and the Backuses come here and swell that to pretty nearly $200,000. Now, gentlemen of the jury, it don't matter how much that cost. It don't matter what it could be duplicated for. The correct rule of damages in such a case as this would be the difference in the market value of this property before and the market value after this elevated road was built. It is possible that planing-mill property is not very salable, that is, it is not often sold. A large property like this is not often sold. But, do you believe, gentlemen of the jury, that that property could have been sold before this superstructure was built, for $100,000? That is a fair question to submit to this jury. Much less could it have been sold for $150,000, while it might cost—while it might take years to build up a property of this kind, while it might take a farmer years to make his farm productive, or a manufacturer years to make his plant productive, if you put it on the market you would certainly have to sell it for much less than it actually cost. That is the experience
2967 of every one. After this superstructure was built there how much less is it worth? Now, we cannot form anything more than a judgment in regard to it. There is no accurate way of determining it. We can only look at the property, we can look at what it was designed for, we can look at the uses to which it can be put, we can look at it as it is there, and we can determine how

much this elevated road really affects that property, really affects the value of it as a manufacturing plant existing there as it does today. There is no practical difficulty about that, because we know what a railroad is and we know what a planing mill is, and we know very well that Absalom Backus & Sons are not the only men on earth that know how to run a planing mill. I have no doubt there are members of this jury that have just as good a knowledge of it in a general way as the Backuses have. There are other men in the business, there are other men that seem to thrive in the business, and the idea that they have something down there that simply eclipses all humanity is simply ridiculous. They have a planing mill there, they have machinery which they have used in the mill a good many years. It is worth just exactly what it is capable of being used for, just exactly what it can be made productive of, the amount of capital it can be made productive upon, and no more and no less. And when any one undertakes to argue they can't make as much mon there today as they could in 1892, they are simply fooling thems s. They are just simply allowing the imagination of Absalom B us and his sons to run away with them. They are just simply taking a view of it that magnifies the difficulty, building up a fictitious fabric, a speculative fabric that has no real foundation in truth. And they have not pointed it out. They can appeal to you in regard to Mr. Backus' age and the life his sons have followed in building up this property, but it does
2968 not change that property, it does not change the planing-mill business. It does not change the fact that you can go down to that lumber yard and you can take 2,500 or 3,000 feet on to one of those trucks and you can shove it through these planing mills and make flooring of it, or you can put it through a resaw and make thinner boards of it, and you can send it on to that mill and make it into anything you want and sell and dispose of it in the open markets, just as they could eighteen months ago. They try to show us a great deal of this discolored lumber down there and sappy lumber. Of course lumber is becoming poorer in this country every year—they sort it closer. There is a lot of inferior lumber, but will anybody tell me why they can't make just as nice stuff as you could eighteen months ago? Where is the point or place where it could be so covered with soot and cinders as to be affected in its value? There is no place, unless they purposely and wilfully put it out and expose it after they have dressed it, either to the beatings of the cinders and smoke of the Michigan Central or this elevated road. And if they have done business all these years alongside of the Michigan Central with all the exposure, I do not see why they cannot do it now. You go down and look at those sheds where they store the finished product and you will see just exactly how it is. It is perfectly apparent and perfectly plain that they have fully as much if not more exposure, and in fact the only exposure that is in that entire mill upon their finished product, their dressed lumber, is in those sheds, and not when the rough lumber is passing under that viaduct and into the south end of that mill. So that when we come to look at the value of that

property, when we come to look at the situation of this property, when we come to look at the nature of the business, we can see that this elevated road has very little if any effect upon it. If it has any effect, as pointed out by Mr. Robison, and as I
2969 frankly concede it has, it is in connection with the fire risk, and my brethren can talk here and talk as much as they see fit in regard to it, the fact is when you come to examine that, the increased insurance is because of the present situation of that property, because of the exposed condition of the property, if they leave it the way it is. It is precisely in the same condition with reference to a fire risk as the Peninsular stove works property was when they had that old mansard roof, with its rotten shingles up there on a level with the smokestack of these engines, and if they persist in leaving it there in that exposed condition, of course there is increased risk in the insurance, and of course insurance people will be shy of that risk and shy of that property. But, gentlemen of the jury, while Mr. Jones is compelled to come on this stand and concede the companies have not increased the risk on the mill, or upon any other part of that property except the power-house, he does undertake to tell us something about this 80 per cent. clause, and he shows his skill as an insurance agent when he undertakes to tell us about that, and he tries to make out that it is forced upon a man to take 80 per cent. That would be well enough in our case if it was true. That he took his increased insurance because of the 80 per cent. clause, but that 80 per cent. clause is not to the effect that a man is compelled to take 80 per cent. insurance. All it provides for is that if he takes less than 80 %, and there is a partial loss—if there is a total loss he gets the entire amount he is insured for, but if there is a partial loss he has to bear some proportion of that loss as he would bear the loss if it was a total one. That is, the insurance companies found that with the improved fire apparatus that we have in the cities and the care that is taken of these manufacturing plants, the great majority of losses are partial
2970 losses, and under the old method they would have to foot the whole bill as if it were a total loss, only insuring for 80 % of the total value, the insured carried some of the risk himself and therefore was correspondingly interested in preserving his property from fire. So that when Mr. Jones testifies to that he testifies to something that is not true, and he is trying to make out something that is not true, and you will remember Mr. Backus had to admit that he did his insurance long before he had any litigation with any railway company, and that he went upon the stand in these cases and testified he was going to increase the risk, and of course when the railroad was built and put through the lumber yard he did increase the risk, and when this was built he did increase the risk, but how did he do it? They went and asked Mr. Chapman to fix a rate upon that shaving-house, that was all. And they figured $4,500 increased insurance out of this. Jones lays it all to this elevated structure. Now, if Mr. Backus desires to carry more insurance than he did before, there is no objection to his doing that. If he has the money to pay these insurance people and he does not

want to run any risk, there is no objection to that. If he wants to pay it to these insurance companies in order to get his protection in that way, we have no fault to find, although we submit that under the evidence in this case it would be a good deal better for him to make a comparatively small expenditure in improving his property and in putting it in shape and in putting in modern dust-arresters and putting his shaving vault in such a shape so that the insurance companies would not charge this 80 % upon that shaving *value* and would even reduce, as they say, the insurance upon the other parts of that property. But, as suggested by Brother Robison, and there is evidently a good deal of truth in it, he is so wedded to that dust-arrester that he patented, that he invented, that he
2971 claims is the best on earth, that he had rather pay the insurance companies this increased amount than to make a change or admit that he is wrong, or admit that somebody else is superior in inventive power and has invented an apparatus that double discounts it as far as doing the work is concerned, and as far as the fire risk is concerned. So far excelled him that it has driven him utterly and completely from the trade, so far excelled him that they have monopolized the business throughout the United States and Canada, and there is nobody but wagon-makers, J. C. Wilson & Co., and one other company down here that pay him the honor of using this rat-trap they had there years ago.

Mr. DICKINSON: May I ask a question. Is there any testimony they would not increase the rate if the centrifugal dust-arrester had been put in?

Mr. BAKER: Gentlemen of the jury, all we could show, and all anybody could show would be the facts in regard to it. The situation of the property, the way it is situated, and show the way other property is insured, and to show how other people do it, and it is entirely fictitious when they argue that this dust-arrester has no affect upon the fire risk. I am willing to concede the stronger they make that the nearer it is to the truth and the better I like it. Because there can be no possible question that if they go on there just as they are now, that if he keeps that vault open down there, where you can stand up alongside of an engine on that track and look right into it, there can be no possible question, if they keep sawdust strewn around that yard, and using that proporty just as they are using it, and keep that burlap dust-arrester on top of that property, so that when cinders are blown into it, when the mill is not in operation, it will be liable to be burned up, and there is just the same kind of risk at the Peninsular stove works, and
2972 that illustrates it better than anything else possibly could and if they can make anything out of that they are welcome to it, because I think we fully realize what the danger from a locomotive is. They have reduced it to a minimum, they have reduced it so that it is upon very rare occasions they will set fire, but that they will do it, no man can deny and no man cares to deny. It is only necessary for men who have property alongside of a railroad and exposed to that risk to put their property so that when the cinders strike they will go out. It is so plain that a ten-year-old

boy from a mechanical school could put that mill in shape so that it would not burn in a thousand years. That is perfectly plain to my mind, and plain to this jury if it is not plain to my distinguished friends who represent the other side.

Col. ATKINSON: I did not catch your answer to Mr. Dickinson's question.

Mr. BAKER: No, I suppose not. Brother Dickinson would have this case disposed of on expert testimony. That is, he would get us up in this world of high skill, that there is nobody knows how to run a matching machine but somebody down there in Backus' mill, that nobody knows how to dress lumber except they use some machine that he has got, or some workman that he has got. They don't seem to realize that the planing-mill business is one of the most common on earth. You can't go to a little village or any considerable town in the United States but what you will find something of that kind. They are everywhere and it is common knowledge what they are. That they are not really extra hazardous there can be no question. That they are naturally subject to losses by fire more than ordinary property is beyond question, and what I desire this jury to do is to consider that independently, to take into consideration the natural risks that that property is subject to and see how much additional if any risk it is subject to or increased hazard
2973 because of this elevated structure. And because of the passing of the trains, and it seems to me, gentlemen of the jury, that it must be perfectly apparent to any one that the fact that it is put up there is of itself a very great protection. Because the cinders have further to fall, the further they go the less liable they are to set fire. Whereas, if you had it on the grade with the Michigan Central, blowing right into your open sheds, it might set fire if the wind was in the right direction. So that when you come to look at it, the increased risk there is from two causes only. They do not store sawdust, they have only a floor out there between the fence and the mill, that is all. It is the open court. All the increased fire risk is right where the insurance agent put it, right on that dust-arrester just as it stands there, principally because of the burlap existing there on top of the property and partly because of those open doors. You will remember they do not feed that sawdust into their fire-boxes at all. They only use a part of their kindling wood and their shavings. That the sawdust vault on the south end of that property is merely used as a place to store sawdust and they haul it away by teams. They have not had the foresight, they have not had the judgment or the good sense even to put a galvanized sheet-iron covering over that door extending it out to the fence, or a galvanized sheet-iron awning over the other door that extends into the yard, they have not done anything with it except the moment the jury go down there to look at it they go and open those doors. I do not know what they do when the jury are not there, but what I want to call your attention to is that they haul it away in wagons or carts when it is perfectly feasible to blow that sawdust from another part of the yard, or it is perfectly feasible to make a little

enclosure there and pack that sawdust. They now have
2974 machines to press sawdust just as they press hay, and they can pack it and bind it up with wire and ship that sawdust all over the country. Nothing of the kind in use there, although they say this is an article of commerce and although their property is so constructed that they have to haul it away from there with carts. Now the idea of insisting on keeping that there in the face of this testimony; we do not have to have insurance agents or any one to tell us what will cause a fire. That is common knowledge. We understand it just as well as all the insurance agents or planing-mill people on earth. If there is dry sawdust, or any kind of dust, from one of those mills, collected in any considerable quantities, and fire gets there, of course it will burn. And if it is confined it may be subject to explosion, just as flouring mills have been known to explode, and this sawdust vault might blow up any day, if you should light a match in it. Now, it may be all right enough to come in here and ring changes on this insurance, and to figure the percentage and show how many hundreds of thousands of dollars it would cost to avoid that risk, but I take it that practical, sensible men will readily see it can be avoided at a nominal expense, at the expense of $1,500 or $2,000, possibly five thousand dollars. Put that vault in some other place or enclose it, and dispose of it instead of moving it with wagons. There must be a limited demand anyhow, but it may be made into cakes about as big as a bundle of hay and shipped all over the country and disposed of. And do you suppose when we are through with this matter that they won't do that? Do you suppose this mill will ever burn up from this superstructure, if we get through litigation without its being burned up, that these ingenious mechanics, the greatest in the State, will not go to work and fix that property so as to avoid that risk? They
have not done it before simply because they either wanted
2975 the mill to burn up so as to swell their damages, or they wanted to have their case and ring their charges on it through the eloquent counsel until they have misled the jury and got a large sum of money from this company. When you come down to it, the real facts, the damage is small, and whatever you do give them, as suggested by Mr. Robison, will be more a matter of sentiment than anything else. Because today that Absalom Backus and Henry Backus and Newton Backus cannot go on with their business, cannot conduct it just as well as they ever conducted it, can't make as much money as they ever made, to my mind is an absurdity, and if it is true it is because of some other cause and some other influence that is operating on that business than this structure. They are trying to unload either an unprofitable business upon this company, or they are trying to magnify these damages so as to get out whole any way, shape or manner they can do it, and still have their property left, because you must remember in your deliberations, that when you bring in your reward that it is just so much money for them and they have their property left. They have that entire plant, they have all that machinery. They have the lumber yard down below there, they have their warehouse

up on Fort street, and they dominate and control it the same as when they bought it. So it is only necessary for you, gentlemen of the jury, to see how far this mill property is affected in value. How far they have been really damaged by the construction of this elevated structure and the operation of this railroad, and there is no doubt you should consider this fact, that they propose to operate that railroad there for all time. That railroad was not built there to look at, that railroad was built there for the purpose of operating railroad trains, and the more trains that are operated there
2976 the better it will be for the union depot company, and it behooves people who live along or have property along the line of that superstructure to adapt their property to the changed condition and put it in shape so that the winds of heaven may blow from the north, or from the south, the east or the west, the fire from these locomotives cannot cause them to be consumed, and if in the meantime, before they make those changes they propose to pay increased insurance and carry a high amount of insurance, that is in accordance with their judgment, but it is not something that should be charged to my client or should be charged to this enterprise. We should pay what injury we do to this property, judged reasonably and sensibly and upon the facts that have been put in evidence here by the witnesses, and over and above all that, gentlemen of the jury, by your own judgment, by what you have seen down there, by the operations of that planing mill as you have seen it carried on, and as you know the business must be carried on. Exercise your judgment upon that subject. Make a fair and reasonable estimate as to the amount of these damages. Add a little something for sentiment and bring in your reward, and if you are sensible men, as I think you are, this company will be perfectly satisfied with the result. And with these remarks, gentlemen of the jury, I submit the case for your consideration.

2977 *Charge of the Court.*

GARTNER, *J.:*

GENTLEMEN OF THE JURY: I invite your cool, calm, careful and conscientious consideration to the matters about to be submitted to you. The case is one of more than ordinary interest. The importance to the petitioner and respondents, the interests involved, the eminence and ability of learned counsel engaged, the wisdom and legal learning shown, the more than ordinary interest exhibited, the far more than ordinary eloquence displayed and to which you have been unwearied listeners, the great earnestness in the presentation and contest made, all imperiously demand that you seek well and faithfully to perform the further duty which now devolves upon you, and bring to bear in the matters about to be submitted to you a cool and unbiased judgment and a careful consideration of the facts as you may find them, supported by the evidence produced, with a firm resolve to do your duty, your whole duty, to all the parties, without fear or favor, and without regard for the opinion of others as to conclusions honestly reached. The matter

has assumed that shape to be, as I have said, one of more than ordinary interest. Its final determination rests largely, if not entirely, with you; your responsibility must not be underestimated. The question before you is (as I will more fully explain hereafter) what compensation are the respondents entitled to as the owners of certain property, by reason of the construction of the superstructure in and along River street? Opportunity has been given you to fully examine the situation and condition of respondents' property, as well as the superstructure of the petitioner. Such view and such examinations as have been made by you, together with the evidence admitted during the hearing, as well as all the
2978 arguments made, based upon and supported by the evidence admitted, constitute collectively the basis upon which your conclusions should rest. Your award should be the result of a careful, thoughtful and conscientious consideration of all these matters, remembering that what you have before you upon which to base your award is the knowledge you obtained by viewing the premises, the evidence and all the evidence admitted in the case, and the arguments made, in so far as you find such arguments supported by the evidence as you may find it. The evidence and the particular weight to be given to the testimony of any witness, or whether such testimony should be disregarded, are matters upon which I cannot in any way enlighten you. This is a matter belonging solely to the jury, and no judge is or should be permitted to enter upon, explain, elaborate upon, or express by intimation or otherwise, any opinion to a jury upon this peculiarly absolute province of the jury, in a controversy of this nature. I will, however, add that you should not suppose the existence of facts not supported by your view or observation of the premises, or the evidence admitted in the case, unless it be in instances where common experience and frequent observation show a fact fairly inferable though not fully established by the view of the premises or by the testimony in the case. But the former must be established by evidence before you; you should infer or presume the second. What you may infer as a fact must be a conclusion logically reached from facts established by evidence and resting in common experience.

Thus far I have dealt in the broadest generalities, but I may say that keeping these matters before you, your duty will be well done; failing, you are likely to be led into error which may terminate in rank injustice to either party.

The power of eminent domain, or in other words, the
2979 power to take private property for public uses, is in the State. All property is subject to this power. It is a power recognized under the Constitution and law of the land; it is a power delegated by the people to and vested in the legislature, subject to certain constitutional limitations, and can only be exercised by virtue of a legislative enactment given in express terms or by necessary implication. The power of the legislature was, by the constitution of 1850 of this State, limited and restricted in this. By article 18, section 2, it is provided that "When private property is taken for the use and benefit of the public, the necessity for using

such property, and the just compensation to be made therefor, except when to be made by the State, should be ascertained by a jury of twelve freeholders residing in the vicinity of such property," etc. Thus you will observe that the questions of necessity and compensation are for the jury and are not in any way subject to legislative interference, and while the manner of procedure may be and is prescribed by statute, still any statute upon the subject which fails to observe and provide for every constitutional safeguard would be inoperative and void.

That the petitioner, under the statute under which it is incorporated, is vested with the exercise of this power of eminent domain, is not and cannot be questioned. Certain proceedings have heretofore been had in this matter, and I call attention to them only for the purpose of stating to you that the question of the necessity for the taking—and which, as I have already stated, is one of the questions to be determined under the provision of the constitution—is settled. That question, viz., necessity, has been determined, and with that you have nothing to do. That has passed out of the case and is not before you. The question, and the only question before you for your determination is that of com-
2980 pensation and of compensation only. Your duty and your only duty is to ascertain and determine what compensation or damages ought justly to be paid by the Fort Street Union Depot Company to the respondents for the real estate, property, franchises, easements and privileges described in the petition, viz:

1. The amount to be allowed to Absalom Backus, Jr., as the owner of the fee of the land described.

2. The amount to be allowed to A. Backus, Jr., & Sons, a corporation, as tenants in possession of such lands.

Upon this question, viz: compensation or damages, what I have to say must necessarily be in a broad and the most general way. This is a question for you, and from the very nature of a proceeding of this character you are vested with large powers and great discretion. These powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power, the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent and unbiased judgment. The compensation or damages must be neither inadequate or excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with under the so-called power of eminent domain, a power somewhat and necessarily arbitrary in its character, and that where this is done the party whose property is taken, or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably

2981 exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the conditions of things as they exist. Under the constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation.

I shall not call attention to any particular part of the testimony in the case; the responsibility of its application and the weight to be given it rests with you, always regarding that which is real and substantial and disregarding that which is fictitious and speculative; treating conditions as they have been shown and as they are, without speculating as to what might possibly happen or occur, taking conditions as you find them, and the natural and probable consequences following such conditions.

I do not want to leave this case without again impressing upon your minds your great responsibility. You want to and must do that which is just and right by the petitioner, that which is just and right by the respondents. You have before you such knowledge as you obtained by viewing the premises, the evidence admitted in the case, the arguments of counsel, and which, as I have said, you may consider, in so far as supported by the evidence, and also the little that I have had to say to you. These matters are to be your guide absolutely and solely in the determination of the question involved. Let me impress upon you that in a court of jus-

2982 tice friendship ceases. We know no friends, we know no enemies, we do no favors. Here we are actuated by reason only, in its most cool, calculating, deliberate and unsympathetic spirit. Favor, offend, displease, are words which neither in thought nor spirit have meaning here. To do what is just and right is and should be our sole and absolute object. In the settling and determination of rights, in the administration of the law, acquaintances, associations and friendships are not in any way factors. Purity and honest intention, the careful exercise of honest judgment, with a firm resolve to do exact justice, are the only virtues. These principles are predominate and the indomitable spirit to do right is the only incentive which actuates an honest mind and an honest man.

Gentlemen, the matter is now in your hands. Discharge your duty faithfully and honestly. I invoke in you the spirit so beautifully, though figuratively exemplified in the Goddess of Justice, who, blindfolded, weighs in the scale every human action and fearlessly determines the right, without passion, without prejudice, and regardless of and uninfluenced by wealth, position, or any thought and sentiment not just and pure.

2983 THE FORT STREET UNION DEPOT COMPANY
vs.
A. BACKUS, JR., & SONS.

NOVEMBER 6, 1893.

Defendants' Exceptions to the Charge of the Court.

Mr. DICKINSON: I except to the sitting of the court and his charge to the jury generally, and to the fact of his charging the jury.

We except to his statement to the jury that the question of necessity is disposed of, and that they have nothing to do with it.

We except to that part of the charge of the court wherein he says that the damages are to be confined to the damage to the real estate described and the improvements upon it; whereas, in our view, the damages are to the entire plant, including the injury to the business from the impairment of the mill as affecting its adjuncts, the lumber yard and the storehouse.

We except to the statement of the court as to avoiding undue influence, prejudice and all that is stated in that connection, in view of what had heretofore appeared as to the verdict theretofore rendered having been set aside as excessive; to that which was said also as to taking care to avoid any grossly excessive verdict in view of what has been said in the course of the trial and appearing on the record, that the prior verdict was set aside as excessive. To what is said in another place for the same reasons, as to avoiding an ex-
2984 cessive or exorbitant verdict; to what is said by the court as to avoiding the giving of speculative damages, in view of what has been said before by the court in regarding to taking into consideration the profits. I refer to what has been said upon the records in the course of the testimony and upon the argument, expressing the views of the court against taking into consideration the profits.

We except to the refusal of the court to charge as I requested in the language or in the substance, according to the decisions of the supreme court, which I read in full upon the opening of my argument and called attention of the court to it especially, to the expression of Campbell, J., in delivering the opinion of the court in G. R. & I. Co. *vs.* Weiden, 70 Mich., 395, 393.

Mr. BAKER: Petitioner excepts to the refusal of its first and second requests, and the refusal generally of the circuit judge to tell the jury that they were not to consider the profits of the business.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

GENTS: You will please take notice that on Monday, the 4th
2985 day of December, 1893, at the opening of court on that day, or as soon thereafter as counsel can be heard, the petitioner will

move the court, before the Honorable George Gartner, circuit judge, to enter the following judgments in favor of petitioner in this cause under the statute:

1. A judgment against Absalom Backus, Jr., for $2,850.00, with interest from the 23rd day of January, 1892.

2. A judgment against A. Backus, Jr., & Sons for $30,293.00, with interest from the 23rd day of January, 1892.

3. A judgment against Absalom Backus, Jr., and A. Backus, Jr., & Sons, for the costs of the second trial of this cause, including all costs of the appeal, according to the statute in such case made and provided.

Said motion will be based on the files and records in this case in the supreme court and in this court.

Detroit, November 21, 1893.

F. A. BAKER,
Attorney for Petitioner.

To Dickinson, Thurber & Stevenson, attorneys for respondents.

(Endorsed: No. 29249. Motion to enter judgment.)

2986 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

Objection and Plea to Entry of Judgment.

Without waiving the objections heretofore made in this cause, in the course of the proceedings, to the jurisdiction of the court, and of the tribunal before which the last hearing was had, but expressly reserving all such objections and all protests against said jurisdiction and said proceedings heretofore made, and renewing them, Absalom Backus, Jr., and A. Backus, Jr., & Sons, on receiving notice of the motion made by the above-named petitioner for judgment against the said Absalom Backus, Jr., for $2,850.00, with interest, and for a judgment against A. Backus, Jr., & Sons for $30,293.00, with interest, and for a judgment against both Absalom Backus, Jr., and A. Backus, Jr., & Sons, "for the cost of the second trial of this cause, including all costs of the appeal," file the following objections and plea:

1. That the court has no jurisdiction or authority to enter said judgment-, or any of them, and that the provisions in said statute referred to in the said motion for the said judgments, and in accordance with which said motion is alleged to be made, are unconstitutional and void.

2987 2. That it appears by the record that before any proceedings were taken for the said alleged second trial of this mat-

ter, the said petitioner had entered fully and absolutely into the possession and ownership of the property described in the petition, and thereby sought to be condemned, and has paid the respondents for the same without condition, and has been for a long period of time, to wit, a year or more, operating lines of railroad upon said property so sought to be condemned, and possessed and owned by it, upon which it had constructed its permanent railroad trestle-work and other equipments of this railroad, all as described in said petition; and that therefore, under the constitution and laws of the State there was no jurisdiction or authority to proceed with said condemnation proceedings in and by the said second trial.

3. That as the consideration of the question of necessity for the alleged improvements set forth in the petition was expressly excluded from the consideration of the jury by the court, the proceeding of ordering a new jury and a second trial before them upon the single question of damages, was void and of no effect.

4. That after the objection and protest of the respondents at the said second trial, the circuit judge, Hon. George Gartner, did before the said jury sit from the beginning of the trial of the cause to its close, in all respects as in a trial at common law, and did hold before the said jury that his function in that regard was not advisory, but that the said judge had the power to rule upon and admit or exclude testimony, and to direct and instruct the jury; and did state to the jury in that connection that he would not only instruct them, but that he would see that his instructions were carried out, thereby restraining the jury and restricting their judgment
2988 and discretion, in direct violence of the constitution of the State and of the construction of the said constitution by the courts of last resort of the State, and in every other case involving the premises, except in these proceedings, thereby denying the respondents, Absalom Backus, Jr., and A. Backus, Jr., & Sons, persons within its jurisdiction, by the State of Michigan, of the equal protection of the laws of said State, in violation of the true intent and meaning of article 14 of the Constitution of the United States.

5. That under the constitution of the State of Michigan the property of no person shall be taken for public use without just compensation made therefor; and that when private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when made by the State, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.

That the necessity of taking the property in question has not been passed upon by a jury, as prescribed by the constitution, except in a verdict which has been annulled and set aside by the decision of the supreme court.

6. That the verdict first rendered in this matter was appealed from, as a whole, by the petitioners, and wholly set aside, and on the second trial of said cause the court erred in holding that such verdict, after having been appealed from and set aside, was still in

force, so far as it found that it was necessary to take the property for public use.

7. That it is not competent, under the constitution of this State, to rest the taking of private property for public use partly upon one verdict, and partly upon another; but under the constitution, a single jury, or commissioners when allowed by law, must
2989 find the necessity for taking such property, as well as the damages to be allowed to the owner for taking the same.

8. That the circuit judge erred in charging the jury that in fixing the just compensation to be allowed to the respondents, the jury should consider only the property described in the petition; whereas the plant consisted in addition of a lumber yard and storehouse that were used together with said property, and all the evidence tended to show injury to the entire business carried on by the concern, and to all of the property on which it was conducted.

9. That the court erred, in the charge to the jury, in all that was said by the court in instructing them to discharge anything of a speculative nature, in connection with the requests for instruction made by the counsel for the respondents, and the colloquy between the court and said counsel regarding those requests immediately succeeding them.

10. That the court erred in refusing to consider the requests of counsel for respondents that the jury should consider something apart from the money value of the property itself, and the point that respondents were entitled to be compensated apart from the money value of the property itself, so as to lose nothing from the interruption of their business and the damage occasioned by the change.

11. The court erred in its refusal to follow the decision read to the court upon question of damage, delivered by Mr. Justice Campbell, in the case of Grand Rapids R. R. *vs.* Weiden, 70 Mich., 393.

12. That the counsel for the petitioners argued to the jury that the compensation allowed by the first jury had been held by the supreme court of this State to be excessive, thereby improperly influencing the judgment of the jury upon said second trial,
2990 by the alleged opinion of the judges of the supreme court on the question of damages.

13. That the jury impanelled in this cause was improperly influenced in their decision as to the just compensation to be allowed said respondents, by a statement of one of said jurors that he had examined the assessment-rolls and found that the property in question had been assessed at twenty-seven or twenty-eight thousand dollars ($28,000.00); whereas no such evidence had been introduced in said cause, and no such evidence was properly before said jury. That the statement made as to said assessment-rolls was not only improper, but absolutely misleading. The assessments of said property showing that before said elevated railway had been built, said property was assessed at about double what it was assessed after the building of said elevated railway; as will appear by an affidavit hereto attached.

14. That said jury, in considering their verdict, were improperly

influenced by a statement made by some of their number, that the witness Jones, who had testified to the entire fire risk on account of the building of said elevated railway, had served as a juror on the first trial of this cause; whereas in truth and in fact the said Jones had not so served, and was entitled to the credit to be given to a fair and impartial witness.

15. That the jury in this cause acted improperly and illegally in not examining the premises in question together, and that the jurors Baker and Safford acted improperly and illegally in separating themselves from the rest of said jury, and making a separate examination of said property.

16. That the jurors in said cause were improperly influenced in said cause by the statement of one of their number, Mr. Sommers, that the reason why the retail trade of the respondents had
2991 fallen off was that they so treated their customers that no one ever dealt with them but once; all of which instances of misbehavior and illegal action on the part of said jury will appear by the affidavits hereto attached.

17. Because the verdict is against the evidence, and because on the whole record it conclusively appears that the jury were unduly influenced and constrained to reduce the verdict of the first jury, and to discharge all the evidence in the cause tending to show the amount of damages.

18. Further objecting to the granting of the motion in this matter, the respondents renew the objections to the proceedings for a second trial from their inception which were embraced in the protests and objections of these respondents filed in this cause before the empaneling of the jury, a true copy of which is hereto annexed, marked Exhibit "A."

DICKINSON, THURBER & STEVENSON,
Attorneys for Absalom Backus, Jr., and A. Backus, Jr., & Sons.

JOHN ATKINSON, *Of Counsel.*

2992 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

In the Matter of THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

STATE OF MICHIGAN, *County of Wayne,* } *ss:*

Daniel R. Griswold, of said county, being duly sworn, says that the verdict recently given in this cause is grossly inadequate, unjust and oppressive.

This affiant further states that since the giving of said verdict he has talked with Messrs. Zimmer, Young, Eby and Hauser, who

were members of said jury; that he is informed by said jurors that during the discussion in the jury-room after said cause was submitted, a member of said jury, whom some of the above-named jurors say was Mr. Sommers, stated to his fellow-jurors that he had examined the assessment-rolls in the city hall, and that the property in question was assessed at something like twenty-seven or eight thousand dollars, and that, therefore, it was of little value compared with value put upon it by the witnesses; that during the discussion in said jury-room, one of the jurors, whom some of the above-named jurors also say was Mr. Sommers, stated that the reason of the falling off of the retail trade of respondents was because they so dealt with their customers that no one ever bought from them but once.

2993 This deponent further says that he learned from said jurors that some of the jurors on said panel insisted that the testimony of Mr. Jones, who was sworn on said trial, should be entirely disregarded, on the ground that he had been one of the previous jurors in this case.

This deponent further says that after his honor Judge Gartner had directed the jury to go in a body to examine the property in question, two of the jurors, Messrs. Baker and Safford, separated themselves from the rest and drove to the premises in question by themselves and made their examination separate and apart from the other jurors.

This deponent further states that said Baker and Safford, as this deponent has learned from the other jurors in said cause, voted throughout for a very low compensation.

That deponent was informed by said jurors that the juror Sommers, during the time the jurors were in the jury-room and were considering, separated himself from the others and voted for a very low compensation, to wit, fifteen thousand dollars, absolutely refusing to reason with his fellow-jurors or to give any other reason for the vote which he cast except as above stated.

DANIEL R. GRISWOLD.

Subscribed and sworn to before me this 13th day of December, A. D. 1893.

JENNIE ATKINSON,
Notary Public, Wayne County, Michigan.

2994 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

STATE OF MICHIGAN, } *ss:*
County of Wayne, }

James A. Jones, being duly sworn, says that he was a witness called for the respondents at the last trial of the above matter. He

further saith that he never sat as a juror in any cause in which the above-named petitioner was a party, and that he never sat as a juror in any cause where the above-named defendants, or any or either of them were parties, except once, and that was in 1882, in a cause where the Detroit Western Transit & Junction railroad was the other party to the cause.

JAMES A. JONES.

Subscribed and sworn to before me this 16th day of December, 1893.

JAMES H. CULLEN,
Notary Public, Wayne County, Michigan.

2995 STATE OF MICHIGAN: '

In the Circuit Court for the County of Wayne.

In the Matter of THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, WILLIAM H. DAVISON, Respondents.

STATE OF MICHIGAN, } *ss:*
County of Wayne. }

Henry N. Backus, of said county, being duly sworn, says that he is one of the above-named respondents; that the verdict recently given in this cause is greatly inadequate, unjust and oppressive.

This affiant further states that since the giving of said verdict he has talked with Messrs. Zimmer, Young, Eby and Hauser, who were members of said jury; that he is informed by said jurors that during the discussion in the jury-room after said cause was submitted, a member of said jury, whom some of the above-named jurors say was Mr. Sommers, stated to his fellow-jurors that he had been over and examined the assessment-rolls in the city hall, and that the property in question was assessed at something like twenty-seven or twenty-eight thousand dollars, and that, therefore, it was of little value compared with value put upon it by the witnesses; that since hearing the said statement of said jurors, affiant has examined the said assessment-rolls and finds that since the building and operation of the petitioner's railroad, the assessment of the said
2996 real estate has been spread upon the said roll at less than half what it was before said railroad was built, and that he has been further informed by said jurors that during the discussion in said jury-room, one of the jurors, whom some of the above-named jurors also say was Mr. Sommers, stated that the reason of the falling off of the retail trade of respondents was because they so dealt with their customers that no one ever bought from them but once.

This deponent further says that he learned from said jurors that some of the jurors on said panel insisted that the testimony of Mr.

Jones, who was sworn on said trial, should be entirely disregarded, on the ground that he had been one of the previous jurors in this case.

This deponent further says that after his honor Judge Gartner had directed the jury to go in a body to examine the property in question, two of the jurors, Messrs. Baker and Safford, separated themselves from the rest and drove to the premises in question by themselves and made this examination separate and apart from the other jurors.

This deponent further states that said Baker and Safford, as this deponent has learned from the other jurors in said cause, voted throughout for a very low compensation.

That deponent was informed by said jurors that the juror Sommers, during the time the jurors were in the jury-room and were considering, separated himself from the others and voted for a very low compensation, to wit, fifteen thousand dollars, absolutely refusing to reason with his fellow-jurors or give any other reason for the vote which he cast except as above stated.

HENRY N. BACKUS.

Subscribed and sworn to before me this 16th day of December, A. D. 1893.

JAMES H. CULLEN,
Notary Public, Wayne County, Michigan.

2997 And then follows, as Exhibit "A," the plea and protest of Absalom Backus, Jr., and A. Backus, Jr., & Sons, as set forth on pages 36 to 42 of this Record.

(Endorsed: Objections to judgment. Filed Dec. 28th, '93. Victor T. Lemke, deputy clerk.)

Judgment.

At a session of the circuit court for the county of Wayne, held at the court-rooms, in the city of Detroit, on the 28th day of December, 1893.

Present: Hon. George Gartner, circuit judge.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

It appearing that heretofore, to wit, on the 16th day of July, 1891, a jury empanelled in this cause to determine the questions of public necessity and compensation, rendered, reported and filed in this court a verdict in favor of the public necessity, and awarding compensation or damages to the respondents as follows:

To Absalom Backus, Jr., as the owner of the fee of the property described in the petition in this cause, the sum of seventeen thousand eight hundred and fifty dollars.

To A. Backus, Jr., & Sons, a corporation, as the tenants in
2998 the possession of the said parcel of land, the sum of seventy-eight thousand two hundred and ninety-three dollars.

To James N. Dean and William H. Davison, executors of the estate of Grozier Davison, deceased, the sum of one dollar.

And it further appearing that the petitioner, The Fort Street Union Depot Company, appealed from the said award of damages or compensation to the supreme court of this State, and that said court, under the statute in that behalf, directed that a new appraisal be had before a new jury, and remanded the case to this court for that purpose.

And it further appearing that heretofore, to wit, on the 11th day of September, 1893, a jury was duly impanelled and sworn to make a new appraisal in this cause according to law, and that on the 6th day of November, 1893, said jury assessed the damages or compensation of said Absalom Backus, Jr., at the sum of fifteen thousand dollars, and the damages or compensation of said A. Backus, Jr., & Sons at the sum of forty-eight thousand dollars.

And the said petitioner having made a motion that judgment be rendered against said respondents respectively for the amounts said awards were reduced by said second appraisal.

And said respondents having filed certain affidavits and objections in opposition to said motion.

And the questions so presented having been duly argued by Fred. A. Baker, attorney for the petitioner, and by John Atkinson and Don M. Dickinson, counsel for respondents, and the court having duly considered and deliberated thereon, it is ordered and adjudged that all of the objections to said motion, including the matters set forth in said affidavits, are overruled as not sufficient to defeat the entry of said judgments under the statute in such cases made
2999 and provided, and on motion of F. A. Baker, attorney for petitioner, it is ordered and adjudged and considered that said petitioner, The Fort Street Union Depot Company, do recover of the respondent Absalom Backus, Jr., the sum of two thousand eight hundred and fifty dollars, and that petitioner have execution thereof.

And on motion it is further ordered, adjudged and considered that the petitioner The Fort Street Union Depot Company do recover of the corporation respondent, A. Backus, Jr., & Sons, the sum of thirty thousand two hundred and ninety-three dollars, and that petitioner have execution thereof.

And on like motion it is further ordered, adjudged and considered that the petitioner The Fort Street Union Depot Company do recover of the respondents Absalom Backus, Jr., and A. Backus, Jr., & Sons, the costs of the petitioner on its said appeal, including the costs of said second appraisal as a part thereof, the said costs to be taxed according to law and the rules and practice of this court, and that the petitioner have execution thereof.

GEO. GARTNER,
Circuit Judge.

(Endorsed: No. 29249. Judgments. Filed December 28, 1893. Victor T. Lemke, dep. clerk.)

3000 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

Petitioner's Taxed Bill of Costs under Second Appraisal.

Return to appeal					$5 00
Copy of record for printer, 3,076 folios at 10c					307 60
Printing record, 1,542 pages at 80c					1,233 60
Printing brief, 65 pages at 80c					52 00
Clerk's fee, supreme court					6 00
Fees for 12 jurymen for 50 days each at $2.50					1,500 00
Transcript of testimony and proceedings reduced to writing, 4,795 folios at 20c					959 00
Witnesses:					
Frances Adams,	1 day,	1	mile		1 10
Jas. F. Joy,	1 "	1	"		1 10
Robert Zug,	1 "	1	"		1 10
Lewis H. Phister,	1 "	1	"		1 10
E. F. Chapman,	1 "	1	"		1 10
P. C. Miller,	2 "	221	"		24 10
John Frim,	1 "	1	"		1 10
C. M. Heald,	1 "	1	"		1 10
G. F. Sherwood,	2 "	80	"		9 00
Henry Spitzley,	2 "	1	"		2 10
A. F. Kramer,	2 "	1	"		2 10
3001					
Edwin Saunders,	1 "	100	"		11 00
Geo. H. House,	1 "	100	"		11 00
Chas. H. Ellis,	1 "	1	"		1 10
Geo. M. Brown,	1 "	100	"		11 00
Thos. J. Hadsell,	1 "	100	"		11 00
					$4,168 20

STATE OF MICHIGAN, } ss:
County of Wayne, }

Fred. A. Baker, being duly sworn, says that the foregoing items of costs charged as disbursements have actually been paid, or the liabilities therefor incurred, and were necessary and are reasonable in amount; that the witnesses above named were in good faith made to attend, and were deemed material and necessary,

and they respectively traveled the number of miles and actually attended the number of days specified, and that the copies and exemplifications charged for were actually and necessarily used, or necessarily and in good faith obtained for use.

FRED. A. BAKER.

Sworn to and subscribed before me this 29th day of December, A. D. 1893.

EDWARD A. STRICKER,
Notary Public, Wayne County, Michigan.

To Dickinson, Thurber & Stevenson, attorneys for respondents:

Take notice: The foregoing is a true and correct copy of petitioner's bill of costs in this cause, and of the affidavit of disbursements required by rule. Application will be made to the
3002 clerk of said court, at his office, on the 2nd day of January, A. D. 1893, at 10 o'clock a. m., to tax the same.

Dated at Detroit, December 29, A. D. 1893.

Yours, etc.,

FRED. A. BAKER,
Attorney for Petitioner.

Taxed Bill of Costs for Plaintiff.

I do hereby tax the costs of plaintiff at the sum of four thousand one hundred and sixty-eight dollars and twenty cents.

WM. MAY, *Clerk.*

Dated February 12th, 1894.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

And now come the said respondents, by Don M. Dickinson, their counsel, and move the court to vacate and set aside the order of William May, Esq., clerk of said court, taxing the costs of the petitioner in the above-entitled cause at the sum of $4,168.20, for the following reasons:

3003 (1) That the taxation of the entire bill of costs is invalid on the general ground that all of the proceedings had in the above cause were invalid and without jurisdiction, and particularly that the alleged judgment is invalid, and that the court or judge had no jurisdiction to enter the said judgment.

(2) That the court below has no statutory authority to tax the said bill of costs.

DON M. DICKINSON,
Attorney for Respondents.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

COUNTY OF WAYNE, *ss:*

Don M. Dickinson, the attorney for the respondents in this cause, being duly sworn, deposes and says that the bill of costs hereto annexed was served on this deponent, or on some person in deponent's office, on the 29th day of December, A. D. 1893, and that on the 2nd day of January, 1894, he attended before William May, clerk of the said court, pursuant to the notice endorsed on the said bill of costs as served, for the purpose of opposing the taxation thereof.

3004 And deponent further says that he then and there opposed the said taxation, and objected to the following items in the said bill, *i. e.:*

Copy of record for printer, 3,076 folios at 10c.....	$307 60
Printing record, 1,542 pages, at 80c.....	1,233 60
Printing brief, 65 pages, at 80c.....	52 00
Fees of 12 jurymen in court below, 50 days each at $2.50.	1,500 00
Transcript of testimony and proceedings below reduced to writing, 4,795 folios at 20c...	959 00

on the ground that in the court below there is no statutory authority to tax such items.

And this deponent further says that he objected to the taxation of the entire bill of costs on the general ground that all the proceedings below in the above cause were invalid and without jurisdiction, and particularly that the alleged judgment is invalid and that the court or judge had no authority or jurisdiction to enter said judgment.

And further deponent saith not.

DON M. DICKINSON.

Subscribed and sworn to before me this 24th day of February, A. D. 1894.

SAMUEL S. HARRIS,
Notary Public, Wayne County, Michigan.

Here follows petitioner's bill of costs and taxation therefor, as set forth on pp. 1362–1364 of this Record.

(Endorsed: No. 29249. Notice of motion. Motion. Affidavit of Don M. Dickinson, and bill of costs. Filed Feb'y 7, 1894. Jas. A. Robison, deputy clerk.)

3005 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

Præcipe for Writ of Execution.

To the clerk:

You will please issue writs of *fieri facias* on the judgment against respondents Absalom Backus, Jr., and A. Backus, Jr., & Sons, as follows:

1. Against Absalom Backus, Jr., for $2,850.00.
2. Against A. Backus, Jr., & Sons for $30,293.00.
3. Against Absalom Backus, Jr., and A. Backus, Jr., & Sons for $4,168.20.

Direct said writs to the sheriff of the county of Wayne and make them returnable the first Tuesday of June next.

Detroit, Mar. 26, 1894.

FRED. A. BAKER,
Attorney for Petitioner.

(Endorsed: No. 29249. Filed March 26, '94. Charles C. Kellogg, deputy clerk.)

3006 *Writ of Execution.*

STATE OF MICHIGAN, } *ss:*
County of Wayne, }

The Circuit Court for the county of Wayne.

To the sheriff of the county of Wayne, Greeting:

In the name of the people of the State of Michigan. You are commanded, that of the goods and chattels of Absalom Backus, Jr., respondent, and for want thereof, then of his lands and tenements in your bailiwick, you cause to be made the sum of two thousand eight hundred and fifty dollars, which The Fort Street Union Depot Company, petitioner, on the 28th day of December, 1893, in the circuit court for the county of Wayne aforesaid, at the court-room of said court, in the city of Detroit, recovered against him on a reduction of the award of compensation or damages in a certain condemnation suit or proceeding pending in said court whereof the said respondent stands convicted, as appears of record; and have you that money before the judges of the said circuit court aforesaid, at the court-room of said court, in the city of Detroit, on Tuesday, the fifth day of June, 1894, then and there to render to the said petitioner, and have you then and there this writ.

Witness, the Honorable Robert E. Frazer, presiding judge of the

circuit court for the county of Wayne, at the court-room of said court, in the city of Detroit, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-four.

WM. MAY, *Clerk*,
[SEAL.] By CHAS. C. KELLOGG,
Deputy Clerk.

3007 STATE OF MICHIGAN, } ss:
County of Wayne, }

Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

I do hereby certify that by virtue of the annexed writ of execution, issued out of and under the seal of the circuit court for the county of Wayne, in the above-entitled cause, to me directed and delivered, I have on this ninth day of May, A. D. 1894, levied upon all the following goods, chattels and personal property of Absalom Backus, Jr., that is to say:

Five hundred feet of pine and hardwood lumber now situated in the warehouse of A. Backus, Jr., & Sons, on the north side of Fort street west, at street numbers 420 to 438, in the city of Detroit, in said county.

CHARLES P. COLLINS, *Sheriff*,
By PETER J. CANTO,
Deputy Sheriff.

Dated Detroit, May 9th, A. D. 1894.

(Endorsed: No. 29249. Writ of *fi. fa.* Date of judgment, Dec. 28, '93. Amount of judgment, $2,850.00.)

STATE OF MICHIGAN, } ss:
County of Wayne, }

I, Henry M. Reynolds, clerk of Wayne county, and clerk
3008 of the circuit court for the county of Wayne, do hereby certify that the above and foregoing is a true and correct copy of the *fi. fa.* issued out of said court, in said cause, together with the sheriff's certificate of levy attached to said *fi. fa.* That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county, at Detroit, this 22nd day of August, A. D. 1894.

[SEAL.] HENRY M. REYNOLDS, *Clerk*,
By CHAS. C. KELLOGG,
Deputy Clerk.

Writ of Execution.

STATE OF MICHIGAN, } ss:
County of Wayne, }

The Circuit Court for the County of Wayne.

To the sheriff of the county of Wayne, Greeting:

In the name of the people of the State of Michigan. You are commanded, that of the goods and chattels of Absalom Backus, Jr., and of A. Backus, Jr., & Sons, a corporation, respondents, and for want thereof, then of their lands and tenements in your bailiwick, you cause to be made the sum of four thousand one hundred and sixty-eight dollars and twenty cents, which The Fort Street Union Depot Company, petitioner, on the 28th day of December, 1893, in the circuit court for the county of Wayne aforesaid, at the court-room of said court, in the city of Detroit, recovered against them for its costs and charges by it about a certain condemnation suit in that behalf expended, whereof the said respondents stand con-
3009 victed, as appears of record; and have you that money before the judges of the said circuit court aforesaid, at the court-room of said court, in the city of Detroit, on Tuesday, the fifth day of June, 1894, then and there to render to the said petitioner, for its costs aforesaid; and have you then and there this writ.

Witness, the Honorable Robert E. Frazer, presiding judge of the circuit court for the county of Wayne, at the court-room of said court, in the city of Detroit, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-four.

WM. MAY, *Clerk,*
[SEAL.] By CHAS. C. KELLOGG,
Deputy Clerk,

STATE OF MICHIGAN, } ss:
County of Wayne, }

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

I do hereby certify that by virtue of the annexed writ of execution, issued out of and under the seal of the circuit court for the county of Wayne, in the above-entitled cause, to me directed, I have on this 9th day of May, A. D. 1894, levied upon all the following goods and chattels and personal property of A. Backus, Jr., & Sons, that is to say:

3010 1 heavy steam-engine with automatic cut off.
4 steam boilers complete.
2 steam pumps and connections.
1 large exhaust-injector.
1 large fan and coil.

3 large blowers and shavings connections.
1 knife-grinding machine.
1 upright copper-tube heater.
1 upright heater and filter.
1 horizontal condensing and settling boiler.
1 extra-heavy drive-pulley.
1 large steam drum.
5 Woods & Backus 30″ x 8″ 8-roll machines.
1 " " 24″ x 8″ 8-roll machine.
1 " " 24″ matching machine.
2 " " 14″ flooring machines.
1 S. A. Woods heavy moulding machine.
3 extensions-frame gang rip-sawing machines.
3 power spin-feed rip-sawing machines.
1 heavy band resawing machine.
1 automatic saw-filing machine.
1 four-sided Huntington moulding machine.
1 heavy Jostin & Backus resawing machine.
1 heavy Cornell & Dengler & Backus resawing machine.
1 Graham & Backus resawing machine.
1 Huntington & Backus resawing machine.
10 Backus improved matching machines.
8 Backus bumping and gluing machines.
30 Backus improved sawing machines.
5 Backus improved swing sawing machines.
120 Backus heavy factory trucks.
3 panel or pony planing machines.
2 traveling-bed rip-sawing machines.
12 extra resaws, Backus teeth.
200 M feet of pine lumber now in planing mill.
3011 150 M feet of pine lumber now in shed adjoining planing mill.
100 M feet of pine and hardwood lumber now in dry kilns.

All of said property being situated in and on the planing-mill and box-factory property of A. Backus, Jr., & Sons, between Fort street west and River street, and between the Michigan Central railroad and the lots and property of Barbara Steadley and Margaret Specht.

Detroit, May 9th, 1894.

CHARLES P. COLLINS, *Sheriff*,
By PETER J. CANTO,
Deputy Sheriff.

(Endorsed: No. 29249. Writ of *fi. fa.* Date of judgment, Dec. 28, '93. Amount of judgment, $4,168.20.)

STATE OF MICHIGAN, } ss:
County of Wayne, }

I, Henry M. Reynolds, clerk of Wayne county, and clerk of the circuit court for the county of Wayne, do hereby certify that the above and foregoing is a true and correct copy of the *fi. fa.* issued out of

said court in said cause, together with the sheriff's certificate of levy attached to said *fi. fa.* That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In testimony whereof I have hereunto set my hand *has* affixed the seal of said court and county, at Detroit, this 22nd day of August, A. D. 1894.

[SEAL.] HENRY M. REYNOLDS, *Clerk*,
By CHAS. C. KELLOGG,
Deputy Clerk.

3012 *Writ of Execution.*

STATE OF MICHIGAN, } ss:
County of Wayne, }

The Circuit Court for the County of Wayne.

To the sheriff of the county of Wayne, Greeting:

In the name of the people of the State of Michigan. You are commanded, that of the goods and chattels of A. Backus, Jr., & Sons, a corporation, respondents, and for want thereof, then of its land and tenements in your bailiwick, you cause to be made the sum of thirty thousand two hundred and ninety-three dollars, which The Fort Street Union Depot Company, petitioner, on the 28th day of December, 1893, in the circuit court for the county of Wayne aforesaid, at the court-room of said court, in the city of Detroit, recovered against it on a reduction of the award of compensation or damages in a certain condemnation suit or proceeding pending in said court, whereof the said respondent- stands convicted, as appears of record; and have you that money before the judges of the said circuit court aforesaid, at the court-room of said court, in the city of Detroit, on Tuesday, the fifth day of June, 1894, then and there to render to the said petitioner, and have you then and there this writ.

Witness, the Honorable Robert E. Frazer, presiding judge of the circuit court for the county of Wayne, at the court-room of said court, in the city of Detroit, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-four.

WM. MAY, *Clerk*,
[SEAL.] By CHAS. C. KELLOGG,
Deputy Clerk.

3013 STATE OF MICHIGAN, } ss:
County of Wayne, }

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON, Respondents.

I do hereby certify that by virtue of the annexed writ of execution issued out of and under the seal of the circuit court for the

county of Wayne in the above-entitled cause, to me directed and delivered, I have, on this 9th day of May, A. D. 1894, levied upon all the following goods, chattels and personal property of A. Backus, Jr., & Sons, that is to say:

1 heavy steam-engine with automatic cut-off.
4 steam boilers complete.
2 steam pumps and connections.
1 large exhaust-injector.
1 large fan and coil.
3 large blowers and shavings connections.
1 knife-grinding machine.
1 upright copper-tube heater.
1 upright heater and filter.
1 horizontal condensing and settling boiler.
1 extra-heavy drive-pulley.
1 large steam drum.
5 Woods & Backus 30″ x 8″ 8-roll machines.
1 " " 24″ x 8″ 8-roll machine.
1 " " 24″ matching machine.
2 Woods & Backus 14″ flooring machines.
3014 1 S. A. Woods heavy molding machine.
3 extension-frame gang rip-sawing machines.
3 power spin-feed rip-sawing machines.
1 heavy band resawing machine.
1 automatic saw-filing machine.
1 four-sided Huntington moulding machine.
1 heavy Jostin & Backus resawing machine.
1 heavy Cornell & Dangler & Backus resawing machine.
1 Graham & Backus resawing machine.
1 Huntington & Backus resawing machine.
10 Backus improved matching machines.
8 Backus bumping and gluing machines.
30 Backus improved sawing machines.
5 Backus improved swing sawing machines.
120 Backus heavy factory trucks.
3 panel or pony planing machines.
2 traveling-bed rip-sawing machines.
12 extra resaws, Backus teeth.
200 M feet of pine lumber now in planing mill.
150 M feet of pine lumber now in shed adjoining planing mill.
100 M feet of pine and hardwood lumber now in dry kilns.

All of said property being situated in and on the planing-mill and box-factory property of A. Backus, Jr., & Sons, between Fort street west and River street, and between the Michigan Cenral railroad and the lots and property of Barbara Steadly and Margaret Specht.

Detroit, May 9th, 1894.

CHARLES P. COLLINS, *Sheriff*,
By PETER J. CANTO,
Deputy Sheriff.

(Endorsed: No. 29249. Writ of *fi. fa.* Date of judgment, Dec. 28, '93. Amount of judgment, $30,293.00.)

3015 STATE OF MICHIGAN, } ss:
County of Wayne, }

I, Henry M. Reynolds, clerk of Wayne county, and clerk of the circuit court for the county of Wayne, do hereby certify that the above and foregoing is a true and correct copy of the *fi. fa.* issued out of said court in said cause, together with the sheriff's certificate of levy attached to said *fi. fa.* That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county, at Detroit, this 22nd day of August, A. D. 1894.

[SEAL.] HENRY M. REYNOLDS, *Clerk,*
By CHAS. C. KELLOGG,
Deputy Clerk.

Petition for Certiorari.

To the supreme court of the State of Michigan:

The petition of Absalom Backus, Jr., who is a citizen of the State of Michigan, and a person residing in the city of Detroit, in said State, and of A. Backus, Jr., & Sons, which is a corporation created and existing under the laws of the State of Michigan, having its principal office and carrying on its business in said city, respectfully shows:

That on the 24th day of January, 1891, the Fort Street Union Depot Company, a corporation created and existing under the laws of the State of Michigan, filed its petition in the circuit court for the county of Wayne, under and in form and in accordance with
3016 chapter 93 of Howell's Annotated Statutes, entitled "Union Railroad Station and Depot Companies," as amended; and therein and thereby initiated proceedings under such chapter against your said petitioners to build and operate a viaduct or elevated railroad, and a viaduct for teams, on River street, in said city of Detroit, in front of and contiguous to the property known as the Backus planing mill, having a frontage of River street of $238\frac{6}{100}$ feet, and extending back to Fort street, the said property being owned in fee by your petitioner, Absalom Backus, Jr., and leased for the purpose of a planing mill by your petitioners, A. Backus, Jr., & Sons; that such proceedings were had upon said petition under said chapter, that on the 25th day of February, 1891, a jury of twelve (12) freeholders, under the direction of Honorable George Gartner, circuit judge, were impaneled and sworn to ascertain the public necessity for taking said real estate, property, franchise and easements for the purpose of the said petitioner, and the public use and benefit thereof, and to appraise and determine the damages or compensation to be allowed to your petitioners therefor.

That on the 2nd day of March, 1891, the trial of said issue commenced and continued from day to day and until March the 18th, 1891, when the jury reported that they were unable to agree either on the question of necessity or on the amount of compensation.

That afterwards, on June 4, 1891, a second jury was impaneled and sworn, under the direction of said judge, in accordance with the prayer of said petition of the said The Fort Street Union Depot Company, and the said jury proceeded to hear proofs and testimony thereupon from day to day until the 16th day of July, 1891, when the said jury rendered a verdict and finding that the taking of said property was for the public use and benefit and was
3017 a public necessity, and assessing the damages of your petitioners as follows:

Absalom Backus, Jr., seventeen thousand eight hundred and fifty dollars ($17,850); and A. Backus, Jr., & Sons, seventy-eight thousand two hundred and ninety-three dollars ($78,293).

That on August 15th, 1891, the said The Fort Street Union Depot Company filed a motion for a new trial in the said circuit court, which was duly heard and argued by counsel, and having been considered by the court, the Honorable George Gartner, circuit judge, an order was assumed to be entered by the said circuit judge, setting aside the award and ordering a new trial.

That afterwards the supreme court, in the case reported in 89 Mich., at page 210, granted a mandamus compelling the said circuit judge to vacate and set aside the said order for a new trial and confirm the award, which the *the* circuit judge subsequently did on or about the 5th day of December, 1891; and thereupon the said The Fort Street Union Depot Company took an appeal in the premises to this the supreme court.

That afterwards, to wit, on the 23rd day of January, 1892, the said The Fort Street Union Depot Company paid to these petitioners the amount in full of the award of said jury as aforesaid, unconditionally, and entered into full possession of the property, franchise, easements and rights of these petitioners, described in said petition, and have since maintained and operated their lines of railroad over the same, and have maintained the viaduct for teams over the same.

That on the 30th day of January, 1892, these petitioners moved this court, as appears by the files and records of said court, that the appeal should be dismissed because of the said payments of
3018 the said awards, and the taking possession of the property by the said The Fort Street Union Depot Company.

That afterwards, on the 4th day of March, 1892, the appeal of the said The Fort Street Union Depot Company came on to be heard in the case reported in 92 Mich., at page 33, whereupon said supreme court set aside the award of damages, but did not set aside the verdict of the jury as to the public necessity for taking the property, and did order the question as to the amount of damages to be submitted to a new jury to be impaneled in the circuit court for the county of Wayne, with costs to the said petitioner The Fort Street Union Depot Company.

The decision of this court in the case reported in 89 Mich., page 209 aforesaid, had not, in the meantime, been ordered for reargument, and in the hearing in the case reported as aforesaid in 92 Mich., the chief justice of the court, when counsel for respondents were about to argue the question as to whether the property of the Michigan Central Railway Company could be taken, and as to whether it was error below for counsel for respondents to argue that the said Michigan Central Railway Company's property could be taken, stopped that part of the argument of the said counsel, and stated that this court did not desire to hear argument on that question because the verdict of the jury had been unfavorable to respondents on the question of necessity; but nevertheless this court, as appears in and by its said opinion, reported in 92 Mich., did, without having offered to hear counsel for these petitioners, consider that question, and did decide it adversely to the respondents.

That afterwards before the circuit court for the county of Wayne (Judge Gartner) the said The Fort Street Union Depot Company did file a motion for an order to strike, summon and impanel
3019 a jury for the trial of the question of damages in the matter in pursuance of the order and direction of the supreme court; which came on for hearing on April 17, 1893, whereupon your petitioners did file in the court and cause a paper-writing — words and figures following to wit:

(Then follows respondents' protest and plea to jurisdiction set forth on pp. 36–42 of this Record.)

In the form of a plea and protest, which was overruled by the said circuit court, and the impaneling of said jury proceeded with, notwithstanding your petitioners' said exceptions and protest.

That afterwards to wit: on the 5th day of September, 1893, before the striking or impaneling of the jury, your petitioners' counsel protested in the presence of the court against a retrial for the reasons which he then and there stated, as hereinbefore set forth, and caused a record to be entered on the proceedings of the court of the said protest. Also that before the jury was sworn, your petitioners, through their counsel, protested against and objected to the sitting of Judge Gartner in the case; whereupon all said protests and objections were overruled, and the opening of said counsel for the said The Fort Street Union Depot Company and the testimony of witnesses proceeded with, the said Judge Gartner sitting and presiding and ruling in every respect as in a trial at common law; your petitioners objecting at every stage and protesting against the rulings of the court and against his presence, all in a respectful and decorous manner and language and without any offense to the said judge. That the said hearing proceeded until October 11, 1893, when the counsel for the said The Fort Street Union Depot Company announced that petitioner rested his case; whereupon your petitioners restated the objections and protested against being called upon to go into their case for the defense, which objection and protest
3020 were again overruled, and the court stated that he proposed to sit in the case precisely as a judge would sit in a trial at common law, and further that "the jury will determine those ques-

tions that I will submit to them, and I will see that my ruling is carried out by the jury also;" to all of which rulings and language of the court and each of them, your petitioners' counsel took exceptions; and still reserving their protests and objections, your petitioners proceeded to introduce testimony as to the damages which they had suffered by reason of the taking of the property as aforesaid; and especially the injury to the profits of their business, and the destruction of the facilities for carrying on the planing-mill business; and the hearing was continued from day to day, and the taking of proofs and testimony until the 6th day of November, 1893, when the court (Judge Gartner) proceeded to charge the jury as in a trial at common law, and in his charge did erroneously instruct the jury, as petitioners allege, in the particulars hereinafter more fully set forth, to which petitioners' counsel did then and there to each of said rulings, except.

The case having been given to the jury as aforesaid by the said judge, the said jury proceeded to return a verdict as follows:

Assessing the damages of Absalom Backus, Jr., at the sum of $15,000 and the damages of A. Backus, Jr., & Sons at $48,000; whereupon the said The Fort Street Union Depot Company did move the court before the said Judge Gartner for (1) a judgment against Absalom Backus, Jr., for $2,850 with interest from the 23rd of January, 1892; (2) judgment against A. Backus, Jr., & Sons for $30,293 with interest from the 23rd day of January, 1892; and (3) judgment against A. Backus, Jr., and A. Backus, Jr., & Sons for the costs of the second trial of this cause including all costs of appeal upon the statute, etc.; whereupon these petitioners through
3021 their counsel appeared before said judge and filed the following objections and plea to the entry of any judgment:

(Then follows respondents' objections and plea to the entry of any judgment as set forth on pp. 1348–1359 of this Record.)

Your petitioners further show that all the rulings embraced in the foregoing objections and therein referred to, were made by the said circuit judge, Honorable George Gartner, and exceptions were duly taken thereto by your petitioners' counsel; and that all the objections therein stated of errors in the proceedings were based upon the facts appearing in the trial and on the record as therein stated; and that the facts as to the actions of the jurors as stated in objections from XIII to XIX inclusive were fully supported by affidavits filed in the cause; and that the paper-writing referred to as Exhibit A in objection XVIII was the paper-writing filed before the impaneling of the jury in the words and figures hereinbefore first set out.

Your petitioners further show to the court that on the said hearing your petitioners argued to the said court that there was no power or jurisdiction in the court under the statute to enter up judgment on said motion, and further and specifically argued that there was no power or jurisdiction in the court to order an execution, and that an order for execution was no part of a judgment entry.

That the said court overruled all the said objections, including

the last two, and did proceed on the 28th day of December, 1893, to enter up judgment and order execution in the words and figures following, to wit:

(Then follows the judgment set forth in pp. 1359–1361 of this Record.)

And thereupon the said court did proceed, against the argument and objections of your petitioners' counsel, to tax the costs of
3022 the said The Fort Street Union Depot Company at the amounts and figures set out in the paper-writing marked Exhibit A, hereto annexed; and thereupon, thereafter, the court did issue executions against the property of your petitioner Absalom Backus, Jr., for the sum of $2,850; and against your petitioners A. Backus, Jr., & Sons for the sum of $30,293, and against both of your petitioners for the sum of $4,168, costs; which said executions were addressed to the sheriff of the county of Wayne, who thereupon levied upon and seized the personal property and chattels of A. Backus, Jr., & Sons, as follows: All of their steam-engines, boilers and machines in their planing mill and all of their lumber, manufactured and unmanufactured, in the city of Detroit in said county of Wayne, of the value of one hundred thousand dollars ($100,000) and upwards, and did levy upon and seize the property of your petitioner Absalom Backus, Jr., as follows: 500,000 feet of pine and hardwood lumber, and other personal property of the value of $10,000 and upwards; and all of the said property of your petitioners the said sheriff still holds and threatens to sell on said executions.

All of the said proceedings related in the premises appear by the files and records of the circuit court for the county of Wayne and of this court, and your petitioners allege manifest errors in the said proceedings, as related in and by their specific protests, objections and exceptions as hereinbefore set forth, and they allege as errors in addition to and supplementary to those set out in the foregoing petition in and by the proceedings they have been also denied by the State of Michigan the equal protection of the laws, contrary to the true intent and meaning of section one of article fourteen of amendments to the Constitution of the United States, in that in the aforesaid opinion of the supreme court that the judgment of the supreme court of this State aforesaid reported in 89 Mich.,
3023 page 209, was set aside and held for naught by the said court without an order for reargument and without notice to the petitioners or their counsel that reargument was desired, and without reargument in their behalf; and in that the said supreme court held as error the argument of the counsel for the said petitioners before the jury that the property of the Michigan Central Railroad Company could be taken under the power of eminent domain, without notifying the counsel for your petitioners that they desired to hear no argument as to whether the property could be taken or as to whether it was error to make the argument that it could be taken; and also that the taking of your petitioners' property under the alleged executions, has deprived your petitioners of their property

without due process of law and in violation of section one article 14 of the amendments to the Constitution of the United States.

That all the proceedings in the premises were purely statutory, and that there was no statutory authority for judgment against these respondents, and no pretense of statutory authority for the issue of the said executions.

Finally, they further allege that the provision of the statute authorizing the Fort Street Union Depot Company to condemn private property for public use was unconstitutional and void.

Wherefore they pray that the writ of certiorari may issue from this court, directed to the circuit court for the county of Wayne for the sending up and review of all the proceedings in the premises and for the correction of the errors aforesaid.

ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
By NEWTON D. BACKUS,
Sec. and Treas.

3024 STATE OF MICHIGAN, } ss:
County of Wayne, }

Newton D. Backus, being duly sworn, upon his oath saith: That he is secretary and treasurer of the corporation known under the name and style of A. Backus, Jr., & Sons, and has signed the foregoing petition in the name of said corporation by the express direction and authority of its board of directors, and he makes this verification in behalf of said corporation and in behalf of A. Backus, Jr., whose signature is appended to the foregoing petition. That he knows the contents thereof, and that the statements of facts contained therein are true so far as stated of the own knowledge of petitioners therein, and that the statements therein made on information and belief or advice and belief are true to the best of his knowledge, advice, information and belief.

A. BACKUS, JR., & SONS,
By NEWTON D. BACKUS,
Sec. and Treas.

Subscribed and sworn to before me this 26th day of June, A. D. 1894.

G. A. WILLIAMS,
Notary Public, Wayne County, Michigan.

Endorsed: Let the writ issue. John W. McGrath, chief justice. June 27, 1894. Filed June 27, 1894. Chas. C. Hopkins, clerk supreme court.

3025 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON.

STATE OF MICHIGAN, *County of Wayne,* } *ss:*

Benjamin S. Warren, being duly sworn, says that he is law clerk in the office of Dickinson, Thurber & Stevenson, attorneys for the above-named Absalom Backus, Jr., A. Backus, Jr., & Sons, James N. Dean and William H. Davison, and has charge of the preparation of the record of certiorari removing said cause to the supreme court. That owing to the voluminous character of the record and the absence from the files of pleadings and papers in the case, it is impossible to prepare the record that it may be filed on August 3rd, the return day of the writ of certiorari, and that twenty days' time will be necessary to get all the papers in the case together and have the proper transcripts thereof made.

BENJAMIN S. WARREN.

Subscribed and sworn to before me this 2nd day of August, A. D. 1894.

BENJAMIN F. BRISCOE,
Notary Public, Wayne County, Michigan.

3026 At a session of the circuit court for the county of Wayne and State of Michigan held at the circuit court rooms in the city of Detroit on the second day of August, A. D. 1894.

Present: Hon. George S. Hosmer, Hon. Robert E. Frazer, Hon. William L. Carpenter, Hon. J. W. Donovan, Hon. Wm. M. Lillibridge.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., *et al.*

Before Hon. J. W. Donovan, circuit judge.

In this cause it is ordered that the time for the return of the writ of certiorari and record in this cause be and the same hereby is extended from the third day of August, the return day of said writ, to the twenty-third day of August next.

(Signed) J. W. DONOVAN,
Circuit Judge.

In the name of the people of the State of Michigan.

[SEAL.]

To judges of the circuit court for the county of Wayne:

We, being willing, for certain causes, that it should be certified to our supreme court what proceedings have been had before you, and

what has been done by you in the case lately pending in said circuit court wherein The Fort Street Union Depot Company is petitioner, and Absalom Backus, Jr., Absalom Backus, Jr., & Sons, and James N. Dean are respondents,

Do, therefore, command you, that you distinctly and openly
3027 certify the records and proceedings in said matter, to the said supreme court, before the justices thereof, that they may have them at the supreme court room, in the capitol, in the city of Lansing, on the third day of August, A. D. 1894, that said court may cause to be done thereupon what of right ought to be done, and have you then and there this writ.

Witness, the Honorable John W. McGrath, chief justice of our supreme court, at Lansing, this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

CHARLES C. HOPKINS,
Clerk Supreme Court.

I hereby certify, that the foregoing writ was duly allowed by Honorable John W. McGrath, chief justice of the supreme court of Michigan, on the 27th day of June, 1894.

[SEAL.] CHARLES C. HOPKINS, *Clerk.*

To the supreme court of the State of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

August 22nd, 1894.

J. W. DONOVAN,
Presiding Circuit Judge.

Endorsed: No. 14268. Writ of certiorari. Filed August 23rd, 1894. Charles C. Hopkins, clerk of supreme court.

3028 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS, Plaintiffs in Error and Respondents Below,
vs.
THE FORT STREET UNION DEPOT COMPANY, Defendant in Error and Petitioner Below.

Assignment of Errors.

In certiorari.

And now some the said respondents, and assign errors in the record and proceedings certified to this court in this cause.

I.

In this: in overruling the pleading, objections and protests in writing filed in the matter in the circuit court for the county of

Wayne, by the respondents below against a third trial of the matter, and the jurisdiction of the court, on April 17th, 1893, before the jury was summoned, struck, sworn or impaneled.

II.

In this: in overruling the several objections and protests of the respondents below to the jurisdiction of the court and of that tribunal at every stage of the proceedings.

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III.

In this: that in and by the constitution of the State of Michigan, in the specific provisions of article XV section 15, and article XVIII, section 2, of said constitution, as uniformly construed by the courts of the State, when private property is sought to be taken for the use and benefit of the public, the necessity for using such property and the just compensation to be made therefor in such cases, must be ascertained by a jury of twelve freeholders, residing in the vicinity of the property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law, without the intervention of any judge or other person as a part of said tribunals or either of them, and without the constraint, influence or direction of any such judge or person. Whereas in these records and proceedings the discretion of the constitutional tribunal was interfered with and constrained by a judge of the circuit court for the county of Wayne, by setting aside the finding of the constitutional tribunal, and ordering a new trial and the power of the said circuit judge to do this indefinitely until the verdict and report of a jury should satisfy his judgment, was asserted and maintained by the said judge and was therein sustained by the court of last resort of this State, whereby as plaintiffs in error aver the proceedings were without jurisdiction, and they, persons within the jurisdiction of the State, were denied the equal protection of the laws of the State, contrary to article XIV, section 1, of the amendments to the Constitution of the United States.

IV.

In this: that there having been one verdict and report of a jury finding the necessity of the taking of the property and the damages to be awarded the respondents therefor, and the petitioner
3030 below having entered upon, taken possession and in all respects to the limits of the prayer of its petition, built and maintained its railroads and its culverts upon the property of the respondents sought to be condemned, and having paid to the respondents unconditionally the award of the said jury, under the constitution and laws of the State of Michigan, and as uniformly construed by the courts of said State, except in this case, there was no jurisdiction in any tribunal to prosecute a proceeding for condemnation under the power of eminent domain thereafter on the part of the said petitioner and defendant in error. Whereas in this

case, the power to so proceed was sustained, and plaintiffs in error aver that all such proceedings are without jurisdiction and void and as sustained by the courts of the State, deprive the plaintiffs in error and respondents below, persons within the jurisdiction of the State, of the equal protection of the laws of the State, contrary to said provision of the Constitution of the United States.

V.

In this: that as the title to the property sought to be condemned passed to the said petitioner below, and the title to the said money passed to the said respondents, the taking possession of the property by the petitioner and the proceedings are without jurisdiction, and the recovery of any portion of said money from the respondents and the seizure of their property thereunder, would be and are depriving plaintiffs in error and respondents below of their property without due process of law, contrary to said provision of the Constitution of the United States.

VI.

In this: that in and by the said proceedings the questions of the necessity for using the property, and the just compensation to be made therefor, were not left to a jury of twelve freeholders
3031 on the demand for a jury, but were left to two juries of twelve each, the one, according to the proceedings, passing upon the question of necessity, and the other upon the question of compensation. Whereas the same jury, under the constitution of the State, one jury of twelve freeholders, must pass upon both questions, and that in this the constitution of the State, as uniformly construed by the courts, has been violated, and in this regard the plaintiffs in error and respondents below have been denied the equal protection of the laws of the State of Michigan.

VII.

In this: that in the condemnation proceedings where a business plant was sought to be condemned for public use, the damages sought to be recovered, by the ruling of this court and of the court below, were held to be confined to the injury to the realty and the buildings thereon, and just compensation for interruption of business and to the business stand, and for diminution of business facilities, was denied, contrary to the said provisions of the constitution of the State of Michigan, and the uniform construction in such cases by the courts of the State in other cases, and contrary to the said provision of the Constitution of the United States.

VIII.

In this: that the verdict of the third jury was never filed or entered in the cause.

IX.

In this: that the court below had no jurisdiction or authority to enter judgment against Absalom Backus, Jr., for $2,850.00, and against A. Backus, Jr., & Sons for $30,293.00, and that the provisions in said statute referred to in the said motion for the
3032 said judgments and in accordance with which said motion is alleged to have been made, were unconstitutional and void.

X.

In this: that as the consideration of the question of necessity for the alleged improvements set forth in the petition was expressly excluded from the consideration of the jury by the court, the proceedings in said third and last trial upon the single question of damages only was void and of no effect.

XI.

In this: that the circuit judge, Hon. George Gartner, did sit with the said jury on said third trial from the beginning of the trial of the cause to its close in all respects as in a trial at common law, and did hold and maintain that his function in that regard was not advisory, but that the said judge had the power to rule upon and admit or exclude testimony and did rule upon and admit or exclude testimony, and to direct and instruct the jury, and did so direct and instruct the jury, and did state to the jury in that connection that he would not only instruct them, but that he would see that his instructions were carried out; in direct violation of the constitution of the State and of the construction of the said constitution by the courts of last resort of the State in all other cases, thereby denying to the respondents below, persons within the jurisdiction of the State of Michigan, the equal protection of the laws of said State, and in violation of the true intent and meaning of the said provision of the Constitution of the United States.

XII.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the first objection of the respondents to the entry of the said judgments, or either of them.

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XIII.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the second objection of the respondents to the entry of the said judgments, or either of them.

XIV.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the third objection of the respondents to the entry of the said judgments, or either of them.

XV.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the fourth objection of the respondents to the entry of the said judgments, or either of them.

XVI.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the fifth objection of the respondents to the entry of the said judgments, or either of them.

XVII.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the sixth objection of the respondents to the entry of the said judgments, or either of them.

XVIII.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the seventh objection of the respondents to the entry of the said judgments, or either of them.

XIX.

In this: that the circuit judge, Hon. George Gartner, over-
3034 ruled, under exception, the eighth objection of the respondents to the entry of the said judgments, or either of them.

XX.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the ninth objection of the respondents to the entry of the said judgments, or either of them.

XXI.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the tenth objection of the respondents to the entry of the said judgments, or either of them.

XXII.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the eleventh objection of the respondents to the entry of the said judgments, or either of them.

XXIII.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the twelfth objection of the respondents to the entry of the said judgments, or either of them.

XXIV.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the thirteenth objection of the respondents to the entry of the said judgments, or either of them.

XXV.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the fourteenth objection of the respondents to the entry of the said judgments, or either of them.

3035

XXVI.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the fifteenth objection of the respondents to the entry of the said judgments, or either of them.

XXVII.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the sixteenth objection of the respondents to the entry of the said judgments, or either of them.

XXVIII.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the seventeenth objection of the respondents to the entry of the said judgments, or either of them.

XXIX.

In this: that the circuit judge, Hon. George Gartner, overruled, under exception, the eighteenth objection of the repondents to the entry of the said judgments, or either of them.

XXX.

In this: that the said circuit judge ordered and directed the issue of an execution without authority of law, after objection and full argument against the order by the counsel for the respondents.

XXXI.

In this: that the property of these respondents, to wit: of the respondents A. Backus, Jr., & Sons of the value of one hundred thousand dollars ($100,000.00) and upwards, and the property of Absalom Backus, Jr., of the value of ten thousand dollars ($10,000.00)
3036 and upwards, had been seized and taken by the sheriff of the county of Wayne under the said execution, directed as aforesaid to be issued by the said circuit judge, and therein and thereby they, and each of them, have been deprived of their property without due process of law, contrary to the said provision of the Constitution of the United States.

XXXII.

In this: that costs of the court below and of this court on appeal were awarded by the said circuit judge against the plaintiffs in error and respondents below, and execution issued therefor, when in and by the statute in such case made and provided, no costs could be awarded except against the defendant in error and petitioner below as the party appealing.

XXXIII.

In this: that the act of the legislature of the State of Michigan under which the said petition was filed by said petitioners, was unconstitutional and void, because the proceedings in the third trial were had under a decision of this court in a case reported in the 92d Mich. Reports, commencing at page 33, without having ordered for reargument the case reported in the 89th Mich. Reports at page 209, and without hearing any reargument thereon, and that on the hearing of the case aforesaid reported in the said 92d Mich. Reports, the chief justice of the court, when counsel for respondents were about to argue the question as to whether the property of the Michigan Central railroad could be taken, and as to whether it was error below for counsel for respondents to argue that the said Michigan Central Railroad Company's property could be taken, stopped that part of the argument of the said counsel for the respondents, and stated that this court did not desire to hear argument on that
3037 question because the verdict of the jury had been unfavorable to respondents on the question of necessity; but nevertheless, this court did, without having offered to hear counsel for petitioners, decide the same adversely to the respondents; contrary to the uniform practice and rulings of this court in all other cases than this, thereby depriving the plaintiffs in error and respondents below of the equal protection of the laws, in violation of the true intent and meaning of the said provision of the Constitution of the United States.

DICKINSON, THURBER & STEVENSON,
Attorneys for Plaintiffs in Error and Respondents Below.

Endorsed: Filed Sept. 22, 1894. Chas. C. Hopkins, clerk supreme court.

3038 At a session of the supreme court of the State of Michigan, held at the supreme court room in the capitol, in the city of Lansing, on the twenty-third day of November, in the year of our Lord one thousand eight hundred and ninety-four.

Present: The Honorable John W. McGrath, chief justice; Charles D. Long, Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, associate justices.

FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., *et al.*, Respondents and Appellants. } #14268.

This cause coming on to be heard is argued by Mr. F. A. Baker, for petitioner, and by Mr. Don M. Dickinson, for respondent, and submitted.

3039

Supreme Court of Michigan.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVISON.

Opinion.

Filed January 8, 1895.

This case is now before us for the third time. It was commenced February 25, 1891. The first jury disagreed. The second jury found a verdict for the respondents of $96,143. This verdict was set aside by the circuit court in which the proceeding was tried. The respondents applied to this court for the writ of mandamus to set aside this order. 89 Mich. 209, 50 N. W. 646. The case was afterwards brought to this court by appeal, and is reported in 92 Mich. 33, 52 N. W. 790. After that decision the case was again tried before a jury, resulting in a verdict for Absalom Backus, Jr., for $15,000, and for Backus, Jr., & Sons for $48,000. For a full statement of the case, reference is had to the former decisions. The case is now brought before us on a writ of certiorari, and substantially the same questions are involved and argued as are stated in the opinion in 92 Mich. and 52 N. W. No motion was made for a rehearing of that decision. The case was remanded for a new trial, under the rulings then made. The respondents will not now be heard upon the questions then decided, and we shall not argue them. By entering upon a new trial without a motion for a rehearing, both parties adopted that decision as the law of the case, and conducted the trial under it. All these questions are therefore *res judicata*, and not now open for review. That case was very ably and fully argued by counsel, and received the most careful consideration by the court, of which four of the present members were then members. A re-examination shows no reason for doubting the soundness of the conclusions then reached. We will now proceed to determine some questions which were not fully disposed of on the former hearing.

1. Complaint is made because the circuit judge presided at the trial, ruled upon questions of evidence, and charged the jury. No errors are assigned upon his rulings in either the admission or rejection of evidence. The precise complaint seems to be that he presided at all. The petition was presented to the circuit court for the county of Wayne, and all the subsequent proceedings were had in that court. The statute expressly provides that the circuit judge may attend the jury "to decide questions of law, and to administer oaths to witnesses." How. Ann. St. § 3466. Against this power there is no constitutional inhibition. The same course pursued upon this proceeding was also pursued in the case of Railway Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271, and the court refused
3040 to set aside the award, even though the charge of the judge was "ambiguous and open to criticism." Under the rule of

that case, this award cannot be disturbed, unless some ruling or instruction of the judge is clearly erroneous, and leads to the plain conclusion that the jury were thereby prejudiced against the respondents. The fact that no errors are assigned upon his rulings upon the testimony removes that question from discussion.

The judge, in both his rulings and his charge, was very careful not to encroach upon the functions of the jury. The charge was so clear, so appropriate to an important litigation (which had been conducted with great ability and vigor on both sides), and so carefully guarded the rights of both petitioner and respondents, that we here give it in full:

"I invite your cool, calm, careful, and conscientious consideration to the matters about to be submitted to you. The case is one of more than ordinary interest. The importance to the petitioner and respondents, the interests involved, the eminence and ability of learned counsel engaged, the wisdom and legal learning shown, the more than ordinary interest exhibited, the far more than ordinary eloquence displayed, and to which you have been unwearied listeners, the great earnestness in the presentation and contest made, all imperiously demand that you seek well and faithfully to perform the further duty which now devolves upon you, and bring to bear in the matters about to be submitted to you a cool and unbiased judgment and a careful consideration of the facts as you may find them, supported by the evidence produced, with a firm resolve to do your duty—your whole duty—to all the parties, without fear or favor, and without regard to the opinions of others as to conclusions honestly reached. The matter has assumed that shape, to be, as I have said, one of more than ordinary interest. It- final determination rests largely, if not entirely, with you. Your responsibility must not be underestimated. The question before you is (as I will explain more fully hereafter), what compensation are the respondents entitled to, as the owners of certain property, by reason of the construction of the superstructure in and along River street? Opportunity has been given you to fully examine the situation and condition of respondents' property, as well as the superstructure of the petitioner. Such view and such examinations as have been made by you, together with the evidence admitted during the hearing, as well as all the arguments made, based upon and supported by the evidence admitted, constitute collectively the basis upon which your conclusions should rest. Your award should be the result of a careful, thoughtful, and conscientious consideration of all these matters, remembering that what you have before you upon which to base your award is the knowledge you obtained
3041 by viewing the premises, the evidence, and all the evidence, admitted in the case, and the arguments made, in so far as you find such arguments supported by the evidence as you may find it. The evidence and the particular weight to be given to the testimony of any witness, or whether such testimony should be disregarded, are matters upon which I cannot in any way enlighten you. This is a matter belonging solely to the jury, and no judge is or should be permitted to enter upon, explain, elaborate upon, or

express, by intimation or otherwise, any opinion to a jury upon this peculiarly absolute province of the jury, in a controversy of this nature. I will, however, add that you should not suppose the existence of facts not supported by your view or observation of the premises, or the evidence admitted in the case, unless it be in instances where common experience and frequent observation show a fact fairly inferable, though not fully established by the view of the premises or by the testimony in the case. But the former must be established by evidence before you; you should infer or presume the second. What you may infer as a fact must be a conclusion logically reached from facts established by evidence and resting in common experience. Thus far I have dealt in the broadest generalities, but I may say that, keeping these matters before you, your duty will be well done; failing, you are likely to be led into error which may terminate in rank injustice to either party.

"The power of eminent domain, or, in other words, the power to take private property for public uses is in the State. All property is subject to this power. It is a power recognized under the constitution and law of the land. It is a power delegated by the people to and vested in the legislature, subject to certain constitutional limitations, and can only be exercised by virtue of a legislative enactment given in express terms or by necessary implication. The power of the legislature was, by the constitution of 1850 of this State, limited and restricted in this: By article 18, § 2, it is provided that, 'when private property is taken for the use and benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, should be ascertained by a jury of twelve freeholders residing in the vicinity of such property,' etc. Thus, you will observe that the questions of necessity and compensation are for the jury, and are not in any way subject to legislative interference; and, while the manner of procedure may be and is prescribed by statute, still any statute upon the subject which fails to observe and provide for every constitutional safeguard will be inoperative and void. That the petitioner, under the statute under which it is incorporated, is vested with the exercise of this power of eminent domain, is not and cannot be questioned. Certain proceedings have hereto-
3042 fore been had in this matter, and I call attention to them only for the purpose of stating to you that the question of the necessity for the taking—and which, as I have already stated, is one of the questions to be determined under the provision of the constitution—is settled. That question—viz. necessity—has been determined, and with that you have nothing to do. That has passed out of the case, and is not before you. The question, and the only question, before you for your determination, is that of compensation, and of compensation only. Your duty, and your only duty, is to ascertain and determine what compensation or damages ought justly to be paid by the Fort Street Union Depot Company to the respondents for the real estate, property, franchises, easements, and privileges described in the petition, viz: (1) The amount to be allowed to Absalom Backus, Jr., as the owner of the

fee of the land described. (2) The amount to be allowed to A. Backus, Jr., & Sons, a corporation, as tenants in the possession of such lands. Upon this question—viz. compensation or damages—what I have to say must necessarily be in a broad and the most general way. This is a question for you, and from the very nature of a proceeding of this character, you are vested with large powers and great discretion. These powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that, the greater the power, the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent, and unbiased judgment. The compensation or damages must be neither inadequate nor excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias, and prejudice, or unfaithfulness in the discharge of the duties imposed on you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with, under the so-called 'power of eminent domain,'—a power somewhat and necessarily arbitrary in its character; and that, where this is done, the party whose property is taken, or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little, nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the condition of thing as they exist. Under the constitution and laws, the right to take another's property for public uses—the power to exercise the right of eminent domain—is
3043 a part of the law of the land; but, when this power is exercised, it can only be done by giving the party whose property is taken, or whose use or enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation.

"I shall not call attention to any particular part of the testimony in the case. The responsibility of its application, and the weight to be given it, rests with you; always regarding that which is real and substantial, and disregarding that which is fictitious and speculative; treating conditions as they have been shown and as they are, without speculating as to what might possibly happen or occur; taking conditions as you find them, and the natural and probable consequences following such conditions.

"I do not want to leave this case without again impressing upon your minds your great responsibility. You want to and must do that which is right and just by the petitioner, that which is right and just by the respondents. You have before you such knowledge as you obtained by viewing the premises, the evidence admitted in the case, the arguments of counsel, and which, as I have said, you may consider in so far as supported by the evidence, and also the

little that I have said to you. These matters are to be your guide absolutely and solely in the determination of the question involved. Let me impress upon you that, in a court of justice, friendship ceases. We know no friends; we know no enemies; we do no favors. Here we are actuated by reason only, in its most cool, calculating, deliberate, and unsympathetic spirit. 'Favor,' 'offend,' 'displease,' are words which neither in thought nor spirit have meaning here. To do what is right and just is and should be our sole and absolute object. In the settling and determination of rights, in the administration of the law, acquaintances, associations, and friendships are not in any way factors. Purity and honest intention, the careful exercise of honest judgment, with a firm resolve to do exact justice, are the only virtues. These principles are predominant, and the indomitable spirit to do right is the only incentive which actuates an honest mind and an honest man. Gentlemen, the matter is now in your hands. Discharge your duty faithfully and honestly. I invoke in you the spirit so beautifully, though figuratively, exemplified in the Goddess of Justice, who, blindfolded, weighs in the scale every human action, and fearlessly determines the right, without passion, without prejudice, and regardless of and uninfluenced by wealth, position, or any thought and sentiment not just and pure."

This charge correctly embodies the law upon this subject. There is nothing in it which could have any other tendency than to direct and aid the jury to a correct result. It in no particular invaded the province of the jury, and left to their consideration every legitimate element of damage. The arguments of the learned 3044 and able counsel on both sides, which extended over two days, are found in full in the record. The reading of them discloses the fact that the judge did not restrict their arguments in the least; that they were not interrupted except by opposing counsel; and that every proper basis of damages was fully presented. Under these circumstances, we cannot concur in the statement of counsel that "the presiding judge made himself a controlling, constraining member of the constitutional tribunal, and thus rendered the proceeding void." In these proceedings it is important that the jury should be confined to a consideration of those matters which have a legitimate bearing upon the questions confided to them for determination. It is of little consequence what agency under the statute has secured the result,—whether it be the judge, or commissioners, or counsel, or the jury themselves. When courts can say that the proceedings have been conducted fairly and honestly, they must confirm the award. It is proper here to note that no requests to charge were presented on behalf of the respondents.

2. The amount of the first award was paid to the respondents pending the appeal to this court. Upon the second trial the award was diminished, and judgment entered for the petitioner for the difference between the two awards. The statute provides for the payment of this sum by the respondents to the petitioner. We think judgment for this amount was properly entered. As already

stated, this proceeding is in the circuit court, and the statute clearly contemplates the entry of judgment and the issue of execution to enforce the finding of the jury. The statute expressly provides for the entry of judgment. How. Ann. St. § 3468. A general statute also provides for issuing execution upon any judgment rendered in any court of record. How. Ann. St. § 7654. The case of Derby *v.* Gage, 60 Mich. 1, 26 N. W. 820, does not apply to this case. The railroad company in that case had abandoned the proceedings by refusing to pay the award, and consequently acquired no rights in the land. No execution could therefore issue either for the award or costs, both of which were held under the statute to be placed on the same footing.

3. The costs of the second trial were allowed by the court to the petitioner. The validity of this allowance depends upon the construction to be given to the statute. That part of the statute relative to costs of the second trial reads as follows: "If the amount of the compensation to be allowed is increased by the second report, the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited as the court shall direct; and in such case all costs of the appeal shall be paid by the company; but if the amount is diminished, the difference shall be refunded to the company
3045 by the party to whom the same may have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing." The costs of the first trial must be paid by the petitioner, and this it did. Had the award been increased, it would have been compelled to pay the costs of the second trial. We think the plain intent was to give costs to the successful party. Upon the appeal of the respondents and the increase of the award, would it be contended that they should pay the costs of securing a victory? If the literal language were followed, judgment for the difference, as well as for the costs, should be against the appealing party; but it is too clear to require argument that the judgment is to be against the respondents for the difference.

4. A motion was made to dismiss the writ of certiorari, on the ground that the second award is final under the statute, and that this provision cannot be evaded by invoking the use of this writ. The statute provides that the second report shall be final and conclusive upon all parties interested. We have chosen to dispose of the questions not adjudicated upon the former hearing on account of the importance of the case. It thus becomes unnecessary to decide the important question raised by the motion, and we pass no opinion upon it.

The award must be affirmed, with costs to the petitioner, The Fort Street Union Depot Company.

C. B. GRANT.
CHAS. D. LONG.
JOHN W. McGRATH.
R. M. MONTGOMERY.
FRANK A. HOOKER.

Order of Supreme Court.

3046 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the eighth day of January, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable John W. McGrath, chief justice; Charles D. Long, Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, associate justices.

THE FORT STREET UNION DEPOT COMPANY, Petitioner,
vs.
ABSALOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. Dean, and William H. Davison, Respondents and Appellants. } #14268.

The record and proceedings in this cause having been removed to this court by writ of certiorari issued to the circuit court for the county of Wayne, and the same and the matters and proceedings therein having been examined and duly considered by the court and no error appearing therein, thereupon it is ordered and adjudged that the order of the circuit court for the county of Wayne, entered herein on the twenty-eighth day of December, 1893, affirming the award of the jury in this cause, be, and the same is hereby, in all things affirmed, and that the petitioner recover of and from the respondents its costs, to be taxed, and that it have execution therefor.

3047 Know all men by these presents that we, A. Backus, Jr., & Sons and Absalom Backus, Jr., of Detroit, Wayne county, Michigan, as principals, and Anson Youngs and Henry N. Backus, as sureties, are held and firmly bound unto The Fort Street Union Depot Company in the sum of five hundred dollars ($500), lawful money of the United States, to be paid to the said The Fort Street Union Depot Company, its successors or assigns; for which payment, well and truly to be made, we bind ourselves and our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this ninth day of March, A. D. 1895.

The condition of this obligation is such that whereas the above-named A. Backus, Jr., & Sons and Absalom Backus, Jr., have applied for a writ of error from the Supreme Court of the United States to the supreme court of the State of Michigan in a certain cause therein pending, wherein the said A. Backus, Jr., & Sons and Absalom Backus, Jr., are respondents and The Fort Street Union Depot Company is petitioner:

Now, therefore, if the said A. Backus, Jr., & Sons and Absalom Backus, Jr., plaintiffs in error, shall prosecute their writ to effect and if they fail to make the plea good shall answer all damages

and costs which may be charged against them, then this obligation to be void; otherwise to remain in full force and virtue.

[CORPORATE SEAL.] A. BACKUS, JR., & SONS,
By N. D. BACKUS, *Sec. & Treas.* [L. S.]
ABSALOM BACKUS, JR. [L. S.]
ANSON YOUNGS. [L. S.]
HENRY N. BACKUS. [L. S.]

3048 UNITED STATES OF AMERICA, } ss:
State of Michigan, Wayne County, }

The above-named Anson Youngs and Henry N. Backus, being duly sworn, each for himself says that he is a freeholder, residing in said county, in the city of Detroit, and that he is worth the sum of five hundred dollars ($500) in property liable to execution over and above all just debts and liabilities.

Subscribed and sworn to before me this 9th day of March, A. D. 1895.

BENJAMIN S. WARREN,
[NOTARIAL SEAL.] *Notary Public, Wayne County, Michigan.*

Approved:
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

March 15, 1895.

Filed May 24, 1895.

CHAS. C. HOPKINS,
Clerk Supreme Court.

3049 Supreme Court of the United States.

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS, Plaintiffs in Error,
vs.
THE FORT STREET UNION DEPOT COMPANY, Defendant in Error.

Assignment of Errors.

Dickinson, Thurber & Stevenson, attorneys for plaintiffs in error.

3050 Supreme Court of the United States.

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS, Plaintiffs in Error,
vs.
THE FORT STREET UNION DEPOT COMPANY, Defendant in Error.

Assignment of errors.

And now come the plaintiffs in error, by Dickinson, Thurber & Stevenson, their attorneys, and say that there is manifest error in

the record and proceedings of the supreme court of the State of Michigan in this cause, as follows:

(1.)

In this, the court erred in overruling the objection and protest of the plaintiffs in error made in writing and repeated at every
3051 stage of the proceedings in the cause from their inception to the taking of the property of the plaintiffs in error under color of a writ of execution, all as shown by the said record, by which said objection and protest it was asserted that the said proceedings and execution were not due process of law within the true intent and meaning of section I of article XIV of the amendments to the Constitution of the United States, and that in and by said proceedings and said execution, the plaintiffs in error, being persons, were deprived of their property by an authority exercised under said State of Michigan, when the exercise of that authority, as is averred, was repugnant to the Constitution of the United States, to wit, in violation of said section I of article XIV.

(2.)

In this, the court erred in overruling the objections of the plaintiffs in error made in writing at the inception of the proceedings and repeated at every stage of the said proceedings up to and including the taking of their property under color of an execution, as shown by the record, by which objections they showed to the supreme court of the State of Michigan that in and by the said proceedings the plaintiffs in error, being persons within its jurisdiction, had been and were denied by the State of Michigan the equal
3052 protection of the laws, whereby, as shown in and by the said record of said proceedings, the authority exercised under said State of Michigan in said cause to carry the said proceedings to judgment and execution was repugnant to the Constitution of the United States, to wit, in violation of said section I of article XIV.

(3.)

In this, the defendant in error having acquired the title, possession, and full enjoyment of the property of the plaintiffs in error specified in the proceedings under the prerogative of eminent domain conferred upon it under the constitution and laws of the State of Michigan, and having paid the ascertained compensation therefor to the plaintiffs in error, and the plaintiffs in error having thereupon in the proceedings below claimed a right and title to the said compensation so paid them and immunity from condemnation proceedings under the constitution and laws of the State of Michigan on the ground that title and possession of all the property sought to be acquired had passed to the defendants in error, and that the title to the said money had thereupon passed to the plaintiffs in error, and thereupon the plaintiffs in error having
3053 insisted that the proceedings below in form for condemnation under the power of eminent domain against them to recover, in whole or in part, the said compensation so paid

to them, including the form of trial, judgment, and execution, were not due process of law, within the true intent and meaning of the Constitution of the United States, and that for the courts of Michigan to maintain and sanction such proceedings as to the plaintiffs in error would be in violation of the constitution and laws of the State of Michigan, and as the same were and had been uniformly construed by the courts of the State, and would be in special discrimination against the plaintiffs in error, in violation of the true intent and meaning of the Constitution of the United States, by denying them the equal protection of the laws, the said supreme court of the State of Michigan overruled the said claim of right, title, and immunity of the plaintiffs in error, as shown in and by the record of the proceedings of said cause.

(4.)

In this, that in and by the constitution of the State of Michigan, by the specific provisions of article XV, section 15, and article XVIII, section 2, of said constitution, and as the same were and had been uniformly construed by the court of last resort of the State of Michigan, when private property is sought to be taken for
3054 the use and benefit of the public, the necessity for using such property and the just compensation to be made therefor in such cases is not referred to any court or to any but a temporary body called for the special purpose, consisting of twelve freeholders residing in the vicinity of the property, exclusive of any other official or person in their deliberations and in the control of the performance of their duties.

Whereas in these records and proceedings, under the authority of the supreme court of the State of Michigan, a judge was made a part of the said special tribunal, acting in every respect as a controlling influence, to the extent and following the form of proceeding as if the tribunal were a court and the proceeding judicial, in accordance with the course of the common law, all against the objection and protest of the plaintiffs in error, and therein and thereby the said supreme court of the State of Michigan denied to the plaintiffs in error, who were persons within the jurisdiction of the State of Michigan, the equal protection of the laws of the State of Michigan, by denying to them the protection of the said articles of the constitution of the State and of the said court's own construction of the said articles of the constitution of the State,
3055 contrary to article XIV, section 1, of the amendments to the Constitution of the United States, notwithstanding that the plaintiffs in error did then and there duly claim before said court the protection of the said provision of the Constitution of the United States.

(5.)

In this, that there having been one verdict and report of a jury finding the necessity of the taking of the property and the damages to be awarded the plaintiffs in error therefor, and the defendant in error having entered upon, taken possession, and in all respects, to

the limits of the prayer of its petition, having built and maintained its railroads and its culverts upon the property of the plaintiffs in error sought to be condemned, and having paid over to the plaintiffs in error unconditionally the award of said jury, under the constitution and laws of the State of Michigan, and as the same were and had been uniformly construed by the courts of said State and by the said court of last resort, there was no jurisdiction in any tribunal to prosecute a proceeding for condemnation under the power of eminent domain thereafter.

Whereas in this case the power to proceed after possession
3056 and payment was sustained by the said supreme court in effect not to condemn property, but to recover back money paid for the same, not in a judicial proceeding, but in the form of a statutory proceeding for condemnation, against the objection and protest of the plaintiffs in error, whereby the said supreme court deprived the plaintiffs in error, persons within the jurisdiction of the State, of the equal protection of the laws of the State, by denying them the protection of the constitution and laws of the State in the premises, as the said constitution and laws were construed by the supreme court of the State of Michigan as to all other persons except the plaintiffs in error, contrary to the said provision of the Constitution of the United States, the protection of which was duly set up and claimed by the plaintiffs in error in said court and denied to the plaintiffs in error by said court.

(6.)

In this, that as the title of the property sought to be condemned passed to the said defendant in error and the title to the said money passed to the said plaintiffs in error by the appropriation of the property of the plaintiffs below, the proceedings therefore
3057 were without jurisdiction, and the recovery of a portion of said money, under color of a judgment, in proceedings not according to the course of the common law, but through the form of statutory proceedings for condemnation and the seizure of the property, under color of an execution issued upon said judgment by the authority of the supreme court of the State, was depriving said plaintiffs in error of their property by the authority of the State of Michigan without due process of law, contrary to the said provision of the Constitution of the United States, protection under which was claimed by the plaintiffs in error and denied by the said supreme court of the State of Michigan.

(7.)

In this, that in and by the said proceedings the question of the necessity for using the property and of the just compensation to be made therefor were, under the rulings of the said supreme court, left separately to two juries of twelve freeholders, one passing on the question of necessity and the other upon the question of compensation.

Whereas one and the same jury, under the constitution and laws

of the State, and as the same were and had been construed
3058 by the court of last resort of the State itself, must pass upon
both questions, whereby, under the authority of the said supreme court of the State of Michigan, the constitution and laws of said State, as construed by itself, have thereby been violated and the plaintiffs in error denied the protection of the laws of the State of Michigan accorded to other persons within its jurisdiction, contrary to the said provision of the Constitution of the United States, the protection of which was claimed by the plaintiffs in error before said court, and in this regard also denied to the plaintiffs in error by said court.

(8.)

In this, that in condemnation proceedings under the constitution and laws of the State of Michigan, and as the same were and had been uniformly construed by the supreme court of the State itself, where a business plant is sought to be condemned for public use, the damages sought to be recovered are not confined to the injury to the realty and the buildings thereon, but must be just compensation and must include damages for interruption to the business and to the business stand and for diminution of business facilities.

Whereas in this case the supreme court of the State denied to the plaintiffs in error the said benefit of said constitution and laws
of the State and of its own rulings and judgment in con-
3059 struction thereof, by holding that the damages should be
confined to the injury to the realty and the buildings thereon, and thereby the said State of Michigan by the act of its courts denied to the plaintiffs in error, being persons within its jurisdiction, the equal benefit of the laws of the said State, contrary to the said provision of the Constitution of the United States, protection under which in this regard was claimed by the plaintiffs in error before said State court, and the claim by said State court was denied.

(9.)

In this, that under the constitution and laws of the State of Michigan, and as the same were and had been uniformly construed by the courts of said State, the said court had no jurisdiction to enter judgment against Absalom Backus, Jr., for $2,850.00, and against A. Backus, Jr., & Sons for $30,293.00, and the taking of the property upon an execution entered upon said judgments under the authority of the State of Michigan, as set forth in the record, was depriving them of their property without due process of law, in violation of the Constitution of the United States, as claimed by
the plaintiffs in error in the said supreme court of the State,
3060 which said claim was overruled by said supreme court.

(10.)

In this, that the property of the said plaintiffs in error, to wit, of A. Backus, Jr., & Sons of the values of $100,000.00 and upwards, and of Absalom Backus, Jr., of the value of $10,000.00 and upwards, had been seized and taken by the sheriff of the county of Wayne,

as appears by the records, under execution upon said alleged judgments, directed as aforesaid to be issued by the circuit judge, and the validity thereafter sustained by the said supreme court.

Whereas under the constitution and laws of the State of Michigan no valid writ of execution upon such judgment could be issued against the goods and chattels, lands and tenements of the plaintiffs in error, and thereby, as the plaintiffs in error asserted and claimed in the said supreme court, they have been deprived of their property without due process of law, contrary to the said provision of the Constitution of the United States, the protection of which provision was invoked by the plaintiffs in error in the said supreme court of the State of Michigan, and denied by said supreme court.

3061 (11.)

In this, that costs of the proceedings were awarded against the plaintiffs in error, and the said execution issued therefor, when in and by the constitution and laws of the State no costs could be awarded, except against the defendant in error as the party appealing.

(12.)

In this, because the proceedings in the third trial in the condemnation proceedings were had in a case reported in 92 Mich. Rep., p. 33, without having ordered for reargument the case reported in 89 Mich Rep., p. 209, and without hearing any reargument thereon in behalf of the plaintiffs in error, and that on the hearing of the case aforesaid, reported in the 92 Mich., the chief justice of the court, when counsel for the plaintiffs in error were about to argue the question as to whether the property of the Michigan Central could be taken, and whether it was error for the counsel for the plaintiffs in error to argue that the said Michigan Central Railroad Co.'s property could be taken, stopped that part of the argument of
3062 the counsel for the plaintiffs in error, and stated that the said supreme court did not desire to hear argument on that question because the verdict of the jury had been unfavorable to the plaintiffs in error on the question of necessity; nevertheless the said supreme court did, without having offered to hear counsel for plaintiffs in error, decide the same adversely to the plaintiffs in error on the questions decided in favor of the plaintiffs in error in the said 89 Mich. Rep., at p. 209, and adversely to the plaintiffs in error on the questions as aforesaid regarding the right to take the property of the Michigan Central railroad, contrary to the law and the uniform practice and rulings of the supreme court of the State, then and still of the force of law as held to from the establishment of government in the State of Michigan, thereby depriving the plaintiffs in error of the equal protection of the laws, in violation of the true intent and meaning of the said provision of the Constitution of the United States.

DICKINSON, THURBER & STEVENSON,
Attorneys for Plaintiffs in Error.

[Endorsed:] Filed June 24, 1895. Chas. C. Hopkins, clerk supreme court of Michigan.

3063 Parties.	Plaintiff's attorneys.	Defendants' attorneys.
14268. The Fort Street Union Depot Company, petitioner, *vs.* A. Backus, Jr., and A. Backus, Jr., & Sons, respondents and appellants.	Fred. A. Baker..... Certiorari to Wayne.	Dickinson, Thurber & Stevenson.

Costs.	Journal.	Date.	Proceedings.
		1894.	
		June 27	Writ allowed by McGrath, C. J., and issued returnable August 3, 1894.
		July 23	Proof of service of writ filed.
		Aug. 3	Proof of notice of extension of time filed.
		" 4	Note of argument filed.
		" 23	Return filed.
		Sept. 22	Assignment of errors filed.
	M, 305	Nov. 23	Argued and submitted.
		1895.	
	M, 365	Jan. 8	Affirmed with costs.
		March 22	Writ of error from Supreme Court United States received.
		" 22	Citation with proof of service filed.
		May 24	Bond filed.
		Aug. 5	Return to writ of error sent to Supreme Court U. S.

3064 UNITED STATES OF AMERICA, *ss:*

To the Fort Street Union Depot Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein A. Backus, Jr., & Sons and Absalom Backus, Jr., are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 15th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

3065 UNITED STATES OF AMERICA, } *ss:*
State of Michigan, County of Wayne, }

On this 21st day of March, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared Benjamin S. Warren before me, the subscriber, a notary public in and for the

county of Wayne and State of Michigan, and makes oath that on the above date he delivered a true copy of the within citation to the Fort Street Union Depot Company by leaving the same at its office in the city of Detroit, in said county, with James Joy, Esq., who had charge of the said office at that time; and deponent further says that he delivered a true copy of the within citation to Fred. A. Baker, attorney for the said The Fort Street Union Depot Company, by leaving the same at his office, in the city of Detroit, in said county, with Edward A. Stricker, who had charge of the office at that time.

BENJAMIN S. WARREN.

Sworn to and subscribed the 21st day of March, A. D. 1895.

SAMUEL S. HARRIS,
Notary Public, Wayne County, Michigan.

I accept service of within on date above stated.

FRED. A. BAKER,
Att'y for Defendant.

Filed March 22, 1895.

CHAS. C. HOPKINS,
Clerk Supreme Court.

3066 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Fort Street Union Depot Company, petitioner, and A. Backus, Jr., & Sons and Absalom Backus, Jr., respondents, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution
3067 or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said respondents, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf,

do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

3068 I hereby certify and acknowledge that a copy of the within writ of error was lodged in my office on the 22nd day of March, A. D. 1895.

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

3069 Supreme Court of the State of Michigan.

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS, Plaintiffs in Error,
vs.
THE FORT STREET UNION DEPOT COMPANY, Defendant in Error.

STATE OF MICHIGAN, *ss:*

In the Supreme Court.

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court and filed in my office, as appears of record and on file in my office; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon; the citation, with acceptance of service endorsed thereon by counsel for the defendant in error; a copy of the bond to the adverse party filed with the writ of error, and the assignment of errors by plaintiffs in error in the Supreme Court of the United States; that at the time said writ of error was served upon me there was lodged with me for the adverse party a copy of such writ.

I further certify that no order was ever entered by said supreme

court granting a reargument in the case of A. Backus, Jr., & Sons and A. Backus, Jr., relators, *vs.* George Gartner, judge of the circuit court for the county of Wayne, respondents, reported in 89 Michigan Reports, at page 209.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this twenty-ninth day of July, in the year of our Lord one thousand eight hundred and ninety-five.

Seal of the Supreme Court of Michigan, Lansing.

CHAS. C. HOPKINS,
Clerk of the Supreme Court of the State of Michigan.

Endorsed on cover: Case No. 15,997. Michigan supreme court. Term No., 55. A. Backus, Jr., & Sons and Absalom Backus, Jr., plaintiffs in error, *vs.* The Fort Street Union Depot Company. Filed August 19, 1895.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS
vs.
FORT STREET UNION DEPOT COMPANY. } No. 55.

It is hereby stipulated that there was omitted from the return of the clerk of the supreme court of Michigan the amended order of confirmation granted and entered in this cause in the Wayne circuit court on the 23 day of January, 1892, as of the 30th day of November, 1891, and a certified copy of which order is hereto annexed.

It is further stipulated that the verdict of the jury referred to in the certificate of the clerk of the Wayne circuit —, on p. 980 of the printed Record, was afterwards found in his office, and a copy was produced on the hearing in the State supreme court.

Said verdict awarded to the respondents damages or compensation as follows:

To A. Backus, Jr., & Sons	$48,000
To Absalom Backus, Jr.	15,000
	$63,000

This stipulation and annexed amended order of confirmation may be printed as an addition to the record in this cause.

Dated Jan. 5, 1898.

DON M. DICKINSON,
Attorney for Plaintiff in Error.
FRED. A. BAKER,
Attorney for Defendant in Error.

At a session of the circuit court for the county of Wayne, convened and held at the circuit court rooms, in the city of Detroit, on the thirtieth day of November, in the year one thousand eight hundred and ninety-one.

Present: Hon. Geo. Gartner, circuit judge.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSOLOM BACKUS, JR., A. BACKUS, JR., & SONS, JAMES N. DEAN, and WILLIAM H. DAVIDSON.

Before Judge Gartner.

Amended Order of Confirmation.

In obedience to the writ of mandamus granted by the supreme court of this State in the above-entitled cause, condemnation suit,

but not otherwise, and against the deliberate judgment of this court, it is ordered that notwithstanding the objections made to the confirmation of the verdict and the award of the jury in this case as set forth in the motion made by the petitioner to vacate and set aside said verdict and award, and notwithstanding the further objections and the affidavits in support thereof this day read and filed, the said verdict and award is hereby in and by virtue of the legal operation and effect of said writ of mandamus in all things confirmed.

The petition in this cause was filed by the Fort Street Union Depot Company against the above-named respondents to condemn to the public use the right of way for the construction and operation of an elevated railroad in, upon, and along River street, in the city of Detroit, in the said county of Wayne, in front of the property hereinafter described, in which the respondents are interested as owners or otherwise, in accordance with the ordinance agreed upon between the Fort Street Union Depot Company and the common council of the city of Detroit, the orders of the State railroad crossing board and of the commissioner of railroads, the plan approved by the commissioner of railroads and the general plan adopted by said company, all of which are set forth or are mentioned in and were filed and served with the petition in this cause.

The respondents demanded a jury to determine the questions of necessity and compensation.

A jury was empanelled and sworn, who reported to the court that they were unable to agree upon a verdict.

A second jury was empanelled, and they reported the verdict and award confirmed by this order.

The following is a description of the real estate and property in which the respondents are interested and in front of which the said elevated railroad is to be constructed and operated, viz:

All those certain pieces or parcels of land situated on the north side of River street, in the city of Detroit, in said county, known as the Backus planing mill and box factory. Said property is situated on the Lognon farm, so called, and the River Street frontage of said property is 238.06 feet, and it is bounded on the east by a strip of land, the property of the Michigan Central Railroad Company, and on the west by a lot, the property of Barbara Steadley.

It is further ordered that within sixty days from the date of this order the Fort Street Union Depot Company is required to tender and pay to Absolom Backus, Jr., the sum of seventeen thousand eight hundred and fifty dollars, and to A. Backus, Jr., and Sons the sum of seventy-eight thousand two hundred and ninety-three dollars, and to James N. Dean and William H. Davison, executors, the sum of one dollar, together with their costs and expenses, if the same have been taxed, including an attorney fee of twenty-five dollars; and if the said parties or either of them refuse to accept the tender and payment of said sums, the Fort Street Union Depot Company is required to deposit the same, under the supervision of the clerk of this court, in the Detroit National bank and to the credit of this cause, including said costs and expenses; provided,

that if said costs and expenses have not been taxed within the said sixty days, the same to be so deposited within five days after they are taxed.

Said money shall remain on deposit in said bank, but at the risk of the petitioner, subject to be drawn therefrom and to be paid to the parties entitled to the same on orders signed by one of the judges of this court and countersigned by the clerk.

It is further ordered that upon the tender and payment or deposit of said sum of ninety-six thousand one hundred and forty-four dollars and of said costs, expenses, and counsel fees, as aforesaid, the said Fort Street Union Depot Company shall be entitled to enter upon and take possession of and use the right of way above described for the purpose of its incorporation under its articles of association and the constitution and laws of this State, and that said respondent shall be divested and barred of all right, estate, and interest in such right of way until such right or title shall be again legally vested in them and said right of way shall be deemed to have been acquired by said company for public use.

(Signed) GEORGE GARTNER,
Circuit Judge.

Endorsed: Filed Jan. 23, 1892. Wm. E. Fenwick, deputy clerk.

STATE OF MICHIGAN, *County of Wayne,* } ss:

I, William May, clerk of the circuit court for the county of Wayne, do hereby certify that the above and foregoing is a true and correct copy of judgment entered in the above-entitled cause by said court, as appears of record in my office; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, this 23rd day of December, A. D. 1897.

[Seal of the Circuit Court of Wayne County, Michigan.]

HENRY M. REYNOLDS, *Clerk,*
By W. H. AUSTIN, *Deputy Clerk.*

STATE OF MICHIGAN, ss:

In the Supreme Court.

CLERK'S OFFICE.

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the amended order of confirmation contained in the record on appeal, now on file in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom and the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this thirtieth day of December, A. D. 1897.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS, *Clerk.*

[Endorsed:] 15997. United States Supreme Court. A. Backus, Jr., & Sons *et al. v.* Fort Street Union Depot Co. Supplementary return. No. 55. Oct. term, 1897.

[Endorsed:] 15997. United States Supreme Court. A. Backus, Jr., & Sons *et al. vs.* Fort Street Union Depot Co. Stipulation. No. 55. Oct. term, 1897. Original.

[Endorsed:] Case No. 15,997. Supreme Court U. S., October term, 1897. Term No., 55. A. Backus, Jr., & Sons *et al.*, pl'ffs in error, *vs.* The Fort Street Union Depot Company. Stipulation and addition to record. Filed January 10, 1898.

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UNITED STATES OF AMERICA.

Supreme Court of the United States.

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS, Plaintiffs in Error. vs. THE FORT STREET UNION DEPOT COMPANY, Defendant in Error.	Error to Supreme Court of Michigan.

MOTION TO DISMISS WRIT OF ERROR.

And now comes the Fort Street Union Depot Company, by Fred A. Baker, its attorney, and moves the court to dismiss the writ of error in this cause, and for the following reasons:

1. The final judgment or decree in this cause in the Supreme Court of Michigan was not rendered in a suit in which was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and there was no decision in the court below against the validity of any such treaty, statute, or authority.

2. The final judgment or decree in this cause in the Supreme Court of Michigan was not rendered in a suit in

which was drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and there was no decision in the court below in favor of the validity, as against the constitution, treaties and laws of the United States, of any statute of, or authority exercised under, any State.

3. The final judgment or decree in this cause in the Supreme Court of Michigan was not rendered in a suit in which any title, right, privilege or immunity was claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and there was no decision against any title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority.

4. No Federal question was presented, raised, argued, or decided in the court below, and no such question was involved in the case in the court below.

5. The Supreme Court of the United States has no jurisdiction in this cause.

6. The writ of error in this cause was improvidently allowed and issued.

This motion is based upon the files and record in this cause, printed copies of so much of the same as are necessary to dispose of this motion being herewith submitted.

FRED A. BAKER,
Attorney for Defendant in Error.

To Dickinson, Thurber & Stevenson, Attorneys for Plaintiffs in Error:

Gentlemen—You will please take notice that on Monday, the 14th day of October, 1895, at the opening of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, the above and foregoing motion to dismiss the writ of error in the above

entitled cause will be submitted to said court. You are herewith served with copies of the printed record and brief which will be submitted to the court in support of said motion.

Detroit, September 7, 1895.

FRED A BAKER,
Attorney for Defendant in Error.

RECORD IN COURT BELOW.

PETITION AND NOTICE.

STATE OF MICHIGAN—To the Circuit Court for the County of Wayne

Your petitioner, the Fort Street Union Depot Company, respectfully represents:

1. That your petitioner is a railroad corporation, organized under an act entitled, "An act to authorize the incorporation of companies for the construction of union railroad depots and stations, with the necessary connecting tracks, and the management of the same," approved June 9, 1881, and the amendments thereto; that your petitioner heretofore, to wit, on the 24th day of August, 1889, was duly incorporated by the filing of its articles of association, and annexed affidavit, in the office of the Secretary of State, as required by said act.

2. That the capital stock of your petitioner has been in good faith subscribed, as required by said act, to organize such company; that is to say, the capital stock of your petitioner is fixed by said articles of association at the sum of one million dollars, which was not less than the estimated and probable cost of your petitioner's proposed station grounds, depot buildings and railroad tracks proposed to be laid; that more than fifty per cent. of said capital stock was subscribed upon said articles of association, and

ten per cent. was in good faith in cash paid in to the directors named in said articles, and an affidavit was made and attached to said articles by William W. Crapo and George Coppell, two of said directors, showing that said amount had been subscribed and ten per cent. in cash paid in as aforesaid.

3. That your petitioner has surveyed its depot grounds and the route of its proposed tracks in the county of Wayne, and made a map and survey thereof, by which said depot grounds and route are designated, and that it has located the same according to such survey, and filed a certificate thereof, indorsed on such map and survey, and signed by a majority of the directors of said company, in the register's office of said county of Wayne, to wit, on the 12th day of November, 1889; that before filing said map and survey, to wit, on the 22d day of October, 1889, your petitioner submitted the same to the State Railroad Crossing Board, consisting of the Commissioner of Railroads, Attorney-General and Secretary of State, for approval, in compliance with section seven of the general railroad law of this State, as amended by act No. 236 of the Public Acts of 1887, p. 294; that thereupon such proceedings were had that afterwards, to wit, on the 8th day of November, 1889, said map and survey was duly approved by said board, and a certificate of such approval indorsed thereon, and said map and survey, so certified and approved, now remains of record in the said register's office for the county of Wayne, and to which record reference is hereby made.

4. That the route of the proposed tracks of your petitioner, as shown by said map and survey, lies upon and along River street, in said city of Detroit, from a point at or near Twelfth street to a point at or near Eighth street, and the terms and conditions under which your petitioner is to construct its said tracks upon and along said River street, have been agreed upon between the Common Coun-

cil of the city of Detroit, and your petitioner, as shown by the following ordinance adopted by the Common Council and accepted by your petitioner:

COPY OF ORDINANCE.

"Whereas, The Fort Street Union Depot Company is a corporation under the laws of this State, for the construction of a Union Depot on the southwest corner of Third street and Fort street west, in this city, and said company, for the purpose of furnishing access to said Union Depot, propose to build an elevated railroad in, upon and along River street, from the west line of the Thompson farm to the east line of lot number ten (10) of the Labrosse farm; thence northeasterly to a point south of Fort street, north of Congress street and west of the west line of Seventh street; thence across Seventh, Sixth, Fifth and Fourth streets, between Fort and Congress streets; and,

Whereas, The act under which said Depot Company is organized provides that the terms and conditions under which said elevated railroad may be constructed in any street shall be agreed upon between the company and the Common Council; and,

Whereas, The construction of said road may render it necessary to vacate Fourth, Fifth, Sixth or Seventh streets, between Fort and Congress streets, or to change the grade of Sixth or Seventh streets; therefore,

Section 1. It is ordered that the terms and conditions for the construction of said railroad along River street shall be as follows:

That is to say, the superstructure of said elevated railroad shall be supported by iron posts not more that 15 inches square or in diameter; that said posts shall be set along the line of the curbing now in said highway, and outside of the roadway and curbing, so that the super-

structure will span the entire roadway or paved portion of said highway; said posts shall be not less than 30 feet apart along said curb lines, except in crossing the Michigan Central Raidroad, where they shall be so placed as to be most convenient for both roads; said posts shall rest wholly upon solid foundations of masonry wholly beneath the surface of the street, and such posts shall be of such length that at no point on the line of the said road shall the space between the surface of said River street, or any street leading into said River street, and the superstructure be less than 13 feet in the clear, and no posts shall be palced within or between the curb lines of any street leading into or intersecting said River street, or within the lines of the sidewalk upon such intersecting streets.

In case said roadway shall be constructed across and over any of the said Fourth, Fifth, Sixth or Seventh streets, the superstructure shall be supported either by stone walls, erected on the street lines, or by iron posts not more than 15 inches square or in diameter, which shall be set so as to span the entire roadway of said streets, and none of which shall be set between the curb lines of either of said streets, or within the sidewalk lines thereon; the said posts shall rest upon solid foundations of masonry wholly beneath the surface of said streets, and at no point on either of said streets, provided the roadway shall be constructed over either of said streets, shall the space between the surface of the street and the superstructure be less than 13 feet clear under said structure; and,

The superstructure shall consist of iron and steel girders and ties, having an aggregate height of five feet, substantially as shown on the "cross section" thereof, filed by said company with the city clerk, with a map showing the route of said railroad along said River street and the location of the posts for the support, and which

said cross section and map are made a part of this ordinance.

Suitable iron pans or shields to catch the ashes and refuse from locomotives shall be constructed upon the tracks of said elevated railroad, on and along River street, and over any other street above which said roadway shall be constructed. And the said company shall cause to be properly lighted to the satisfaction of the Board of Public Works the said River street under said superstructure, and any street crossing over which said roadway may be constructed.

Sec. 2. The said company shall keep the posts and superstructure of said elevated railroad in good order and repair, and in constructing the same shall obstruct the streets for a reasonable time only.

Sec. 3. In case the Common Council should, in its discretion, at any time hereafter resolve and determine to vacate the said Fourth, Fifth, Sixth and Seventh streets, or either or any of them, and take the necessary steps and proceedings to vacate the said streets or either of them, and the same or either of them should be vacated, the said Fort Street Union Depot Company shall pay all the costs and expenses of such proceedings, and shall pay all damages which may be awarded in said proceedings to any person or persons by reason of such vacation.

Sec. 4. In case the said roadway should be constructed by said company over the said Fourth, Fifth, Sixth or Seventh streets, or over either of said streets, at a height leaving a space less than 13 feet in the clear between the present surface of such street and the superstructure of said roadway, and the Common Council should, in its discretion, at any time hereafter, resolve and determine to change the grade of either or any of said streets and the same be changed, the said Fort Street Union Depot Company hereby agree to pay all the costs

and expenses of such change and alteration of grade, and to pay all damages that may be awarded to any person or persons by reason of change of grade, and fully to indemnify the city against any and all claims, awards or judgments that may be recovered against the city by reason of such change of grade.

Sec. 5. The said company shall acquire by purchase or condemnation, from the adjoining property owners, the right to build said elevated railroad in said street as required by the constitution and laws of the State.

Sec. 6. In consideration of the police and fire protection, and in lieu of local taxes, the said company shall, and it hereby agrees to pay to the city treasurer, on or before the 1st day of July in each year, two and one-half per cent. of the gross earnings of said company, as determined by the State Railroad Commissioner and Auditor General, in pursuance of sections 19, 20 and 21 of the Union Depot Act of 1881. Provided, that if by any change in the constitution or laws of this State, the company should hereafter be required to pay local taxes, then the company is to be credited upon the percentage herein stipulated, with the amount of local taxes it may be required to pay.

Sec. 7. The said company shall within thirty (30) days after the passage of this ordinance file a written acceptance of the terms and conditions thereof with the city clerk, and shall procure from the owner or owners thereof, a deed to the city of Detroit, dedicating to the public use as a street, all that parcel of land in the City of Detroit, in the County of Wayne and State of Michigan, from River street to the channel bank of the Detroit river, included between the lines of Twelfth street extended, except the part thereof owned by the Michigan Central Railway Company, and the same to be kept open and clear

for public use, and shall cause said deed to be filed with the controller of the city; and

Said company shall execute and deliver to the City of Detroit, a good and sufficient bond, in the penal sum of $500,000, to be approved by the Common Council, conditioned for the faithful performance of the terms and conditions of this ordinance, and to fully indemnify and save harmless the City of Detroit, from any and all claims for damages for which said city may be made or become liable to pay, by reason of the construction, maintenance or operation of said railroad or superstructure. This ordinance shall take effect upon the filing of said acceptance, the delivery of said deed and the approval of said bond."

5. That at the time of approving the map and survey of your petitioner, to wit, on the 8th day of November, 1889, the State Railroad Crossing Board made an additional and further order requiring the Michigan Central Railroad Company and the Fort Street Union Depot Company to construct and maintain at their joint and equal expense, an overhead passage-way for teams and travelers on foot, at the crossing of River street by the tracks of the Michigan Central Railroad, and afterwards, to wit, on the 30th day of April, 1890, the Commissioner of Railroads, in his separate official capacity, made an order to the same effect and caused the same to be served on each of said companies. Reference is hereby made to said orders as they remain of record in the office of the Commissioner of Railroads. That each of said orders reserved to the Commissioner of Railroads the power to approve of the plans of the superstructure of the viaduct or elevated railroad to be erected in River street at said railroad street crossing by your petitioner, and also of the plans of the superstructure of the passageways for teams and travelers on foot, to be erected by the Michigan Cen-

tral Railroad Company and your petitioner at their joint and equal expense.

6. That afterwards, to wit, on the 15th day of July, 1890, your petitioner submitted plans for the construction of said overhead crossings to the Hon. John T. Rich, Commissioner of Railroads, for his approval, and after a full hearing thereon, he did approve of said plans, and indorsed his approval thereon, and filed the same so indorsed in the office of the Commissioner of Railroads; and he also delivered a duplicate original of said plans and indorsement to your petitioner, and the same are now in its possession, ready to be produced and proven as the Court may direct.

7. That your petitioner has also prepared and adopted plans for the construction of its proposed viaduct or elevated railroad in said River street from a point near Twelfth street to a point near Eighth street, and said plans conform to the said ordinance, the orders of the State Railroad Crossing Board and of the Commissioners of Railroads, and the crossing plans approved by the Commissioner of Railroads.

The plans so adopted by your petitioner are made a part of this petition, and a copy thereof is herewith filed and served.

8. That your petitioner desires to build said viaduct or elevated railroad and to construct the same in accordance with the terms and conditions, and in full compliance with all of the requirements, of the ordinance agreed upon between the Common Council of the City of Detroit and your petitioner as aforesaid, the orders of the State Railroad Crossing Board and of the Commissioner of Railroads, the crossing plans approved by the Commissioner of Railroads, and the general plans designed and adopted by your petitioner as aforesaid.

That your petitioner also desires, and holds itself in read-

iness, to join with the Michigan Central Railroad Company in the construction of said passageways for teams and foot travelers, and to pay its half of the cost and expense thereof.

9. That the Michigan Central Railroad Company owns all the property on the south side and some of the property on the north side of River street, between Twelfth street and Third street, and your petitioner has acquired from the Michigan Central Railroad Company, by due condemnation proceedings, the right to construct said viaduct or elevated railroad along said River street, as herein proposed, and your petitioner now desires to acquire the like right from the owners of the remaining property on the north side of said street, in front of said proposed viaduct or elevated railroad.

10. That of the property so situated on the north side of said River street, one parcel is known as the Backus Box Factory and Planing Mill. This property has a frontage on River street of two hundred and thirty-eight and 6.100 feet, and it extends from River street the same or a greater width to Fort street west and the right of way of the Michigan Central Railroad Company. The River street frontage of the property is bounded on the west by a lot owned or known as the property of Barbara Steadley, and on the east it is bounded by a strip of land seventeen feet feet wide, owned and occupied by the Michigan Central Railroad Company.

11. That the names and places of residence of the parties, so far as the same can with reasonable diligence be ascertained, who own, or have or claim to own, or have estates or interests in said lands and property are as follows:

The property is owned in fee by Absalom Backus, Jr., of Detroit, in said county, and it is in possession of a corporation known as "A. Backus, Jr., & Sons.," also of De-

troit, in said county, as the tenant for a term of years of said owner.

The estate of the late Crozier Davison is interested in a portion of said property under a land contract executed by the deceased to Absalom Backus, Jr., to the amount of about fifteen thousand dollars, and this interest, which is in the nature of mortgage, is held by James N. Dean, of Detroit, and William H. Davison, of Greenfield, in said county, as executors and trustees under the will of said Crozier Davison.

12. That your petitioner seeks to acquire under this petition, in the county of Wayne, and from the said owners, and others above named who own or have or claim to own, or have or claim to have estates or interests in the lands and property above described, the following real estate, property, easements, rights and franchise, that is to say:

I.

The right of way to construct and maintain said viaduct or elevated railroad in, upon and along River street, and in front of the above described property, in accordance with the ordinance agreed upon between the Common Council of the city of Detroit and your petitioner as aforesaid, the orders of the State Railroad Crossing Board and of the Commissioner of Railroads, the plans approved by the Commissioner of Railroads, and the general plans designed and adopted by your petitioner as aforesaid.

13. That all of the real estate, property, franchise and easements set forth and described in the preceding paragraph of this petition are required by your petitioner for the purposes of its incorporation and the taking thereof is necessary for the public use; that the Union Depot and station grounds proposed by your petitioner, and the proposed railroad tracks connecting therewith, are a necessary public improvement, and public necessity requires

that all of said real estate, property, franchises and easements, and all of the estate, right, title and interest of the said owners and others interested therein, as herein described and set forth, should be taken for said improvement and for the use and benefit of the public.

14. That your petitioner has not been able to acquire title to the said real estate, property, franchises and easements, and that the reason of such inability is this, that your petitioner has been unable to agree with the said Absalom Backus, Jr., and A. Backus, Jr., & Sons for the purchase thereof, there being a great difference between them and your petitioner as to the price or compensation that your petitioner ought justly to pay for the same.

PRAYER.

Your petitioner prays that an order may be granted by the Court appointing three disinterested and competent freeholders, as Commissioners under the Constitution and Laws of this State, to ascertain and determine the public necessity for taking said real estate, property, franchises and easements for the purposes of your petitioner and the public use and benefit, as aforesaid, and to appraise and determine the damages or compensation to be allowed to the said owners of, and parties interested in, the said real estate, property, franchises and easements, so proposed to be taken.

F. A. BAKER,
Attorney for Petitioner.

STATE OF MICHIGAN,
COUNTY OF WAYNE, } ss.

On the 24th day of January, 1891, before me, a notary public in and for said county, personally appeared Fred A. Baker, the person who signed the above and foregoing

petition, and made oath that he is the attorney for said petitioner, and signed said petition on its behalf; that he has read said petition and knows the contents thereof, and the same are true of his own knowledge, except the matters and things therein stated to be on information and belief, and as to those he believes the same to be true.

WILLIAM E. FENWICK,
Notary Public, Wayne County, Michigan.

To Absalom Backus, Jr., A. Backus, Jr., & Sons, and James N. Dean, William H. Davison, Executors and Trustees, etc.:

You will please take notice that on Monday, the 7th day of February, 1891, at the court room in the City Hall, in the city of Detroit, at the opening of court on that day, or as soon thereafter as counsel can be heard, a petition of which the within and foregoing is a true copy, will be presented to the Circuit Court for the County of Wayne, and at which time and place you are required to show cause, if any you have, against the prayer of said petition.

Detroit, January 24th, 1891.

F. A. BAKER,
Attorney for Petitioner.

SERVICE OF PROCESS.

More than ten days before the 7th day of February, 1891, a copy of the foregoing petition and notice was personally served on each of the respondents therein named, as required by the Michigan statute under which the petition was filed.

1 How. Stat., p. 890, §3464.

PROCEEDINGS ON PETITION.

On the day named the respondents appeared before the court by Dickinson, Thurber & Stevenson, their attorneys,

and showed cause why the petition should not be granted, but the court being of the opinion that the cause shown was not sufficient, granted the prayer of the petition.

Thereupon the respondents, by their said counsel, demanded, as provided in the statute, a jury of twelve freeholders of the county to determine the public necessity for taking the property described in the petition and to appraise and determine the damages or compensation to be allowed therefor.

1 How. Stat., p. 891, §3465.

A jury of twelve freeholders were duly impaneled and sworn, and a hearing was had before them, and a large number of witnesses were sworn, but the jury were unable to agree on a verdict, and so reported to the Court.

Another jury was then impaneled and sworn. Both parties having been heard, this jury agreed upon the following award, which was duly reported to the Court:

AWARD OF JURY.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY

vs.

ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN, and
WILLIAM H. DAVISON,
Respondents.

To said Court:

We, the undersigned, inhabitants and freeholders of the County of Wayne, duly impaneled and sworn as jurors in this cause to ascertain the necessity of taking for public

use, to wit, for the purpose of constructing a union railroad depot and station grounds in the City of Detroit, in said county, with the necessary connecting railroad tracks and accommodation, all of the real estate, property, franchises, rights, easements and privileges described in the petition in this cause, and to ascertain and determine the compensation or damages which ought justly to be made by the Fort Street Union Depot Company to the above named respondent therefor, do respectfully certify and report that we met at the court room in the market building in the City of Detroit, on the 8th day of June, 1891. That the Fort Street Union Depot Company appeared by F. A. Baker, its attorney, and the respondents appeared by Don M. Dickinson and J. Logan Chipman, their attorneys. That we proceeded to hear the proofs and allegations of the parties, and also proceeded together to view the premises proposed to be taken, and for that purpose we continued our sessions from day to day until the 16th day of July 1891, when this cause was submitted to us by said parties. That we caused the testimony and arguments of counsel before us to be stenographically reported and reduced to writing at the request of the parties, and the same are herewith returned and filed.

After said cause was submitted to us, having maturely considered the proofs and allegations of the parties and the arguments of counsel thereon, we did ascertain and determine that public necessity requires that said real estate, property, franchises, easements and privileges should be taken for public use, to wit, for the purposes of constructing, maintaining and operating a Union Railroad Depot and Station Grounds in the City of Detroit, in said county, with the necessary connecting railroad track and accommodation by the Fort Street Union Depot Company, under its articles of association and the constitution and laws of this State.

And thereupon we did further ascertain and determine that the compensation or damages which ought justly to paid by the Fort Street Union Depot Company to respondents for the said real estate, property, franchises, easements and privileges as described in the petition in this cause is as follows:

To Absalom Backus, Jr., as the owner of the fee of a parcel of land hereinafter described, the sum of seventeen thousand eight hundred and fifty dollars.

To A. Backus, Jr., & Sons, a corporation as the tenants in possession of said parcel of land, the sum of seventy-eight thousand two hundred and ninety-three dollars.

To James N. Dean and William H. Davison, executors of the estate of Crosier Davison, deceased, the sum of one dollar.

The real estate, property, franchises, rights, easements and privileges referred to in this award are more particularly known and described as the right of way to construct and maintain a viaduct or elevated railroad in, upon and along River street and in front of the property in which the respondents are interested as owners or otherwise, in accordance with the ordinance agreed upon between the Common Council of the City of Detroit and the petitioners, the orders of said railroad crossing board and of the commissioner of railroads, and the general plans and designs adopted by the petitioners and as approved by the State railroad commissioner, which were filed and served with and constitute a part of the petition in this cause.

The property in which the respondents are interested as owners or otherwise, in front of which said viaduct or elevated railroad is to be constructed or maintained, is situated on the north side of River street, in the City of Detroit, in the County of Wayne, and is bounded and described as follows: Bounded on the westerly side by a parcel of land owned by Barbara Steadley, and on the

northerly side by Fort street west and the Michigan Central Railroad, on the easterly side by a strip of land seventeen feet wide owned by the Michigan Central Railroad Company, and on the southerly side by River street, formerly known as Woodbridge street. Said property is known as the Backus Planing Mill and Box Factory, and it has a frontage on River street of two hundred and thirty-eight and forty-hundredths feet.

(Signed) J. H. Lesher, P. H. Hickey, Joseph C. Wallich, Felix Julien, John Kelly, William M. Quemby, Eugene Charest, Maxine J. Rivard, Christian M. Traub, Patrick Spillane, Leopold Freud.

TESTIMONY.

The stenographic report of the testimony and arguments of counsel accompanying the above award covers over 1,400 printed pages. As no question arises in this Court on the testimony it is not here printed.

MOTION FOR NEW TRIAL.

The petitioner being dissatisfied with the damages or compensation awarded by the jury, entered a motion for a new trial. Affidavits were filed in support of and against this motion. The motion was argued before Hon. Geo. Gartner, Circuit Judge, and was granted by him, as shown by the following:

ORDER VACATING AWARD.

October 26th, 1891.

THE FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., et al.

Before Judge Gartner.

In this cause the motion of said complainant for an order of the Court setting aside the award heretofore made by the jury in said cause, and for the impaneling of another jury in said cause having been heretofore argued and submitted after due consideration thereon, it is ordered that the award heretofore made by the jury impaneled in said cause and entered therein be and the same hereby is set aside and held for naught. And it is further ordered that a new jury be impaneled in said cause in accordance with the statute governing said proceedings.

(Signed) GEO. S. HOSMER,
Presiding Judge.

MANDAMUS PROCEEDINGS.

The foregoing order was vacated by a writ of mandamus issued by the Supreme Court of the State.

Backus vs. Gartner, 89 Mich., 209.

The petitioner then filed additional reasons and affidavits showing why the verdict of the jury should not be confirmed.

The petitioner then gave notice for the settlement of an order of confirmation, and such an order was settled and signed. The notice and order follow:

NOTICE.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN,
WILLIAM H. DAVISON,
Respondents.

To Dickinson, Thurber & Stevenson, Attorneys for said Respondents:

Protesting against the injustice of the writ of mandamus granted by the Supreme Court in this cause, and for the purpose of enabling the petitioner to perfect an appeal herein to the Supreme Court, you are hereby notified that on Monday, the 30th day of November, 1891, or as soon thereafter as counsel can be heard, the petitioner will apply to the Circuit Court for the County of Wayne, before the Honorable George Gartner, Circuit Judge, to settle and sign an order of confirmation in this cause. You are herewith served with a copy of an order which is submitted as a proper one to make under the circumstances of this case.

Detroit, November 27th, 1891.

F. A. BAKER,
Attorney for Petitioner.

ORDER OF CONFIRMATION.

At a session of the Circuit Court for the County of Wayne, held at the Court House, in the City Hall, in the City of Detroit, on the 30th day of November, 1891.

Present: Hon. Geo. Gartner, Circuit Judge.

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,

vs.

ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN,
WILLIAM H. DAVISON,
Respondents.

In obedience to the writ of mandamus granted by the Supreme Court of this State in the above entitled condemnation suit, but not otherwise, and against the deliberate judgment of this Court, it is ordered, that notwithstanding the objections made to the confirmaion of the verdict and award of the jury in this case as set forth in the motion made by the petitioner to vacate and set aside said verdict and award, and notwithstanding the further objections and the ffidavits in support thereof this day read and filed, the said verdict and award is hereby in and by virtue of the legal operation and effect of said writ of mandamus, in all things confirmed.

The petition in this case was filed by the Fort Street Union Depot Company, against the above named respondents, to condemn to the public use the right of way for the construction and operation of an elevated railroad in, upon and along River street, in the City of Detroit, in said County of Wayne, in front of the property hereinafter described, in which the respondents are interested as owners, or otherwise, in accordance with the ordinance agreed upon between the Fort Street Union Depot Company and the Common Council of the City of Detroit, the orders of the State Railroad Crossing Board, and of the Commissioner of Railroads and the general plan adopted by said company, all of which are set forth or were mentioned in, and were filed and served with the petition in this case.

The respondents demanded a jury to determine the questions of necessity and compensation.

A jury was impaneled and sworn, who reported to the Court that they were unable to agree on a verdict.

A second jury was then impaneled, and they reported the verdict and award confirmed by this order.

The following is a description of the real estate and property in which the respondents are interested, and in front of which the said elevated railroad is to be constructed and operated, viz:

All those certain pieces or parcels of land situated on the north side of River street, in the City of Detroit, in said county, known as the Backus Planing Mill and Box Factory. Said property is situated on the Lognon Farm, so called, and the River street frontage of said property is 238.06 feet, and it is bounded on the east by a strip of land, the property of the Michigan Central Railroad Company, and on the west by a lot, the property of Barbara Steadley.

It is further ordered that within sixty days from the date of this order, the Fort Street Union Depot Company is required to deposit under the supervision of the clerk of this Court, in the Detroit National Bank, and to the credit of this cause, the sum of ninety-six thousand one hundred and forty-five dollars, and also the costs and expenses of the respondents, including an attorney fee of twenty-five dollars, as they may have been taxed, provided that if said costs and expenses have not been taxed within said sixty days, that the same be so deposited within five days after they are taxed.

Said moneys shall remain on deposit in said bank, but at the risk of petitioner, subject to be drawn therefrom, and to be paid to the parties entitled to the same, on orders signed by one of the judges of this Court and countersigned by the clerk.

It is further ordered that upon the deposit of the said sum of ninety-six thousand one hundred and forty-five dollars, and of the said costs, expenses and counsel fees, as aforesaid, the said The Fort Street Union Depot Company shall be entitled to enter upon and take possession of and use the right of way above described for the purpose of its incorporation, under its articles of association and the constitution and laws of this State, and that said respondents shall be divested and barred of all right, estate and interest in such right of way, until such right or title shall be again legally vested in them, and said right of way shall be deemed to have been acquired by said company for public use.

GEORGE GARTNER,
Circuit Judge.

APPEAL TO SUPREME COURT.

December 5th, 1891, the petitioner gave notice of an appeal to the Supreme Court of the State from this order of confirmation, notice of the appeal being given as required by the statute.

I. How. Stat., p. 893, §3468.

AMENDED ORDER OF CONFIRMATION.

At a session of the Circuit Court for the County of Wayne, held at the Court House, in the City Hall, in the City of Detroit, on the 23d day of January, 1892.

Present: Hon. Geo. Gartner, Circuit Judge.

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN,
WILLIAM H. DAVISON,
Respondents.

In obedience to the writ of mandamus granted by the Supreme Court of this State in the above entitled condemnation suit, but not otherwise, and against the deliberate judgment of this Court, it is ordered, that notwithstanding the objections made to the confirmation of the verdict and award of the jury in this case as set forth in the motion made by the petitioner to vacate and set aside said verdict and award, and notwithstanding the further objections and the affidavits in support thereof this day read and filed, the said verdict and award is hereby in and by virtue of the legal operation and effect of said writ of mandamus, in all things confirmed.

The petition in this case was filed by the Fort Street Union Depot Company, against the above named respondents, to condemn to the public use the right of way for the construction and operation of an elevated railroad in, upon and along River street, in the city of Detroit, in said county of Wayne, in front of the property hereinafter described, in which the respondents are interested as owners, or otherwise, in accordance with the ordinance agreed upon between the Fort Street Union Depot Company and the Common Council of the City of Detroit, the orders of the State Railroad Crossing Board, and of the Commissioner of Railroads, the plan approved by the Commissioner of Railroads and the general plan adopted by said

company, all of which are set forth or were mentioned in, and were filed and served with the petition in this case.

The respondents demanded a jury to determine the questions of necessity and compensation.

A jury was impaneled and sworn, who reported to the Court that they were unable to agree on a verdict.

A second jury was then impaneled, and they reported the verdict and award confirmed by this order.

The following is a description of the real estate and property in which the respondents are interested, and in front of which the said elevated railroad is to be constructed and operated, viz.:

All those certain pieces or parcels of land situated on the north side of River street, in the city of Detroit, in said county, known as the Backus Planing Mill and Box Factory. Said property is situated on the Lognon farm, so called, and the River street frontage of said property is 238.06 feet, and it is bounded on the east by a strip of land, the property of the Michigan Central Railroad Company, and on the west by a lot, the property of Barbara Steadley.

It is further ordered that within sixty days from the date of this order, the Fort Street Union Depot Company is required to tender and pay to Absalom Backus, Jr., the sum of seventeen thousand eight hundred and fifty dollars, and to "A. Backus, Jr., & Sons" the sum of seventy-eight thousand two hundred and ninety-three dollars, and to James N. Dean and William H. Davison, executors, the sum of one dollar, together with their costs and expenses if the same have been taxed, including an attorney fee of twenty-five dollars, and if the said parties, or either of them, refuse to accept the tender and payment of said sums the Fort Street Union Depot Company is required to deposit the same under the supervision of the Clerk of this Court in the Detroit National Bank, and to the credit of this cause, including said costs and expenses; provided,

that if said costs and expenses have not been taxed within said sixty days, the same to be so deposited within five days after they are taxed.

Said moneys shall remain on deposit in said bank, but at the risk of petitioner, subject to be drawn therefrom, and to be paid to the parties entitled to the same, on orders signed by one of the judges of this Court and countersigned by the Clerk.

It is further ordered that upon the tender and payment or deposit of the said sum of ninety-six thousand one hundred and forty-four dollars, and of the said costs, expenses and counsel fees, as aforesaid, the said The Fort Street Union Depot Company shall be entitled to enter upon and take possession of and use the right of way above described for the purpose of its incorporation, under its articles of association and the constitution and laws of this State, and that said respondents shall be divested and barred of all right, estate and interest in such right of way, until such right or title shall be again legally vested in them, and said right of way shall be deemed to have been acquired by said company for public use.

GEORGE GARTNER,
Circuit Judge.

TENDER AND PAYMENT.

Very soon after the entry of the foregoing amended order of confirmation, the petitioner tendered to the respondents the amounts so awarded to them. The tenders were accepted by the respondents, and the money was paid to and received by them.

The respondents never caused their costs and expenses to be taxed, and for that reason they were not tendered or paid to them.

TAKING POSSESSION.

Immediately after the foregoing tender and payment the petitioner took possession of the right of way described in the condemnation proceedings, and constructed a viaduct or elevated railroad thereon, and has from thence hitherto used the same for the purposes for which the petitioner was incorporated.

PROCEEDI[illegible]GS ON APPEAL.

The petitioner prosecu[illegible]d its appeal to the State Supreme Court. The case was argued March 3d and 4th, 1892, and was decided June 10th, 1892.

Union Depot Co. vs. Backus, 92 Mich., 33.

ORDER OF SUPREME COURT.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court room in the Capitol, in the City of Lansing, on the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable Allan B. Morse, Chief Justice.
John W. McGrath,
Charles D. Long,
Claudius B. Grant,
Robert M. Montgomery,
Associate Justices.

THE FORT STREET UNION DEPOT COMPANY,
Petitioner and Appellant,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN, and
WILLIAM H. DAVISON,
Respondents and Appellees.

This cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and having been argued by counsel, and due deliberation having been had thereon, it is now ordered and adjudged that the verdict and award of the jury in this cause, in so far as the same fixes and determines the compensation and damages, that the petitioner ought justly to pay to the respondents, be and the same is hereby vacated and set aside, and that the said verdict and award, so far as the same determines the question of public necessity, be and the same is hereby affirmed.

It is further ordered and adjudged that there be a new appraisal of the compensation and damages that ought justly to be paid to the respondents, be had before a new jury to be impaneled and sworn according to the act under which the proceedings in this cause were instituted, and for the purposes of said new appraisal this cause, and the record therein, are hereby remanded to the Circuit Court for the County of Wayne with directions to proceed with said new appraisal, the costs of this appeal to abide the event of said appraisal as provided by said act."

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN,
WILLIAM H. DAVISON,
Respondents.

To Dickinson, Thurber & Stevenson, Attorneys for Respondents:

Gents—Take notice that on Monday, the 10th day of April, 1893, at the opening of Court or as soon thereafter as counsel can be heard, the petitioner will move the Court before the Honorable George Gartner, Circuit Judge, for an order to strike, summon, swear and impanel a jury for the trial of the question of damages in this cause in pursuance of the order and directions of the Supreme Court therein.

Detroit, April 5th, 1893.

F. A. BAKER,
Attorney for Petitioner.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

Edward A. Stricker, being duly sworn, deposes and says, that on this 5th day of April, 1893, he served a notice, of which the annexed is a copy, upon Dickinson, Thurber & Stevenson, and that such service was made at the office of said firm by handing the same to James H. Cullen, a clerk in said office, all members of said firm being absent therefrom.

EDWARD A. STRICKER.

Subscribed and sworn to before me, a Notary Public, this 5th day of April, 1893.

WALTER BARLOW,
Notary Public, Wayne County, Mich.

At a session of the Circuit Court for the County of Wayne, held at the Circuit Court rooms in the City of Detroit, on the 10th day of April, A. D. 1893.

Present: Hon. Henry N. Brevoort, Hon. George Gartner, Hon. George S. Hosmer, Hon. Cornelius J. Reilly.

FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., et al.

Before Judge Brevoort.

In this cause it is ordered that it be and it hereby is continued as to the impaneling of a jury until Friday, April 14th, 1893, without prejudice and without the defendant waiving any of his jurisdictional rights.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

In the matter of the application of the FORT STREET UNION DEPOT COMPANY, a corporation, petitioner against ABSALOM BACKUS, JR., "A. BACKUS, JR., & SONS," JAMES N. DEAN and WILLIAM H. DAVISON.

Absalom Backus, Jr., who is a citizen of the State of Michigan, and a person residing in the City of Detroit, County of Wayne and State of Michigan, and A. Backus, Jr., & Sons, which is a corporation created and existing under the laws of the State of Michigan, having its principal office and carrying on its business in the said City of Detroit, and which is a person residing within the said city, on receipt of a notice of motion in this Court that a jury be struck, summoned, sworn and impaneled before the Honorable George Gartner, Circuit Judge, for the retrial of the question of damages in this cause, in pursuance of the order and directions of the Supreme Court therein, appearing for the purpose of this pleading, objec-

tion and protest only, in their own proper persons come and say:

That this Court, or the said judge, should not make said order or take any further cognizance or jurisdiction of this matter for the following reasons:

1. That the order and direction of the Court heretofore, and the order and direction of the Supreme Court, affirming the order and direction of this Court in that behalf, and all the proceedings in that behalf, providing and directing a retrial of the question of damages in this cause, and the proposed order to strike, summon, swear and impanel a jury for said re-trial, and any order of the Court, directing a re-trial have constituted, and do and will constitute, a denial by the State of Michigan to the said Absalom Backus, Jr., and the said A. Backus, Jr., & Sons, persons within its jurisdiction, of the equal protection of the laws, contrary to the intent and meaning of article fourteen of the Constitution of the United States, in this:

(1.) By the Constitution of the State of Michigan and the laws adopted under and in accordance therewith, as uniformly construed by the courts of said State, except in single case where the said Absalom Backus, Jr., and the said A. Backus, Jr., & Sons were parties whose property was sought to be condemned by the said petitioner, under the petition in this matter, the question of the amount of damages to be awarded for the taking of property for public use is one for a jury (when demanded as it was demanded in this case) as an independent and non-judicial body or referee of its own kind without interference or constraint by a court or by any judge with or of the sound discretion of the jury in fixing it.

And in and by said constitution and said laws, as uniformly construed and applied by the courts of the said State, except in the single case of these two persons, a

judge or a court is not permitted to set up a judgment as to said damages by way of binding instruction to said jury and against their judgment in their said sound discretion or by coercing such constitutional body to adopt the judgment or discretion of said court or judge by granting new trials until an award may be reached which may be in accordance with the judgment of said court or judge.

And the said Absalom Backus, Jr., and A. Backus, Jr., & Sons aver, on information and belief, that the courts of the State and Supreme Court of the State of Michigan have applied these principles repeatedly in adjudicated cases, without exception, in protection of all other persons than themselves within its jurisdiction, and have never denied the application of the said principles of the constitution and the said laws of the State or to any person or persons except to them.

They aver that the said Circuit Judge has asserted the right to pass upon the question of the amount of damages to be awarded these respondents, and to set up his judgment against that of the said constitutional body or tribunal, and has sought to maintain his judgment by awarding a new trial in this case; and in this proceeding he is sustained by the Supreme Court of the State, which is a court of last resort in the State of Michigan; and said Supreme Court also, contrary to the uniform course of its decisions, of which there are many in the official reports of the adjudicated cases, affecting other persons within the jurisdiction of the said State, has, as to these respondents in this proceeding, affirmed its right to set up its judgment as to the proper amount of damages to be awarded, against the sound discretion of said jury, and to coerce a conclusion as to the amount in accordance with its

(2.) And in this, that under the said constitution and judgment, by ordering a new trial in this matter against these respondents.

laws of the State of Michigan, and the adjudications of the courts of the said State, the uniform rule in condemnation proceedings, where business is sought to be condemned for public use, has been that damages for interruption of business and to the business stand, and for the diminution of business facilities, should be awarded as part of just compensation in addition to mere injury to the realty; but in this case, and to these persons, the said Circuit Judge and the Supreme Court have denied the protection of that constitutional rule and law, as repeatedly construed by the said courts, and have limited and do limit in this proceeding the damages to mere injury to the realty and to the buildings thereon.

(3.) And in this also, that under the said constitution and laws of the State of Michigan, as uniformly and, as these respondents aver, repeatedly adjudicated by the courts of said State, no court or tribunal has jurisdiction to prosecute a proceeding as for condemnation under the power of eminent domain, when possession has been actually taken of the property sought to be condemned by the person or body upon whom the prerogative to condemn, under the power of eminent domain, has been conferred.

And these respondents aver that the said petitioner has been in full possession of all the said property since the confirmation of the award in this case by the said Circuit Court, and has thereon constructed its railroads, trestles and bridges, and has been carrying on regularly the railroad business of four great railroad companies, besides its own; and that the order for a new trial in these conditions is a denial of the right of these respondents to this protection under said laws from the oppression of litigation, and their undisturbed holding of the amount they have received by the award of the jury, accorded under said laws by the said courts to all other persons than themselves.

2. That the proceeding sought to be taken in form for a new trial is a proceeding under the authority of the State, through the courts, to deprive the said Absalom Backus, Jr., and A. Backus, Jr., & Sons of their property without due process of law, in violation of Section One, of Article Fourteen of Amendments to the Constitution of the United States.

(1.) Because, on the confirmation of the award and proceedings by the Circuit Judge, the total amount of the award was paid to these respondents by the petitioner, and the petitioner entered into full and complete possession of the respondents' property, sought to be taken by the proceedings; whereby the title to said property passed to said petitioner, and the title to said money passed to these respondents.

(2.) And because this proceeding for a new trial is prosecuted not to reach said property the title to which has passed and which is fully possessed by the petitioner, but to reach, under the constraint of the courts, a portion of the award in money the title to which has passed to these respondents.

(3.) And because the use of the said property contemplated by the petitioner, as shown by its said petition, is not a public use, and is not one as in which the public can make, compel, or have any part, interest, or benefit whatsoever, and its business and purposes are for the private ends and gains of the petitioner, in the prosecution of an enterprise charged with no duty to or service to the public by law; and a proceeding for condemnation for private use is not due process of law.

And these respondents here refer to and read, as a part of this their plea, objection and protest against this proceeding, the record and proceedings in this matter from the filing of the petition, including the proceedings of the jury as signed by them in the two former trials, and the

subsequent record and proceedings in this matter in the said Circuit Court and in the Supreme Court of the State of Michigan.

Respectfully submitting the premises, these respondents, Absalom Backus, Jr., and A. Backus, Jr., & Sons, protest against the summoning and impaneling of a jury in this matter and against any further trial or proceedings herein.

A. BACKUS, JR., & SONS,
By H. N. Backus, Vice-President and Acting President.

A. BACKUS, Jr.,
By H. N. Backus.

STATE OF MICHIGAN, }
COUNTY OF WAYNE, } ss.

Henry N. Backus, being duly sworn upon his oath saith: That he is vice-president and acting president of A. Backus, Jr., & Sons, a corporation created and existing under the laws of the State of Michigan, and signed the foregoing statement by direction of the directors and all the stockholders of the said company; that he knows the contents thereof, and that the statements of fact contained therein are true as far as stated of the own knowledge of the respondents therein named, and that the statements therein contained on information and belief, or advice and belief, are true to the best of his knowledge, advice, information and belief.

He further saith that he is authorized and directed by Absalom Backus, Jr., by special direction, in his absence to append his signature to the foregoing statement.

HENRY N. BACKUS.

Subscribed and sworn to before me this 15th day of April, A. D. 1893.

JAMES H. CULLEN,
Notary Public, Wayne County, Mich.

(Indorsed Plea and Protest to Jurisdiction. Filed April 17, 1893. John Marshall, deputy clerk.)

At a session of the Circuit Court for the County of Wayne, held at the Circuit Court rooms in the City of Detroit, on the seventeenth day of April, A. D. 1893.

Present: Hon. Cornelius J. Reilly, Henry N. Brevoort, George S. Hosmer, George Gartner.

FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., et al.

Before Judge Gartner.

The respondents in this cause appearing specially for that purpose, object to the jurisdiction of the Court to proceed to select a jury for a re-trial of said cause, and file a plea and protest to the jurisdiction of the Court, and thereupon the Court, after hearing the arguments of counsel, overruled the same.

At a session of the Circuit Court for the County of Wayne, held at the Circuit Court rooms in the City of Detroit, on the fifth day of July, A. D. 1893.

Present: Hon. George Gartner, George S. Hosmer, C. J. Reilly, Robert E. Frazer, Henry N. Brevoort.

UNION DEPOT COMPANY
vs.
A. BACKUS, JR., COMPANY, et al.

Before Judge Gartner.

Ordered that the trial of this cause be and the same hereby is set for August fifteenth, A. D. 1893.

At a session of the Circuit Court for the County of Wayne, held at the Circuit Court room in the City of Detroit on the 15th day of August, 1893.

Present: Hon. George Gartner, George S. Hosmer, Henry N. Brevoort, Cornelius J. Reilly, Robert E. Frazer.

FORT STREET UNION DEPOT COMPANY
vs.
ABSALOM BACKUS, JR., et al.

Before Judge Gartner:

In this cause ordered that the Sheriff for the County of Wayne make and return to this Court a list of twenty-four (24) freeholders from which to strike a jury in this cause, and that said Sheriff summon said jurors to appear in Room 1 of the Circuit Court for Wayne County on September the 1st, at 2 p. m., city time.

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne:

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

COUNTY OF WAYNE—ss.

Benjamin F. Briscoe, being duly sworn, deposes and says: That he is one of the deputy sheriffs of the County of Wayne, and that he has been directed by the Court to make a list in writing of twenty-four inhabitants and freeholders of said County of Wayne, who are qualified to serve as jurors in courts of record in this State, from

which to strike a jury in the above entitled cause. Deponent further says and makes oath that he will select such persons according to his best judgment and without favor or partiality to either party.

BENJ. F. BRISCOE.

Subscribed and sworn to before me in open court on this 15th day of August, A. D. 1893.

GEO. GARTNER,
Circuit Judge.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

SHERIFF'S RETURN OF LIST OF JURORS.

COUNTY OF WAYNE—ss.

I, Benjamin F. Briscoe, deputy sheriff of the County of Wayne, do hereby certify and return, that in obedience to an order granted by the Court on the 15th day of August, 1893, in the matter of the petition to acquire certain lands for public use of The Fort Street Union Depot Company, petitioner, against Absalom Backus, Jr., and others, respondents, I have selected, according to my judgment and without favor or partiality to either party, the following list, in writing, of twenty-four freeholders

and inhabitants of the said County of Wayne, qualified to serve as jurors in the courts of record in this State, and from which list a jury may be impaneled, according to law, in the case of the said The Fort Street Union Depot Company, petitioner, against the respondents named in the title to this return, and who are persons having estates, or are otherwise interested in one of the lots, tracts or parcels of land sought to be acquired by said petitioner.

LIST OF JURORS.

Names.	Residences.
1. Samuel Marks	Cor. Field & Milwaukee avs.
2. Fred Guenther	Commonwealth ave.
3. Herbert Snow	Dearborn.
4. Thomas A. Dingwall	1087 Boulevard West.
5. Henry H. Eby	Wyandotte.
6. Wm. C. Hausherr	216 Pitcher st.
7. Wm. A. Eldridge	241 Bagg st.
8. F. F. Summers	143 Lincoln ave.
9. Chester E. Wright	Belleville.
10. Berthold Mueller	300 Toledo ave.
11. Joseph B. Moore	116 Alfred st.
12. John C. Jacob	268 Rivard st.
13. Wm. Wreford	345 Larned st. east.
14. John W. Leonard	671 Fourth ave.
15. Peter Flannigan	871 Humboldt ave.
16. Ferdinand Kuhn	14 Michigan ave.
17. Mason E. Safford	208 Jefferson ave.
18. Edward Kanter	Madison ave.
19. James B. Lauder	87 Elizabeth st. east.
20. F. Wm. Lichtenberg	205 Fort st. east.
21. Marvin H. Chamberlain	17 Peterboro st.
22. John McLean	1560 Woodward ave.
23. John McDonald, Jr.	407 Myrtle st.
24. Hiram Bunnell	27 Michigan ave.

Given under my hand on this the first day of September, 1893, at Detroit, in said County of Wayne.

BENJAMIN F. BRISCOE,
Deputy Sheriff.

(Endorsed No. 29249—Sheriff's Return of Jury List.)

SAMUEL STEWART,
Dtputy Clerk.

Filed September 5th, 1893.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

STATE OF MICHIGAN, }
COUNTY OF WAYNE, } ss.

To the Sheriff of Wayne County—Greeting:

In the name of the People of the State of Michigan, you are hereby commanded that you summon:

1. Herbert Snow, Dearborn;
2. Henry H. Eby, Wyandotte;
3. Thomas A. Dingwall, 1087 Boulevard West;
4. William C. Hausherr, 216 Pitcher;
5. William A. Eldridge, 241 Bagg;
6. F. F. Summers, 143 Lincoln;
7. Chester E. Wright, Belleville;
8. Joseph B. Moore, 116 Alfred;
9. John W. Leonard, 671 Fourth;
10. Peter Flannigan, 871 Humboldt ave.;
11. Mason S. Safford, 206 Jefferson ave.;
12. Edward Kanter, 25 Madison ave.;

To be and appear in the Circuit Court for the County of Wayne at the Circuit Court room in the City of Detroit on Monday, the 11th day of September, A. D. 1893, at 2 o'clock in the afternoon of said day, to serve as jurors for the trial of the case of The Fort Street Union Depot Company against Absalom Backus, Jr., and others, and of this writ make due return.

Witness the Hon. George Gartner, presiding judge.

In witness whereof I have hereunto set my hand and affixed the seal of said Court on this the fifth day of September, A. D. 1893.

(Seal.)

WILLIAM MAY,
Clerk of the Circuit Court for the
County of Wayne, State of Michigan.
By JAMES A. ROBINSON,
Deputy Clerk.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

I hereby certify and return to the clerk of the Circuit Court for the County of Wayne that I have served the within veniri, or writ of summons, upon the persons within specified.

Dated at Detroit this 11th day of September, 1893.

Fees, $15.00.

CHARLES P. COLLINS,
Sheriff.
By BENJ. F. BRISCOE,
Deputy Sheriff.

Received and filed on the 11th day of September, A. D. 1893.

WM. E. FENWICK,
Deputy Clerk.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

COUNTY OF WAYNE—ss.

We, the undersigned inhabitants and freeholders of said County of Wayne, being duly impaneled to serve as a jury in this cause to determine the damages or compensation which ought justly to be paid by said petitioner, The Fort Street Union Depot Company, to the respondents as the owners of and persons interested in the particular description of real estate mentioned and described in said petition, do hereby take and subscribe on oath that they will justly and impartially ascertain and determine the damages or compensation which ought justly to be made by said company to said respondents according to the constitution and laws of this State.

MASON S. SAFFORD,
WM. C. HAUSHERR,
RICHARD ROWLAND,
EVERETT N. CLARK,
VINCENT ZIMMEL,
HENRY H. EBY,
JOHN W. LEONARD,
JAMES M. YOUNG,
HENRY E. BAKER,
F. F. SOMMER,
CHESTER E. WRIGHT,
JOHN E. CALNON.

Taken and subscribed before me in open Court on this, the 11th day of September, 1893.

GEORGE GARTNER,
Circuit Judge.

At a session of the Circuit Court for the County of Wayne, held at the Circuit Court rooms in the City of Detroit, on the 11th day of September, A. D. 1893.

Present, Hon. George Gartner, Hon. George S. Hosmer, Hon. C. J. Reilly, Hon. Robert E. Frazer, Hon. Henry N. Brevoort.

THE FORT STREET UNION DEPOT COMPANY,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON.

Before Judge Gartner.

In this cause, the sheriff for the County of Wayne on this day having made return to the venire issued that he had served said venire on the persons named therein, and all of the persons named therein except William A. Eldridge having appeared and the following: Herbert Snow, Thomas A. Dingwell, Joseph B. Moore, Peter Flannigan, after showing due cause therefor, and having been with the other jurors sworn on their voir dire, were excused from serving in said cause; and the Court having ordered the sheriff to summon talesmen, and thereupon such proceedings were had that on the 11th day of September, 1893, the following named persons, freeholders, qualified to sit as jurors in courts of record in this State, to wit: Henry E. Baker, Henry H. Eby, Wm. C. Hausherr, Frank F. Sommers, Chester E. Wright, John W. Leonard, Mason

E. Safford, John E. Calnon, Richard Rowland, Vincent Zimmel, James M. Young and Everett M. Clark, were duly impaneled, tried and sworn as a jury to determine the public necessity for taking and using for public use the real estate, property rights and assessments and privileges described in the petition in said cause and which the above named respondents are interested as owners or otherwise, and if they shall deem the same necessary to be taken, to justly and impartially determine the damages or compensation which ought justly to be made by the said petitioners to said respondents as owners or as interested in said real estate, property, interests, rights, assessments and privileges mentioned in said petition, said jurors having subscribed said oath and the same having been filed, they retired and elected Henry E. Baker, one of their number, as their foreman, and the sheriff appointed the sheriff of the County of Wayne as the proper person to attend and take charge of said jury while engaged in said proceedings.

PROCEEDINGS WHEN JURY WERE IMPANELED.

The record shows that the following proceedings took place when the jury were impaneled:

Before Judge Gartner.

September 5th, 1893.

Mr. Dickinson: On behalf of the respondents in this case I desire to renew my solemn protest against a re-trial and against a further harassment of these respondents in this matter for the reasons stated in the papers filed at the last hearing, when the order was entered to proceed with the drawing and striking of a jury. I desire that this protest be entered now and at every stage of the proceedings. I desire the report to further note that the Court is present at this time.

A jury was then struck in the regular way by Mr. F. A. Baker, on behalf of the petitioner, and Mr. Don M. Dickinson, on behalf of the respondents, and an adjournment taken to Monday, September 11th, 1893, at 2 p. m.

September 11, 1893, 2 p. m.

The Court: You may call the jury, Mr. Sheriff.

Mr. Dickinson: Before the jury is called, if your honor please, I desire to ask whether your honor, Judge Gartner, of the Circuit Court, proposes to sit in this case.

The Court: I have not yet considered that matter.

Mr. Dickinson: So far as the presence of the Court is required.

Mr. Baker: If the Court please, in regard to that matter, we argued that question somewhat fully before the Supreme Court in the second hearing in this case, and I became satisfied that the Supreme Court from the decision that they had made in the case, and from what took place on the argument in that case, are of the opinion that it is perfectly competent for the Circuit Judge to try these cases precisely the same as in an ordinary civil action at common law, and your honor will remember that the statute expressly provides for it.

Mr. Dickinson: I do not think you quite understand my motion, Mr. Baker. I was not going into that question of whether it is competent for the Court to sit, whatever judge we have. I asked His Honor whether it is his purpose to sit in this matter—leaving that question open as to the competency to sit permanently or a time.

The Court: The matter is before me now, Mr. Dickinson.

Mr. Dickinson: We had no means of knowing until this time, because we are now just entering upon the examination of the jurors and the question arises. We had no opportunity of knowing whether your honor would sit here until this moment.

The Court: I have had charge of the matter since its

inception. I suppose I shall have to continue in charge of it.

Mr. Dickinson: Very well. Now, upon that matter I desire to ask, under instructions of my clients—the specific instructions in writing of my clients—to have some other judge sit, on the ground that your honor is prejudiced against them and on account of the influence which your honor would be under, consciously or unconsciously, for the petitioner. This motion we would like to support by affidavit at any time your honor will hear it.

Mr. Baker: Of course no such motion can be entered, if the Court please. No such motion has ever been made in my experience in the State of Michigan—such a thing as challenging the Court.

Mr. Dickinson: I will cite your honor a precedent in the 89 Kentucky, in a precisely similar case, as it happens, of the building of a viaduct, and it is always competent—wherever it is believed, I think, in any case at common law—wherever either party believes that he is entitled to a change of venue, for instance, or believes that the court before whom he is to be heard is prejudiced—it is always competent and he has a right to make a motion for a change of judge.

Mr. Baker: No such practice has ever prevailed in this State or any other jurisdiction, unless there is some statute that provides for it. In Kentucky they have some statute which authorizes either party to call for a trial by a member of the bar, but there is no such jurisdiction here. There is no such thing as change of venue because of the prejudice of the Court, and it is an insult to the Court to allege any such thing.

Mr. Dickinson: I do not think your honor will so understand it as an insult to the Court. It is perfectly competent for the party to make the objection and to support it.

Mr. Baker: I frequently find fault with the judges, but I never come into court to do it.

The Court: I think, Mr. Dickinson, that having had charge of this matter from the beginning, I will take charge of it at this time.

Mr. Dickinson: And your honor will not listen to affidavits showing the prejudice or in support of the objection I have made?

The Court: I have not said that. Of course, I do not know what the affidavits are.

Mr. Dickinson: Well, we desire time to make that showing. We did not know before this time that your honor would sit.

The Court: You might impanel the jury; they will have to view the premises.

Mr. Dickinson: Your honor exercises the judicial function at once on the impaneling of the jury. It must be made now if at any time. I suppose your honor has the power to go on without listening to the motion, if your honor sees fit.

The Court: I am here willing to listen to any motion counsel desires to make.

Mr. Dickinson: This motion I desire to make and sustain it by affidavit.

The Court: I will hear it at this time.

Mr. Dickinson: We have not been prepared.

Mr. Baker: A man who comes in with such a motion as that ought to be prepared.

Mr. Dickinson: Yes, he ought to be, if he knew who the Court was to be.

Mr. Baker: You ought to know who the Court was to be.

The Court: I think you may go on and impanel the jury; the matter will be adjourned for a few days anyway.

Mr. Dickinson: And your honor will listen to the motion later?

The Court: Yes.

Mr. Dickinson: If your honor has the 89 Kentucky, your honor will see that it is an entirely proper motion.

The Court: I am not at all thin-skinned, Mr. Dickinson.

Mr. Dickinson: I desire, may it please the Court, at this stage of the case also to interpose the objection to a re-trial of the case, which I have heretofore stated in writing on the files of the Court, and to protest against this re-trial for those reasons and against the jurisdiction of the Court.

The Court: You may proceed with calling the jury, Mr. Sheriff.

The jury was then called and selected in the regular way, and duly sworn.

The Court: Gentlemen of the Jury—This is a case which will probably take some time to try, and all that is necessary for me to say at this time is that in view of the fact that it is a very important case, you are to be very careful not to hold any conversation about it, either among yourselves, or to permit any conversation with any outsider with reference to the matter. You must keep your mind entirely clear and free from any influence. You want to listen to the testimony and the arguments of counsel as they are made in Court, and after you retire to the jury room then, and only then, to talk the matter over and consider the testimony offered in the case, together with the arguments of counsel, in arriving at a conclusion of such questions as may have been presented to you.

Adjourned until September 13, 1893.

The trial before the jury, the Hon. George Gartner, Circuit Judge, presiding, went on from September 13, 1893, to November 6, 1893, when the jury agreed upon and reported to the Court a written award signed by all of the twelve jurors. The original award was misplaced in the files of the Court, and was not to be found when return

was made to the State Supreme Court, but its contents were shown by affidavits duly filed, so that no question arises thereon.

AWARD OF JURY.

The damages or compensation awarded to
Absalom Backus, Jr.....$15,000
To A. Backus, Jr., & Sons..... 48,000

TESTIMONY.

The jury returned with their award a stenographic report of the testimony and arguments of counsel, and the rulings of the Circuit Judge, and his charge and instructions to the jury. This report covers nearly 1,300 printed pages, but as no question arises thereon, on this motion, it is not here printed.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

Gents:

You will please take notice that on Monday, the 4th day of December, 1893, at the opening of Court on that

day, or as soon thereafter as counsel can be heard, the petitioner will move the Court, before the Honorable George Gartner, Circuit Judge, to enter the following judgments in favor of petitioner in this cause under the statute:

1. A judgment against Absalom Backus, Jr., for $2,850.00, with interest, from the 23d day of January, 1892.

2. A judgment against A. Backus, Jr., & Sons for $30,293.00, with interest from the 23d day of of January, 1892.

3. A judgment against Absalom Backus, Jr., and A. Backus Jr., & Sons, for the costs of the second trial of this cause, including all costs of the appeal, according to the statute in such case made and provided.

Said motion will be [illegible] records in this case in the Supreme Court and in this Court.

Detroit, November 21st, 1893.

F. A. BAKER,
Attorney for Petitioner.

To Dickinson, Thurber & Stevenson, Attorneys for Respondents.

(Endorsed: No. 29,249. Motion to Enter Judgment.)

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

OBJECTION AND PLEA TO ENTRY OF JUDGMENT.

Without waiving the objections heretofore made in this cause, in the course of the proceedings, to the jurisdiction of the Court, and of the tribunal before which the last hearing was had, but expressly reserving all such objections and all protests against said jurisdiction and said proceedings heretofore made, and renewing them, Absalom Backus, Jr., and A. Backus, Jr., & Sons, on receiving notice of the motion made by the above named petitioner for judgment against the said Absalom Backus, Jr., for $2,850.00, with interest, and for a judgment against A. Backus, Jr., & Sons for $30,293.00, with interest, and for a judgment against both Absalom Backus, Jr., and A. Backus, Jr. & Sons, "for the cost of the second trial of this cause, including all costs of the appeal," file the following objections and plea:

1. That the Court has no jurisdiction or authority to enter said judgment, or any of them, and that the provisions in said statute referred to in the said motion for the said judgments, and in accordance with which said motion is alleged to be made, are unconstitutional and void.

2. That it appears by the record that before any proceedings were taken for the said alleged second trial of this matter, the said petitioner had entered fully and absolutely into the possession and ownership of the property described in the petition, and thereby sought to be condemned, and has paid the respondents for the same without condition, and has been for a long period of time, to wit, a year or more, operating lines of railroad upon said property so sought to be condemned, and possessed and owned by it, upon which it had constructed its permanent railroad trestle work and other equipments of this railroad, all as described in said petition; and that therefore, under the Constitution and laws of the State there was no jurisdiction or authority to proceed with said condemnation proceedings in and by the said second trial.

3. That as the consideration of the question of necessity for the alleged improvements set forth in the petition was expressly excluded from the consideration of the jury by the Court, the proceeding of ordering a new jury and a second trial before them upon the single question of damages, was void and of no effect.

4. That after the objection and protest of the respondents at the said second trial, the Circuit Judge, Hon. George Gartner, did before the said jury sit from the beginning of the trial of the cause to its close, in all respects as in a trial at common law, and did hold before the said jury that his function in that regard was not advisory, but that the said Judge had the power to rule upon and admit or exclude testimony, and to direct and instruct the jury; and did state to the jury in that connection that he would not only instruct them, but that he would see that his instructions were carried out, thereby restraining the jury and restricting their judgment and discretion, in direct violence of the Constitution of the State, and of the construction of the said Constitution by the Courts of

last resort of the State, and in every other case involving the premises, except in these proceedings, thereby denying the respondents, Absalom Backus, Jr., and A. Backus, Jr., & Sons, persons within its jurisdiction, by the State of Michigan, of the equal protection of the laws of said State, in violation of the true intent and meaning of Article 14 of the Constitution of the United States.

5. That under the Constitution of the State of Michigan the property of no person shall be taken for public use without just compensation made therefor; and that when private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when made by the State, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.

That the necessity of taking the property in question has not been passed upon by a jury, as prescribed by the Constitution, except in a verdict which has been annulled and set aside by the decision of the Supreme Court.

6. That the verdict first rendered in this matter was appealed from, as a whole, by the petitioners, and wholly set aside, and on the second trial of said cause the Court erred in holding that such verdict, after having been appealed from and set aside, was still in force, so far as it found that it was necessary to take the property for public use.

7. That it is not competent, under the Constitution of this State, to rest the taking of private property for public use partly upon one verdict, and partly upon another; but under the Constitution, a single jury, or commissioners when allowed by law, must find the necessity for taking such property, as well as the damages to be allowed to the owner for taking the same.

8. That the Circuit Judge erred in charging the jury that in fixing the just compensation to be allowed to the respondents, the jury should consider only the property described in the petition; whereas the plant consisted in addition of a lumber yard and storehouse that were used together with said property, and all the evidence tended to show injury to the entire business carried on by the concern, and to all of the property on which it was conducted.

9. That the Court erred, in the charge to the jury, in all that was said by the Court in instructing them to discharge anything of a speculative nature, in connection with the requests for instruction made by the counsel for the respondents, and the colloquy between the Court and said counsel regarding those requests immediately succeeding them.

10. That the Court erred in refusing to consider the requests of counsel for respondents that the jury should consider something apart from the money value of the property itself, and the point that respondents were entitled to be compensated apart from the money value of the property itself, so as to lose nothing from the interruption of their business and the damage occasioned by the change.

11. The Court erred in its refusal to follow the decision read to the Court upon question of damage, delivered by Mr. Justice Campbell, in the case of Grand Rapids R. R. vs. Weiden, 70 Mich., 393.

12. That the counsel for the petitioners argued to the jury that the compensation allowed by the first jury had been held by the Supreme Court of this State to be excessive, thereby improperly influencing the judgment of the jury upon said second trial, by the alleged opinion of the Judges of the Supreme Court on the question of damages.

13. That the jury impaneled in this cause was improperly influenced in their decision as to the just compensation to be allowed said respondents, by a statement of one of said jurors that he had examined the assessment rolls and found that the property in question had been assessed at twenty-seven or twenty-eight thousand dollars ($28,000.00); whereas no such evidence had been introduced in said cause, and no such evidence was properly before said jury. That the statement made as to said assessment rolls was not only improper, but absolutely misleading. The assessments of said property showing that before said elevated railway had been built, said property was assessed at about double what it was assessed after the building of said elevated railway; as will appear by an affidavit hereto attached.

14. That said jury, in considering their verdict, were improperly influenced by a statement made by some of their number, that the witness Jones, who had testified to the entire fire risk on account of the building of said elevated railway, had served as a juror on the first trial of this cause; whereas in truth and in fact the said Jones had not so served, and was entitled to the credit to be given to a fair and impartial witness.

15. That the jury in this cause acted improperly and illegally in not examining the premises in question together, and that the jurors Baker and Safford acted improperly and illegally in separating themselves from the rest of said jury, and making a separate examination of said property.

16. That the jurors in said cause were improperly influenced in said cause by the statement of one of their number, Mr. Sommers, that the reason why the retail trade of the respondents had fallen off was that they so treated their customers that no one ever dealt with them but once; all of which instances of misbehavior and illegal

action on the part of said jury will appear by the affidavits hereto attached.

17. Because the verdict is against the evidence, and because on the whole record it conclusively appears that the jury was unduly influenced and constrained to reduce the verdict of the first jury, and to discharge all the evidence in the cause tending to show the amount of damages.

18. Further objecting to the granting of the motion in this matter, the respondents renew the objections to the proceedings for a second trial from their inception which were embraced in the protests and objections of these respondents filed in this cause before the empaneling of the jury, a true copy of which is hereto annexed, marked Exhibit "A."

DICKINSON, THURBER & STEVENSON,
Attorneys for Absalom Backus, Jr.,
and A. Backus, Jr., & Sons.

JOHN ATKINSON,
Of counsel.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

In the Matter of
THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

STATE OF MICHIGAN, }
COUNTY OF WAYNE, } ss.

DANIEL R. GRISWOLD, of said County, being duly sworn, says that the verdict recently given in this cause is grossly inadequate, unjust and oppressive.

This affiant further states that since the giving of said verdict he has talked with Messrs. Zimmer, Young, Eby and Hauser, who were members of said jury; that he is informed by said jurors that during the discussion in the jury room after said cause was submitted, a member of said jury, whom some of the above named jurors say was Mr. Sommers, stated to his fellow jurors that he had examined the assessment rolls in the City Hall, and that the property in question was assessed at something like twenty-seven or eight thousand dollars, and that, therefore, it was of little value compared with value put upon it by the witnesses; that during the discussion in said jury room, one of the jurors, whom some of the above named jurors also say was Mr. Sommers, stated that the reason of the falling off of the retail trade of respondents was because they so dealt with their customers that no one ever bought from them but once.

This deponent further says that he learned from said jurors that some of the jurors on said panel insisted that the testimony of Mr. Jones, who was sworn on said trial, should be entirely disregarded, on the ground that he had been one of the previous jurors in this case.

This deponent further says that after his Honor Judge Gartner had directed the jury to go in a body to examine the property in question, two of the jurors, Messrs. Baker and Safford, separated themselves from the rest and drove to the premises in question by themselves and made their examination separate and apart from the other jurors.

This deponent further states that said Baker and Safford, as this deponent has learned from the other jurors in said cause, voted throughout for a very low compensation.

That deponent was informed by said jurors that the juror Sommers, during the time the jurors were in the jury room and were considering, separated himself from the others and voted for a very low compensation, to wit, fifteen thousand dollars, absolutely refusing to reason with his fellow jurors or to give any other reason for the vote which he cast except as above stated.

DANIEL R. GRISWOLD.

Subscribed and sworn to before me this 13th day of December, A. D. 1893.

JENNIE ATKINSON,
Notary Public, Wayne County, Michigan.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

STATE OF MICHIGAN, }
COUNTY OF WAYNE, } ss.

JAMES A. JONES, being duly sworn, says that he was a witness called for the respondents at the last trial of the above matter. He further saith that he never sat as a juror in any cause in which the above named petitioner was a party, and that he never sat as a juror in any cause where the above named defendants, or any or either of them were parties, except once, and that was in 1882, in a cause where the Detroit Western Transit & Junction Railroad was the other party to the cause.

JAMES A. JONES.

Subscribed and sworn to before me this 16th day of December, 1893.

JAMES H. CULLEN,
Notary Public, Wayne County, Michigan.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

In the matter of
THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN,
WILLIAM H. DAVISON,
Respondents.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

HENRY N. BACKUS, of said County, being duly sworn, says that he is one of the above named respondents; that the verdict recently given in this cause is greatly inadequate, unjust and oppressive.

This affiant further states that since the giving of said verdict he has talked with Messrs. Zimmer, Young, Eby and Hauser, who were members of said jury; that he is informed by said jurors that during the discussion in the jury room after said cause was submitted, a member of said jury, whom some of the above named jurors say was Mr. Sommers, stated to his fellow jurors that he had been over and examined the assessment rolls in the City Hall, and that the property in question was assessed at something like twenty-seven or twenty-eight thousand dollars, and that, therefore, it was of little value compared with value put upon it by the witnesses; that since hearing the said statement of said jurors, affiant has examined the said assessment rolls and finds that since the building and operation of the petitioner's railroad, the assessment of the said real estate has been spread upon the said roll at less

than half what it was before said railroad was built, and that he has been further informed by said jurors that during the discussion in said jury room, one of the jurors, whom some of the above named jurors also say was Mr. Sommers, stated that the reason of the falling off of the retail trade of respondents was because they so dealt with their customers that no one ever bought from them but once.

This deponent further says that he learned from said jurors that some of the jurors on said panel insisted that the testimony of Mr. Jones, who was sworn on said trial, should be entirely disregarded, on the ground that he had been one of the previous jurors in the case.

This deponent further says that after his Honor Judge Gartner had directed the jury to go in a body to examine the property in question, two of the jurors, Messrs. Baker and Safford, separated themselves from the rest and drove to the premises in question by themselves and made this examination separate and apart from the other jurors.

This deponent further states that said Baker and Safford, as this deponent has learned from the other jurors in said cause, voted throughout for a very low compensation.

That deponent was informed by said jurors that the juror Sommers, during the time the jurors were in the jury room and were considering, separated himself from the others and voted for a very low compensation, to wit, fifteen thousand dollars, absolutely refusing to reason with his fellow jurors or give any other reason for the vote which he cast except as above stated.

HENRY N. BACKUS.

Subscribed and sworn to before me this 16th day of December, A. D. 1893.

JAMES H. CULLEN,
Notary Public, Wayne County, Michigan.

And then follows, as Exhibit "A," the plea and protest of Absalom Backus, Jr., and A. Backus, Jr., & Sons, as set forth on pages 36 to 42 of this record.

(Endorsed: Objections to judgment. Filed Dec. 28th, '93. Victor T. Lemke, Deputy Clerk.)

JUDGMENT.

At a session of the Circuit Court for the County of Wayne, held at the Court Rooms, in the City of Detroit, on the 28th day of December, 1893.

Present, Hon. George Gartner, Circuit Judge.

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

It appearing that heretofore, to wit, on the 16th day of July, 1891, a jury impaneled in this cause to determine the questions of public necessity and compensation, rendered, reported and filed in this Court a verdict in favor of the public necessity, and awarding compensation or damages to the respondents as follows:

To Absalom Backus, Jr., as the owner of the fee of the property described in the petition in this cause, the sum of seventeen thousand eight hundred and fifty dollars.

To A. Backus, Jr., & Sons, a corporation, as the tenants in the possession of the said parcel of land, the sum of seventy-eight thousand two hundred and ninety-three dollars.

To James N. Dean and William H. Davison, executors of the estate of Crozier Davison, deceased, the sum of one dollar.

And it further appearing that the petitioner, The Fort Street Union Depot Company, appealed from the said award of damages or compensation to the Supreme Court of this State, and that said Court, under the statute in that behalf, directed that a new appraisal be had before a new jury, and remanded the case to this Court for that purpose.

And it further appearing that heretofore, to wit, on the 11th day of September, 1893, a jury was duly impaneled and sworn to make a new appraisal in this cause according to law, and that on the 6th day of November, 1893, said jury assessed the damages or compensation of said Absalom Backus, Jr., at the sum of fifteen thousand dollars, and the damages or compensation of said A. Backus, Jr., & Sons, at the sum of forty-eight thousand dollars.

And the said petitioner having made a motion that judgment be rendered against said respondents respectively for the amounts said awards were reduced by said second appraisal.

And said respondents having filed certain affidavits and objections in opposition to said motion.

And the questions so presented having been duly argued by Fred A. Baker, attorney for the petitioner, and by John Atkinson and Don M. Dickinson, counsel for respondents, and the Court having duly considered and deliberated thereon, it is ordered and adjudged that all of the objections to said motion, including the matters set forth in said affidavits, are overruled as not sufficient to defeat the entry of said judgments under the statute in such cases made and provided, and on motion of F. A. Baker, attorney for petitioner, it is ordered and adjudged and considered that said petitioner, the Fort Street Union

Depot Company, do recover of the respondent Absalom Backus, Jr., the sum of two thousand eight hundred and fifty dollars, and that petitioner have execution thereof.

And on motion it is further ordered, adjudged and considered that the petitioner The Fort Street Union Depot Company do recover of the corporation respondent, A. Backus, Jr., & Sons, the sum of thirty thousand two hundred and ninety-three dollars, and that petitioner have execution thereof.

And on like motion it is further ordered, adjudged and considered that the petitioner The Fort Street Union Depot Company do recover of the respondents, Absalom Backus, Jr., and A. Backus, Jr., & Sons, the costs of the petitioner on its said appeal, including the costs of said second appraisal as a part thereof, the said costs to be taxed according to law and the rules and practice of this Court, and that the petitioner have execution thereof.

GEO. GARTNER,
Circuit Judge.

(Endorsed: No. 29249. Judgments. Filed December 28th, 1893. Victor T. Lemke, Dep. Clerk.)

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

PETITIONER'S TAXED BILL OF COSTS UNDER SECOND APPRAISAL.

Return to appeal						$ 5.00
Copy of record for printer, 3,076 folios at 10c						307.60
Printing record, 1,542 pages at 80c						1,233.60
Printing brief, 65 pages at 80c						52.00
Clerk's fee, Supreme Court						6.00
Fees for 12 jurymen for 50 days each, at $2.50						1,500.00
Transcript of testimony and proceedings reduced to writing, 4,795 folios at 20c						959.00
Witnesses—						
Frances Adams,	1 day		1 mile			1.10
Jas. F. Joy,	1 "		1 "			1.10
Robert Zug,	1 "		1 "			1.10
Lewis H. Phister,	1 "		1 "			1.10
E. F. Chapman,	1 "		1 "			1.10
P. C. Miller,	2 "	221	"			24.10
John Frim,	1 "		1 "			1.10
C. M. Heald,	1 "		1 "			1.10
G. F. Sherwood,	2 "	80	"			9.00
Henry Spitzley,	2 "		1 "			2.10
A. F. Kramer,	2 "		1 "			2.10
Edwin Saunders,	1 "	100	"			11.00

Geo. H. House,	1	"100	"	11.00
Chas. H. Ellis,	1	" 1	"	1.10
Geo. M. Brown,	1	"100	"	11.00
Thos. J. Hadsell,	1	"100	"	11.00

$4.168.20

STATE OF MICHIGAN, }
COUNTY OF WAYNE } ss.

FRED A. BAKER, being duly sworn, says that the foregoing items of costs charged as disbursements have actually been paid, or the liabilities therefor incurred, and were necessary and are reasonable in amount; that the witnesses above named were in good faith made to attend, and were deemed material and necessary, and they respectively traveled the number of miles and actually attended the number of days specified, and that the copies and exemplifications charged for were actually and necessarily used, or necessarily and in good faith obtained for use.

FRED A. BAKER,

Sworn to and subscribed before me this 29th day of December, A. D. 1893.

EDWARD A. STRICKER,
Notary Public, Wayne County, Michigan.

To Dickinson, Thurber & Stevenson, Attorneys for Respondents:

Take Notice: The foregoing is a true and correct copy of petitioner's bill of costs in this cause, and of the affidavit of disbursements required by rule. Application will be made to the Clerk of said Court, at his office, on the 2nd day of January, A. D. 1893, at 10 o'clock a. m., to tax the same.

Dated at Detroit, December 29, A. D. 1893.

Yours, etc.,
FRED A. BAKER,
Attorney for Petitioner.

TAXED BILL OF COSTS FOR PLAINTIFF.

I do hereby tax the costs of plaintiff at the sum of four thousand one hundred and sixty-eight dollars and twenty cents.

WM. MAY,
Clerk.

Dated February 12th, 1894.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
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A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

And now come the said respondents, by Don M. Dickinson, their counsel, and move the Court to vacate and set aside the order of William May, Esq., Clerk of said Court, taxing the costs of the petitioner in the above entitled cause at the sum of $4,168.20, for the following reasons:

(1) That the taxation of the entire bill of costs is invalid on the general ground that all of the proceedings had in the above cause were invalid and without jurisdiction, and particularly that the alleged judgment is invalid, and that the Court or Judge had no jurisdiction to enter the said judgment.

(2) That the Court below has no statutory authority to tax the said bill of costs.

DON M. DICKINSON,
Attorney for Respondents.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

COUNTY OF WAYNE—ss.:

DON M. DICKINSON, the attorney for the respondents in this cause, being duly sworn, deposes and says that the bill of costs hereto annexed was served on this deponent, or on some person in deponent's office, on the 29th day of December, A. D. 1893, and that on the 2nd day of January, 1894, he attended before William May, Clerk of the said Court, pursuant to the notice endorsed on the said bill of costs as served, for the purpose of opposing the taxation thereof.

And deponent further says that he then and there opposed the said taxation, and objected to the following items in the said bill, i. e.:

Copy of record for printer, 3,076 folios at 10c....	$ 307.60
Printing record, 1,542 pages, at 80c.....	1,233.60
Printing brief, 65 pages, at 80c.....	52.00
Fees of 12 jurymen in Court below, 50 days each at $2.50.....	1,500.00
Transcript of testimony and proceedings below reduced to writing, 4,795 folios at 20c.....	959.00

on the ground that in the Court below there is no statutory authority to tax such items.

And this deponent further says that he objected to the

taxation of the entire bill of costs on the general ground that all the proceedings below in the above cause were invalid and without jurisdiction, and particularly that the alleged judgment is invalid and that the Court or Judge had no authority or jurisdiction to enter said judgment.

And further deponent saith not.

DON M. DICKINSON.

Subscribed and sworn to before me this 24th day of February, A. D. 1894.

SAMUEL S. HARRIS,
Notary Public, Wayne County, Michigan.

Here follows Petitioner's Bill of Costs and taxation therefor, as set forth on pp. 1362-1364 of this record.

(Endorsed: No. 29,249. Notice of Motion. Motion. Affidavit of Don M. Dickinson, and Bill of Costs. Filed Feby. 7, 1894. Jas. A. Robison, Deputy Clerk.)

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

PRAECIPE FOR WRIT OF EXECUTION.

To the Clerk:

You will please issue writs of fieri facias on the judgment against respondents Absalom Backus, Jr., and A. Backus, Jr., & Sons, as follows:

1. Against Absalom Backus, Jr., for $2,850.00.
2. Against A. Backus, Jr., & Sons for $30,293.00.
3. Against Absalom Backus, Jr., and A. Backus, Jr., & Sons for $4,168.20.

Direct said writs to the Sheriff of the County of Wayne and make them returnable the first Tuesday of June next.

Detroit, March 26, 1894.

FRED A. BAKER,
Attorney for Petitioner.

(Endorsed: No. 29,249. Filed March 26, '94. Charles C. Kellogg, Deputy Clerk.)

WRIT OF EXECUTION.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

The Circuit Court for the County of Wayne:

To the Sheriff of the County of Wayne, Greeting:

In the Name of the People of the State of Michigan. You are Commanded, That of the goods and chattels of Absalom Backus, Jr., respondent, and for want thereof, then of his lands and tenements in your bailiwick, you cause to be made the sum of two thousand eight hundred and fifty dollars, which the Fort Street Union Depot Company, petitioner, on the 28th day of December, 1893, in the Circuit Court for the County of Wayne aforesaid, at the Court Room of said Court, in the City of Detroit, recovered against him on a reduction of the award of compensation or damages in a certain condemnation suit or proceeding pending in said Court whereof the said respondent stands convicted, as appears of record; and have you that money before the judges of the said Circuit Court aforesaid, at the Court Room of said Court, in the City of Detroit, on Tuesday, the fifth day of June, 1894, then and there to render to the said petitioner, and have you then and there this writ.

Witness, the Honorable Robert E. Frazer, Presiding

Judge of the Circuit Court for the County of Wayne, at the Court Room of said Court, in the City of Detroit, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-four.

WM. MAY,
Clerk.

(Seal.) By CHAS. C. KELLOGG,
Deputy Clerk.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

Circuit Court for the County of Wayne.

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

I do hereby certify that by virtue of the annexed Writ of Execution, issued out of and under the seal of the Circuit Court for the County of Wayne, in the above entitled cause, to me directed and delivered, I have on this ninth day of May, A. D. 1894, levied upon all the following goods, chattels and personal property of Absalom Backus, Jr., that is to say:

Five hundred feet of pine and hardwood lumber now situated in the warehouse of A. Backus, Jr., & Sons, on the north side of Fort street west, at street numbers 420 to 438, in the City of Detroit, in said County.

CHARLES P. COLLINS,
Sheriff.

Dated Detroit, May 9th, A. D. 1894.

By PETER J. CANTO,
Deputy Sheriff.

(Endorsed: No. 29,249. Writ of Fi. Fa. Date of Judgment, Dec. 28, '93. Amount of Judgment, $2,850.00.)

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

I, Henry M. Reynolds, Clerk of Wayne County, and Clerk of the Circuit Court for the County of Wayne, do hereby certify that the above and foregoing is a true and correct copy of the Fi. Fa. issued out of said Court in said cause, together with the Sheriff's certificate of levy attached to said Fi. Fa. That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court and County, at Detroit, this 22nd day of August, A. D. 1894.

(Seal.) HENRY M. REYNOLDS,
Clerk.

By CHAS. C. KELLOGG,
Deputy Clerk.

WRIT OF EXECUTION.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

The Circuit Court for the County of Wayne:

To the Sheriff of the County of Wayne, Greeting:

In the Name of the People of the State of Michigan. You are Commanded, That of the goods and chattels of Absalom Backus, Jr., and of A. Backus, Jr., & Sons, a corporation, respondents, and for want thereof, then of their lands and tenements in your bailiwick, you cause to be made the sum of four thousand one hundred and sixty-eight dollars and twenty cents, which the Fort Street Union Depot Company, petitioner, on the 28th day of December, 1893, in the Circuit Court for the County of Wayne aforesaid, at the Court Room of said Court, in the City of

Detroit, recovered against them for its costs and charges by it about a certain condemnation suit in that behalf expended, whereof the said respondents stand convicted, as appears of record; and have you that money before the judges of the said Circuit Court aforesaid, at the Court Room of said Court, in the City of Detroit, on Tuesday, the fifth day of June, 1894, then and there to render to the said petitioner, for its costs aforesaid; and have you then and there this writ.

Witness, the Honorable Robert E. Frazer, Presiding Judge of the Circuit Court for the County of Wayne, at the Court Room of said Court, in the City of Detroit, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-four.

WM. MAY,
Clerk.

(Seal.) By CHAS. C. KELLOGG,
Deputy Clerk.

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,

vs.

ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

I do hereby certify that by virtue of the annexed Writ of Execution, issued out of and under the seal of the Circuit Court for the County of Wayne, in the above entitled cause, to me directed, I have on this 9th day of May, A. D. 1894, levied upon all the following goods and chattels and personal property of A. Backus, Jr., & Sons, that is to say:

1 Heavy steam engine with automatic cut-off.
4 Steam boilers complete.
2 Steam pumps and connections.
1 Large exhaust injector.
1 Large fan and coil.
3 Large blowers and shavings connections.
1 Knife-grinding machine.
1 Upright copper tube heater.
1 Upright heater and filter.
1 Horizontal condensing and settling boiler.
1 Extra heavy drive pulley.
1 Large steam drum.
5 Woods & Backus 30″x8″ 8-roll machines.
1 Woods & Backus 24″x8″ 8-roll machine.
1 Woods & Backus 24″ matching machine.
2 Woods & Backus 14″ flooring machines.
1 S. A. Woods heavy moulding machine.
3 Extension frame gang rip-sawing machines.
3 Power spin-feed rip-sawing machines.
1 Heavy band resawing machine.
1 Automatic saw-filing machine.
1 Four-sided Huntington moulding machine.
1 Heavy Jostin & Backus resawing machine.
1 Heavy Cornell & Dengler & Backus resawing machine.
1 Graham & Backus resawing machine.
1 Huntington & Backus resawing machine.
10 Backus improved matching machines.
8 Backus bumping and gluing machines.
30 Backus improved sawing machines.
5 Backus improved swing-sawing machines.
120 Backus heavy factory trucks.
3 Panel or pony planing machines.
2 Traveling-bed rip-sawing machines.
12 Extra resaws, Backus teeth.

200 M. feet of pine lumber now in planing mill.

150 M. feet of pine lumber now in shed adjoining planing mill.

100 M. feet of pine and hardwood lumber now in dry kilns.

All of said property being situated in and on the planing mill and box factory property of A. Backus, Jr., & Sons, between Fort street west and River street, and between the Michigan Central Railroad and the lots and property of Barbara Steadley and Margaret Specht.

Detroit, May 9th, 1894.

CHARLES P. COLLINS,
Sheriff.

By PETER J. CANTO,
Deputy Sheriff.

(Endorsed: No. 29,249. Writ of Fi. Fa. Date of judgment, Dec. 28, '93. Amount of judgment, $4,168.20.)

STATE OF MICHIGAN, }
COUNTY OF WAYNE, } ss.

I, Henry M. Reynolds, Clerk of Wayne County, and Clerk of the Circuit Court for the County of Wayne, do hereby certify that the above and foregoing is a true and correct copy of the Fi. Fa. issued out of said Court in said cause, together with the Sheriff's certificate of levy attached to said Fi. Fa. That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court and County, at Detroit, this 22nd day of August, A. D. 1894.

(Seal.)

HENRY M. REYNOLDS,
Clerk.

By CHAS. C. KELLOGG,
Deputy Clerk.

WRIT OF EXECUTION.

STATE OF MICHIGAN, }
COUNTY OF WAYNE, } ss.

The Circuit Court for the County of Wayne:
To the Sheriff of the County of Wayne, Greeting:

In the Name of the People of the State of Michigan. You are Commanded, That of the goods and chattels of A. Backus, Jr., & Sons, a corporation, respondents, and for want thereof, then of its lands and tenements in your bailiwick, you cause to be made the sum of thirty thousand two hundred and ninety-three dollars, which the Fort Street Union Depot Company, petitioner, on the 28th day of December, 1893, in the Circuit Court for the County of Wayne aforesaid, at the Court Room of said Court, in the City of Detroit, recovered against it on a reduction of the award of compensation or damages in a certain condemnation suit or proceeding pending in said Court, whereof the said respondent stands convicted, as appears of record; and have you that money before the judges of the said Circuit Court aforesaid, at the Court Room of said Court, in the City of Detroit, on Tuesday, the fifth day of June, 1894, then and there to render to the said petitioner, and have you then and there this writ.

Witness, the Honorable Robert E. Frazer, Presiding Judge of the Circuit Court of the County of Wayne, at the Court Room of said Court, in the City of Detroit, on the 26th day of March, in the year of our Lord one thousand eight hundred and ninety-four.

WM. MAY,
Clerk.

(Seal.)

By CHAS. C. KELLOGG,
Deputy Clerk.

STATE OF MICHIGAN, }
COUNTY OF WAYNE, } ss.

THE FORT STREET UNION DEPOT COMPANY,
Petitioner,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

I do hereby certify that by virtue of the annexed Writ of Execution issued out of and under the seal of the Circuit Court for the County of Wayne in the above entitled cause, to me directed and delivered, I have, on this 9th day of May, A. D. 1894, levied upon all the following goods, chattels and personal property of A. Backus, Jr., & Sons, that is to say:

1 Heavy steam engine with automatic cut-off.
4 Steam boilers complete.
2 Steam pumps and connections.
1 Large exhaust injector.
1 Large fan and coil.
3 Large blowers and shavings connections.
1 Knife grinding machine.
1 Upright copper tube heater.
1 Upright heater and filter.
1 Horizontal condensing and settling boiler.
1 Extra heavy drive pulley.
1 Large steam drum.
1 Woods & Backus 24″x8″ 8-roll machine.
1 Woods & Backus 24″ matching machine.
5 Woods & Backus 30″x8″ 8-roll machines.

2 Woods & Backus 14" flooring machine.
1 S. A. Woods heavy moulding machine.
3 Extension-frame gang rip-sawing machines.
3 Power spin-feed rip-sawing machines.
1 Heavy band resawing machine.
1 Automatic saw-filing machine.
1 Four-sided Huntington moulding machine.
1 Heavy Jostin & Backus resawing machine.
1 Heavy Cornell & Dangler & Backus resawing machine.
1 Graham & Backus resawing machine.
1 Huntington & Backus resawing machine.
10 Backus improved matching machines.
8 Backus bumping and gluing machines.
30 Backus improved sawing machines.
5 Backus improved swing-sawing machines.
120 Backus heavy factory trucks.
3 Panel or pony planing machines.
2 Traveling-bed rip-sawing machines.
12 Extra resaws, Backus teeth.
200 M. feet of pine lumber now in planing mill.
150 M. feet of pine lumber now in shed adjoining planing mill.
100 M. feet of pine and hardwood lumber now in dry kilns.

All of said property being situated in and on the planing mill and box factory property of A. Backus, Jr., & Sons, between Fort street west and River street, and between the Michigan Central Railroad and the lots and property of Barbara Steadly and Margaret Specht.

Detroit, May 9th, 1894.

CHARLES P. COLLINS,
Sheriff.

By PETER J. CANTO,
Deputy Sheriff.

(Endorsed: No. 29,249. Writ of Fi. Fa. Date of judgment, Dec. 28, '93. Amount of judgment, $30,293.00.)

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE. }

I, Henry M. Reynolds, Clerk of Wayne County, and Clerk of the Circuit Court for the County of Wayne, do hereby certify that the above and foregoing is a true and correct copy of the Fi. Fa. issued out of said Court in said cause, together with the Sheriff's certificate of levy attached to said Fi. Fa. That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court and County, at Detroit, this 22nd day of August, A. D. 1894.

(Seal.) HENRY M. REYNOLDS,
Clerk.

By CHAS. C. KELLOGG,
Deputy Clerk.

PETITION FOR CERTIORARI.

To the Supreme Court of the State of Michigan:

The petition of Absalom Backus, Jr., who is a citizen of the State of Michigan, and a person residing in the City of Detroit, in said State, and of A. Backus, Jr., & Sons, which is a corporation created and existing under the laws of the State of Michigan, having its principal office and carrying on its business in said city, respectfully shows:

That on the 24th day of January, 1891, the Fort Street Union Depot Company, a corporation created and existing under the laws of the State of Michigan, filed its petition in the Circuit Court for the County of Wayne, under and in form and in accordance with Chapter 93 of Howell's Annotated Statutes, entitled "Union Railroad Station and

Depot Companies," as amended; and therein and thereby initiated proceedings under such chapter against your said petitioners to build and operate a viaduct or elevated railroad, and a viaduct for teams, on River street, in said City of Detroit, in front of and contiguous to the property known as the Backus planing mill, having a frontage on River street of 238 6-100 feet, and extending back to Fort street, the said property being owned in fee by your petitioner, Absalom Backus, Jr., and leased for the purpose of a planing mill by your petitioners, A. Backus, Jr., & Sons; that such proceedings were had upon said petition under said chapter, that on the 25th day of February, 1891, a jury of twelve (12) freeholders, under the direction of Honorable George Gartner, Circuit Judge, were impaneled and sworn to ascertain the public necessity for taking said real estate, property, franchise and easements for the purpose of the said petitioner, and the public use and benefit thereof, and to appraise and determine the damages or compensation to be allowed to your petitioners therefor.

That on the 2nd day of March, 1891, the trial of said issue commenced and continued from day to day until March the 18th, 1891, when the jury reported that they were unable to agree either on the question of necessity or on the amount of compensation.

That afterwards, on June 4, 1891, a second jury was impaneled and sworn, under the direction of said Judge, in accordance with the prayer of said petition of the said The Fort Street Union Depot Company, and the said jury proceeded to hear proofs and testimony thereupon from day to day until the 16th day of July, 1891, when the said jury rendered a verdict and finding that the taking of said property was for the public use and benefit and was a public necessity, and assessing the damages of your petitioners as follows:

Absalom Backus, Jr., seventeen thousand eight hundred

and fifty dollars ($17,850); and A. Backus, Jr., & Sons, seventy-eight thousand two hundred and ninety-three dollars ($78,293).,

That on August 15th, 1891, the said The Fort Street Union Depot Company filed a motion for a new trial in the said Circuit Court, which was duly heard and argued by counsel, and having been considered by the Court, the Honorable George Gartner, Circuit Judge, an order was assumed to be entered by the said Circuit Judge, setting aside the award and ordering a new trial.

That afterwards the Supreme Court, in the case reported in 89 Mich., at page 210, granted a mandamus compelling the said Circuit Judge to vacate and set aside the said order for a new trial and confirm the award, which the Circuit Judge subsequently did on or about the 5th day of December, 1891; and thereupon the said The Fort Street Union Depot Company took an appeal in the premises to this the Supreme Court.

That afterwards, to wit, on the 23rd day of January, 1892, the said The Fort Street Union Depot Company paid to these petitioners the amount in full of the award of said jury as aforesaid, unconditionally, and entered into full possession of the property, franchise, easements and rights of these petitioners, described in said petition, and have since maintained and operated their lines of railroad over the same, and have maintained the viaduct for teams over the same.

That on the 30th day of January, 1892, these petitioners moved this Court, as appears by the files and records of said Court, that the appeal should be dismissed because of the said payments of the said awards, and the taking possession of the property by the said The Fort Street Union Depot Company.

That afterwards, on the 4th day of March, 1892, the appeal of the said The Fort Street Union Depot Company came on to be heard in the case reported in 92 Mich., at

page 33, whereupon said Supreme Court set aside the award of damages, but did not set aside the verdict of the jury as to the public necessity for taking the property, and did order the question as to the amount of damages to be submitted to a new jury to be impaneled in the Circuit Court for the County of Wayne, with costs to the said petitioner The Fort Street Union Depot Company.

The decision of this Court in the case reported in 89 Mich., page 209, aforesaid, had not, in the meantime, been ordered for re-argument, and in the hearing in the case reported as aforesaid in 92 Mich., the Chief Justice of the Court, when counsel for respondents were about to argue the question as to whether the property of the Michigan Central Railway Company could be taken, and as to whether it was error below for counsel for respondents to argue that the said Michigan Central Railway Company's property could be taken, stopped that part of the argument of the said counsel, and stated that this Court did not desire to hear argument on that question because the verdict of the jury had been unfavorable to respondents on the question of necessity; but nevertheless this Court, as appears in and by its said opinion, reported in 92 Mich., did, without having offered to hear counsel for these petitioners, consider that question, and did decide it adversely to the respondents.

That afterwards before the Circuit Court for the County of Wayne (Judge Gartner) the said The Fort Street Union Depot Company did file a motion for an order to strike, summon and impanel a jury for the trial of the question of damages in the matter in pursuance of the order and direction of the Supreme Court; which came on for hearing on April 17, 1893, whereupon your petitioners did file in the Court and cause a paper writing words and figures following, to wit:

(Then follows respondents' protest and plea to jurisdiction set forth on pp. 31-36 of this record.)

In the form of a plea and protest, which was overruled by the said Circuit Court, and the impaneling of said jury proceeded with, notwithstanding your petitioners' said exceptions and protest.

That afterwards, to wit: On the 5th day of September, 1893, before the striking or impaneling of the jury, your petitioners' counsel protested in the presence of the Court against a re-trial for the reasons which he then and there stated, as hereinbefore set forth, and caused a record to be entered on the proceedings of the court of the said protest. Also that before the jury was sworn, your petitioners, through their counsel, protested against and objected to the sitting of Judge Gartner in the case; whereupon all said protests and objections were overruled, and the opening of said counsel for the said The Fort Street Union Depot Company and the testimony of witnesses proceeded with, the said Judge Gartner sitting and presiding and ruling in every respect as in a trial at common law; your petitioners objecting at every stage and protesting against the rulings of the court and against his presence, all in a respectful and decorous manner and language and without any offense to the said Judge. That the said hearing proceeded until October 11, 1893, when the counsel for the said The Fort Street Union Depot Company announced that petitioner rested its case; whereupon your petitioners re-stated the objections and protested against being called upon to go into their case for the defense, which objection and protest were again overruled, and the Court stated that he proposed to sit in the case precisely as a Judge would sit in a trial at common law, and further that "the jury will determine those questions that I will submit to them, and I will see that my ruling is carried out by the jury also;" to all of which rulings and language of the Court and each of them, your petitioners'

counsel took exceptions; and still reserving their protests and objections, your petitioners proceeded to introduce testimony as to the damages which they had suffered by reason of the taking of the property as aforesaid; and especially the injury to the profits of their business, and the destruction of the facilities for carrying on the planing mill business; and the hearing was continued from day to day, and the taking of proofs and testimony until the 6th day of November, 1893, when the Court (Judge Gartner) proceeded to charge the jury as in a trial at common law, and in his charge did erroneously instruct the jury, as petitioners allege, in the particulars hereinafter more fully set forth, to which petitioners' counsel did then and there to each of said rulings, except.

The case having been given to the jury as aforesaid by the said Judge, the said jury proceeded to return a verdict as follows:

Assessing the damages of Absalom Backus, Jr., at the sum of $15,000 and the damages of A. Backus, Jr., & Sons at $48,000; whereupon the said The Fort Street Union Depot Company did move the Court before the said Judge Gartner for (1) a judgment against Absalom Backus, Jr., for $2,850 with interest from the 23rd of January, 1892; (2) judgment against A. Backus, Jr., & Sons for $30,293 with interest from the 23rd day of January, 1892; and (3) judgment against A. Backus, Jr., and A. Backus, Jr., & Sons for the costs of the second trial of this cause including all costs of appeal upon the statute, etc.; whereupon these petitioners through their counsel appeared before said Judge and filed the following objections and plea to the entry of any judgment:

(Then follows respondents' objections and plea to the entry of any judgment as set forth on pp. 52-57 of this record.)

Your petitioners further show that all the rulings embraced in the foregoing objections and therein referred

to, were made by the said Circuit Judge, Honorable George Gartner, and exceptions were duly taken thereto by your petitioners' counsel; and that all the objections therein stated of errors in the proceedings were based upon the facts appearing in the trial and on the record as therein stated; and that the facts as to the actions of the jurors as stated in objections from XIII. to XIX. inclusive were fully supported by affidavits filed in the cause; and that the paper writing referred to as Exhibit A in objection XVIII. was the paper writing filed before the impaneling of the jury in the words and figures hereinbefore first set out.

Your petitioners further show to the Court that on the said hearing your petitioners argued to the said Court that there was no power or jurisdiction in the Court under the statute to enter up judgment on said motion, and further and specifically argued that there was no power or jurisdiction in the Court to order an execution, and that an order for execution was no part of a judgment entry.

That the said Court overruled all the said objections, including the last two, and did proceed on the 28th day of December, 1893, to enter up judgment and order execution in the words and figures following, to wit:

(Then follows the judgment set forth in pp. 63-65 of this record.)

And thereupon the said Court did proceed, against the argument and objections of your petitioners' counsel, to tax the costs of the said The Fort Street Union Depot Company at the amounts and figures set out in the paper writing marked Exhibit A, hereto annexed; and thereupon, thereafter, the Court did issue executions against the property of your petitioner Absalom Backus, Jr., for the sum of $2,850; and against your petitioners A. Backus, Jr., & Sons for the sum of $30,293, and against both of your petitioners for the sum of $4,168, costs; which said

executions were addressed to the Sheriff of the County of Wayne, who thereupon levied upon and seized the personal property and chattels of A. Backus, Jr., & Sons, as follows: All of their steam engines, boilers and machines in their planing mill and all of their lumber, manufactured and unmanufactured, in the City of Detroit in said County of Wayne, of the value of one hundred thousand dollars ($100,000) and upwards, and did levy upon and seize the property of your petitioner Absalom Backus, Jr., as follows: 500,000 feet of pine and hardwood lumber, and other personal property of the value of $10,000 and upwards; and all of the said property of your petitioners the said sheriff still holds and threatens to sell on said executions.

All of the said proceedings related in the premises appear by the files and records of the Circuit Court for the County of Wayne and of this Court, and your petitioners allege manifest errors in the said proceedings, as related in and by their specific protests, objections and exceptions as hereinbefore set forth, and they allege as errors in addition to and supplementary to those set out in the foregoing petition in and by the proceedings they have been also denied by the State of Michigan the equal protection of the laws, contrary to the true intent and meaning of section one of article fourteen of amendments to the constitution of the United States, in that in the aforesaid opinion of the Supreme Court that the judgment of the Supreme Court of this State aforesaid reported in 89 Mich., page 209, was set aside and held for naught by the said Court without an order for re-argument and without notice to the petitioners or their counsel that re-argument was desired, and without re-argument in their behalf; and in that the said Supreme Court held as error the argument of the counsel for the said petitioners before the jury that the property of the Michigan Central Railroad

Company could be taken under the power of eminent domain, without notifying the counsel for your petitioners that they desired to hear no argument as to whether the property could be taken or as to whether it was error to make the argument that it could be taken; and also that the taking of your petitioners' property under the alleged executions, has deprived your petitioners of their property without due process of law and in violation of section one article 14 of the amendments to the Constitution of the United States.

That all the proceedings in the premises were purely statutory, and that there was no statutory authority for judgment against these respondents, and no pretense of statutory authority for the issue of the said executions.

Finally, they further allege that the provision of the statute authorizing The Fort Street Union Depot Company to condemn private property for public use was unconstitutional and void.

Wherefore they pray that the writ of certiorari may issue from this Court, directed to the Circuit Court for the County of Wayne for the sending up and review of all the proceedings in the premises and for the correction of the errors aforesaid.

ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS.
By NEWTON D. BACKUS, Sec. and Treas.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

NEWTON D. BACKUS, being duly sworn, upon his oath saith: That he is secretary and treasurer of the corporation known under the name and style of A. Backus, Jr., & Sons, and has signed the foregoing petition in the name of said corporation by the express direction and authority of its board of directors, and he makes this

verification in behalf of said corporation and in behalf of A. Backus, Jr., whose signature is appended to the foregoing petition. That he knows the contents thereof, and that the statements of facts contained therein are true so far as stated of the own knowledge of petitioners therein, and that the statements therein made on information and belief or advice and belief are true to the best of his knowledge, advice, information and belief.

A. BACKUS JR., & SONS.

By NEWTON D. BACKUS, Sec. and Treas.

Subscribed and sworn to before me this 26th day of June, A. D. 1894.

G. A. WILLIAMS,
Notary Public, Wayne County, Michigan.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

THE FORT STREET UNION DEPOT COMPANY,
vs.
ABSALOM BACKUS, JR.,
A. BACKUS, JR., & SONS,
JAMES N. DEAN and
WILLIAM H. DAVISON,
Respondents.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

Benjamin S. Warren, being duly sworn, says that he is law clerk in the office of Dickinson, Thurber & Stevenson, attorneys for the above named Absalom Backus, Jr., A. Backus, Jr., & Sons, James N. Dean and William H. Davison, and has charge of the preparation of the record of certiorari removing said cause to the Supreme Court. That owing to the voluminous character of the record and the absence from the files of pleadings and papers in the case, it is impossible to prepare the record that it may be

filed on August 3d, the return day of the writ of certiorari, and that twenty days' time will be necessary to get all the papers in the case together and have the proper transcripts thereof made.

BENJAMIN S. WARREN.

Subscribed and sworn to before me this 2d day of August, A. D. 1894.

BENJAMIN F. BRISCOE,
Notary Public, Wayne County, Michigan.

At a session of the Circuit Court for the County of Wayne and State of Michigan, held at the Circuit Court rooms in the City of Detroit, on the 2d day of August, A. D. 1894.

Present: Hon George S. Hosmer, Hon. Robert E. Frazer, Hon. William L. Carpenter, Hon. J. W. Donovan, Hon. Willard M. Lillibridge.

THE FORT STREET UNION DEPOT COMPANY,
vs.
ABSALOM BACKUS, JR., et al.

Before Hon. J. W. Donovan, Circuit Judge.

In this cause it is ordered that the time for the return of the writ of certiorari and record in this cause be and the same is hereby extended from the 3d day of August, the return day of said writ, to the 23d day of August next.

(Signed) J. W. DONOVAN,
Circuit Judge.

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN.

(Seal.)

To Judges of the Circuit Court for the County of Wayne:

We, being willing, for certain causes, that it should be

certified to our Supreme Court what proceedings have been had before you, and what has been done by you in the case lately pending in said Circuit Court wherein The Fort Street Union Depot Company is petitioner, and Absalom Backus, Jr., Absalom Backus, Jr., & Sons, and James N. Dean are respondents,

Do, therefore, command you, that you distinctly and openly certify the records and proceedings in said matter, to the said Supreme Court, before the Justices thereof, that they may have them at the Supreme Court room, in the Capitol, in the City of Lansing, on the 3d day of August, A. D. 1894, that said Court may cause to be done thereupon what of right ought to be done, and have you then and there this writ.

Witness, the Honorable John W. McGrath, Chief Justice of our Supreme Court, at Lansing, this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

CHARLES C. HOPKINS,
Clerk Supreme Court.

I hereby certify, that the foregoing writ was duly allowed by Honorable John W. McGrath, Chief Justice of the Supreme Court of Michigan, on the 27th day of June, 1894.

CHARLES C. HOPKINS,
Clerk.

(Seal.)

To the Supreme Court of the State of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

August 22d, 1894.

J. W. DONOVAN,
Presiding Circuit Judge.

Endorsed: No. 14268. Writ of certiorari. Filed August 23d, 1894.

CHARLES C. HOPKINS,
Clerk Supreme Court.

STATE OF MICHIGAN—IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE:

ABSALOM BACKUS, JR., and
A. BACKUS, JR., & SONS,
Plaintiffs in Error and Respondents below,
vs.
THE FORT STREET UNION DEPOT COMPANY,
Defendant in Error and Petitioner below.

ASSIGNMENT OF ERRORS.

In Certiorari:

And now come the said respondents, and assign errors in the record and proceedings certified to this Court in this cause.

I.

In this: In overruling the pleading, objections and protests in writing filed in the matter in the Circuit Court for the County of Wayne by the respondents below against a third trial of the matter, and the jurisdiction of the Court, on April 17th, 1893, before the jury was summoned, struck, sworn or impaneled.

II.

In this: In overruling the several objections and protests of the respondents below to the jurisdiction of the Court and of that tribunal at every stage of the proceedings.

III.

In this: That in and by the Constitution of the State of Michigan, in the specific provisions of Article XV., Section 15, and Article XVIII., Section 2, of said Constitution, as uniformly construed by the courts of the State, when private property is sought to be taken for the use and benefit of the public, the necessity for using such property and the just compensation to be made therefor in such cases, must be ascertained by a jury of twelve freeholders, residing in the vicinity of the property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law, without the intervention of any judge or other person as a part of said tribunals or either of them, and without the constraint, influence or direction of any such judge or person. Whereas in these records and proceedings the discretion of the constitutional tribunal was interfered with and constrained by a judge of the Circuit Court for the County of Wayne, by setting aside the finding of the constitutional tribunal, and ordering a new trial and the power of the said Circuit Judge to do this indefinitely until the verdict and report of a jury should satisfy his judgment, was asserted and maintained by the said judge and was therein sustained by the court of last resort of this State, whereby as plaintiffs in error aver the proceedings were without jurisdiction, and they, persons within the jurisdiction of the State, were denied the equal protection of the laws

of the State, contrary to Article XIV., Section 1, of the Amendments to the Constitution of the United States.

IV.

In this: That there having been one verdict and report of a jury finding the necessity of the taking of the property and the damages to be awarded the respondents therefor, and the petitioner below having entered upon, taken possession and in all respects to the limits of the prayer of its petition, built and maintained its railroads and its culverts upon the property of the respondents sought to be condemned, and having paid to the respondents unconditionally the award of said jury, under the constitution and laws of the State of Michigan, and as uniformly construed by the courts of said State, except in this case, there was no jurisdiction in any tribunal to prosecute a proceeding for condemnation under the power of eminent domain thereafter on the part of the said petitioner and defendant in error. Whereas in this case, the power to so proceed was sustained, and plaintiffs in error aver that all such proceedings are without jurisdiction and void and as sustained by the courts of the State, deprive the plaintiffs in error and respondents below, persons within the jurisdiction of the State, of the equal protection of the laws of the State, contrary to said provision of the Constitution of the United States.

V.

In this: That as the title to the property sought to be condemned passed to the said petitioner below, and the title to the said money passed to the said respondents, the taking possession of the property by the petitioner and the proceedings are without jurisdiction, and the recovery

of any portion of said money from the respondents and the seizure of their property thereunder, would be and are depriving plaintiffs in error and respondents below of their property without due process of law, contrary to said provision of the Constitution of the United States.

VI.

In this: That in and by the said proceedings the questions of the necessity for using the property, and the just compensation to be made therefor, were not left to a jury of twelve freeholders on the demand for a jury, but were left to two juries of twelve each, the one, according to the proceedings, passing upon the question of necessity, and the other upon the question of compensation. Whereas the same jury, under the Constitution of the State, one jury of twelve freeholders, must pass upon both questions, and that in this the Constitution of the State, as uniformly construed by the courts, has been violated, and in this regard the plaintiffs in error and respondents below have been denied the equal protection of the laws of the State of Michigan.

VII.

In this: That in the condemnation proceedings where a business plant was sought to be condemned for public use, the damages sought to be recovered, by the ruling of this Court and of the Court below, were held to be confined to the injury to the realty and the buildings thereon, and just compensation for interruption of business and to the business stand, and for diminution of business facilities, was denied, contrary to the said provisions of the Constitution of the State of Michigan, and the uniform construc-

tion in such cases by the courts of the State in other cases, and contrary to the said provision of the Constitution of the United States.

VIII.

In this: That the verdict of the third jury was never filed or entered in the cause.

IX.

In this: That the court below had no jurisdiction or authority to enter judgment against Absalom Backus, Jr., for $2,850.00, and against A. Backus, Jr., & Sons for $30,293.00, and that the provisions in said statute referred to in the said motion for the said judgments and in accordance with which said motion is alleged to have been made, were unconstitutional and void.

X.

In this: That as the consderation of the question of necessity for the alleged improvements set forth in the petition was expressly excluded from the consideration of the jury by the Court, the proceedings in said third and last trial upon the single question of damages only was void and of no effect.

XI.

In this: That the Circuit Judge, Hon. George Gartner, did sit with the said jury on said third trial from the beginning of the trial of the cause to its close in all respects

as in a trial at common law, and did hold and maintain that his function in that regard was not advisory, but that the said judge had the power to rule upon and admit or exclude testimony and did rule upon and admit or exclude testimony, and to direct and instruct the jury, and did so direct and instruct the jury, and did state to the jury in that connection that he would not only instruct them, but that he would see that his instructions were carried out; in direct violation of the Constitution of the State and of the construction of the said Constitution by the courts of last resort of the State in all other cases, thereby denying to the respondents below, persons within the jurisdiction of the State of Michigan, the equal protection of the laws of said State, and in violation of the true intent and meaning of the said provision of the Constitution of the United States.

XII.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the first objection of the respondents to the entry of the said judgments, or either of them.

XIII.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the second objection of the respondents to the entry of the said judgments, or either of them.

XIV.

In this: That the Circuit Judge, Hon. George Gartner,

overruled, under exception, the third objection of the respondents to the entry of the said judgments, or either of them.

XV.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the fourth objection of the respondents to the entry of the said judgments, or either of them.

XVI.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the fifth objection of the respondents to the entry of the said judgments, or either of them.

XVII.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the sixth objection of the respondents to the entry of the said judgments, or either of them.

XVIII.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the seventh objection of the respondents to the entry of the said judgments, or either of them.

XIX.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the eighth objection of the respondents to the entry of the said judgments, or either of them.

XX.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the ninth objection of the respondents to the entry of the said judgments, or either of them.

XXI.

In this: That the Circuit Judge, Hon. George Gartner, overuled, under exception, the tenth objection of the respondents to the entry of the said judgments, or either of them.

XXII.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the eleventh objection of the respondents to the entry of the said judgments, or either of them.

XXIII.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the twelfth objection of the respondents to the entry of the said judgments, or either of them.

XXIV.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the thirteenth objection of the respondents to the entry of the said judgments, or either of them.

XXV.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the fourteenth objection of the respondents to the entry of the said judgments, or either of them.

XXVI.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the fifteenth objection of the respondents to the entry of the said judgments, or either of them.

XXVII.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the sixteenth objection of the respondents to the entry of the said judgments, or either of them.

XXVIII.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the seventeenth objection of the respondents to the entry of the said judgments, or either of them.

XXIX.

In this: That the Circuit Judge, Hon. George Gartner, overruled, under exception, the eighteenth objection of the respondents to the entry of the said judgments, or either of them.

XXX.

In this: That the said Circuit Judge ordered and directed the issue of an execution without authority of law, after objection and full argument against the order by the counsel for the respondents.

XXXI.

In this: That the property of these respondents, to wit: of the respondents A. Backus, Jr., & Sons of the value of one hundred thousand dollars ($100,000.00) and upwards, and the property of Absalom Backus, Jr., of the value of ten thousand dollars ($10,000.00) and upwards, had been seized and taken by the Sheriff of the County of Wayne under the said execution, directed as aforesaid to be issued by the said Circuit Judge, and therein and thereby they, and each of them, have been deprived of their property without due process of law, contrary to the said provision of the Constitution of the United States.

XXXII.

In this: That costs of the Court below and of this Court on appeal were awarded by the said Circuit Judge against the plaintiffs in error and respondents below, and execution issued therefor, when in and by the statute in such

case made and provided, no costs could be awarded except against the defendant in error and petitioner below as the party appealing.

XXXIII.

In this: That the act of the Legislature of the State of Michigan under which the said petition was filed by said petitioners, was unconstitutional and void, because the proceedings in the third trial were had under a decision of this Court in a case reported in the 92d Mich. Reports, commencing at page 33, without having ordered for re-argument the case reported in the 89th Mich. Reports at page 209, and without hearing any re-argument thereon, and that on the hearing of the case aforesaid reported in the said 92d Mich. Reports, the Chief Justice of the Court, when counsel for respondents were about to argue the question as to whether the property of the Michigan Central Railroad could be taken, and as to whether it was error below for counsel for respondents to argue that the said Michigan Central Railroad Company's property could be taken, stopped that part of the argument of the said counsel for the respondents, and stated that this Court did not desire to hear argument on that question because the verdict of the jury had been unfavorable to respondents on the question of necessity; but nevertheless, this Court did, without having offered to hear counsel for petitioners, decide the same adversely to the respondents; contrary to the uniform practice and rulings of this Court in all other cases than this, thereby depriving the plaintiffs in error and respondents below of the equal protection of the laws, in violation of the true intent and meaning of the said provision of the Constitution of the United States.

DICKINSON, THURBER & STEVENSON,
Attorneys for Plaintiffs in Error and Respondents below.

JUDGMENTS AFFIRMED.

The case on certiorari was argued in the Supreme Court of Michigan at the October term, 1894, and on January 8th, 1895, the judgments in favor of The Fort Street Union Depot Co. and against Absalom Backus, Jr., and A. Backus, Jr., & Sons, were duly affirmed by that Court.

Backus vs. Fort Street Union Depot Co., 61 N. W. Rep., p. 787.

UNITED STATES OF AMERICA—ss:

To The Fort Street Union Depot Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Supreme Court of the State of Michigan, wherein A. Backus, Jr., & Sons and Absalom Backus, Jr., are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this 15th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

(Signed) JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA.
SUPREME COURT OF THE UNITED STATES.

A. BACKUS, JR., & SONS, and ABSALOM BACKUS, JR., Plaintiffs in Error, vs. THE FORT STREET UNION DEPOT COMPANY, Defendant in Error.	Error to Supreme Court of Michigan.

To the Clerk of the Supreme Court of the United States:

Sir—You will please enter my appearance as the attorney and counsel of the defendant in error in the above entitled cause.

Detroit, April 8, 1895.

FRED. A. BAKER,
Attorney for Defendant in Error.

UNITED STATES OF AMERICA.
SUPREME COURT OF THE UNITED STATES.

A. BACKUS, JR., & SONS, and ABSALOM BACKUS, JR., Plaintiffs in Error, vs. THE FORT STREET UNION DEPOT COMPANY, Defendant in Error.	Error to Supreme Court of Michigan.

To the Clerk of the Supreme Court of the United States:

Sir—You will please enter my appearance as the attorney and counsel of the defendant in error in the above entitled cause.

Detroit, April 8, 1895.

FRED. A. BAKER,
Attorney for Defendant in Error.

Brief of Dickinson for

Filed Nov. 25, 18

Supreme Court of the United States

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS, Plaintiffs in Error, vs. THE FORT STREET UNION DEPOT COMPANY, Defendant in Error.	Error to Supreme Court of Michigan.

Brief for Plaintiffs in Error Contesting the Motion to Dismiss Writ of Error for Want of Jurisdiction.

DON M. DICKINSON,
Counsel for Plaintiffs in Error.

DETROIT:
John F. Eby & Co., Printers.
1885.

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Supreme Court of the United States.

ABSALOM BACKUS, JR., and
A. BACKUS, JR., & SONS,
Plaintiffs in Error,

vs.

THE FORT STREET UNION DEPOT
COMPANY,
Defendant in Error.

Error to Supreme Court of Michigan.

Brief for Plaintiffs in Error Contesting the Motion to Dismiss Writ of Error for Want of Jurisdiction.

We insist at the outset that a clear understanding of the federal questions presented in the record cannot be had upon a consideration of the meager portion of the exceptionally large original record printed on this motion, and we are unwilling to proceed with the argument, even of the questions of jurisdiction, without the printing of the record to the extent of what would be required by the rules and practice of this court for a hearing on the merits.

Owing to the grave character of the questions involved, as well as to the importance of the interests at stake, and to the distinctions between many of the federal questions submitted on

this record, from any ever before passed on by this court, up to the last case submitted to it at the October term of 1894, and decided, we are extremely desirous of being heard orally, even upon the questions of jurisdiction raised on this motion.

We proceed, however, to submit our views upon the motion record as printed, but it will in the discussion appear how defective that record is on some of the most important questions presented. We shall present our views with exceptional fullness on the motion, because of the efforts often made to invoke this jurisdiction, for various reasons, on untenable or extremely doubtful grounds.

On the motion record itself, enough appears to sustain the jurisdiction of this court, and our right to be heard on the merits. We will show from it that the title, right, privilege or immunity under the constitution of laws of the United States, set up by us, was specially set up in the highest court of the State of Michigan in which a decision could be had, and that the decision of that court was against the title, right, privilege or immunity so set up or claimed; and that wherever the questions are such that they should also have been raised in the *lower* courts of the State, they were so raised.

It will appear that the title, right, privilege or immunity

was specially set up or claimed at the proper time and in the proper way.

Miller vs. Texas, 153 U. S., 535.
Morrison vs. Watson, 154 U. S., pp. 111-115, and cases cited.

That the rights on which we rely were called to the attention of the State court in a proper way, and that the decision of the court was against the rights claimed.

Hoyt vs. Sheldon, 1 Blatchf., p. 518.
Maxwell vs. Newbald, 18 How., pp. 511-515.

That it appears by the record, by clear and necessary intendment, that the federal questions were directly involved, so that the State court could not have given judgment without deciding them; that definite issues as to the possession of the rights were distinctly deducible from the record, and were necessarily disposed of adversely by the decision of the State court.

Powell vs. Brunswick County, 150 U. S., p. 403.

That in this case, the federal questions were fairly presented in the record, and their decision necessary to the determination of the case; and that although the decision of the State court avoids all reference to them, yet that court rejected our claims for federal protection, and hence the decision was as much against our rights within the meaning of Section 709 of the Revised Statutes of the United States, as if the claims had been specifically referred to in the opinion and the rights directly refused.

Chapman vs. Goodnow, 123 U. S., 540.

And to the same effect:

Chicago Ins. Co. vs. Needles, 113 U. S., 574.
Murdock vs. Memphis, 20 Wall., 636.
Minneapolis vs. Bachelder, 1 Id., 109.
Brown vs. Colorado, 106 U. S., 95.

In Arrowsmith vs. Harmoning, 118 U. S., 194, no mention was made of the federal question in the opinion by the State court. The same is true of the opinion of the State court in this case, *although there was presented in the lower State court, and in the Supreme Court of the State, no other questions whatever, as will be seen hereafter, save these two:*

(1) That the proceedings were void from their inception, because in and by them the plaintiffs in error were denied the equal protection of the laws by the State of Michigan, in violation of Section 1, of Article XIV of the Constitution of the United States; and (2) that in and by the said proceedings, including the seizure of their property, the plaintiffs in error had been deprived of their property without due process of law, in express violation of said Section 1, of Article XIV of the Constitution of the United States.

It is even well established that the jurisdiction attaches, if the federal question is raised, *even if it should be a frivolous question.*

Hall vs. Johnson, 15 Wall., 393.

In the brief of the counsel for the motion, he endeavors to show that the Supreme Court of the State did not err in its

decision. Possibly this would do in an argument on the merits, but to obtain jurisdiction here, it is not necessary to show that the Supreme Court of the State erred.

Firman vs. Nichol, 8 Wall., 44.
Hartmann vs. Greenhow, 102 U. S., 672.

Indeed, in the latter case there is an affirmance by the Supreme Court of the State on an equal division of that court, yet the jurisdiction to come here was affirmed.

It is impossible to read this record, showing that in the lower State court and in the Supreme Court we were there solely to invoke this jurisdiction and the protection of the Constitution of the United States, and then read the rulings and opinions of both State courts, and avoid the conclusion that both were written under the mistaken assumption that our right to come here would be dependent upon the fact whether our claims of federal protection were referred to or passed upon in those opinions.

Of course, condemnation cases are suits within the meaning of Section 709 of the Revised Statutes.

Kohl vs. U. S., 91 U. S., 375.

And a "final judgment" from which a writ of error *may* come here from the court of last resort may be an affirmance of the proceedings below.

Mower vs. Fletcher, 114 U. S., 127.
Bostwick vs. Brinkerhoff, 106 U. S., 3.

Although it may also come here on other questions raised in the State court of last resort.

There is one other rule within which we must bring ourselves, in so far as we claim the jurisdiction on the affirmance of the rulings of the lower court by the court of last resort of the State.

The rule in such cases is laid down in Spies' case, 123 U. S., pp. 131-181, as follows:

"To give us jurisdiction under Section 709 of the Revised "Statutes because of the denial by a State court of any title, "right, privilege or immunity, claimed under the Constitution "or any treaty or statute of the United States, it must appear "on the record that such title, right, privilege or immunity was "specially set up or claimed at the proper time in the proper "way. To be reviewable here, the decision must be against the "right *so set up or claimed. As the Supreme Court of the "State was reviewing the decision of the trial court*, it must "appear that the claim was made in that court, because the "Supreme Court was only authorized to review the judgment for "errors committed there, and we can do no more. This is "not, as seems to be supposed by one of the counsel for the "petitioners, a question of a waiver of a right under the Con-"stitution, laws or treaties of the United States, but a question "of claim. If the right was not set up or claimed in the proper "court below, the judgment of the highest court of the State "in the action is conclusive, so far as the right of review here "is concerned."

Now, in this case we show, even by this motion record, that at the inception of the case, and at every stage of it, we rested our entire defense upon grounds, as specifically stated in writing, and at various stages orally, at the beginning, at the close, and intermediately, in the court below—"specially set up" (158 U. S., p. 183)—that all the proceedings were void, and the plaintiffs in error entitled to immunity under the above provisions of

the Constitution of the United States—specifying those provisions.

See motion, Record, pp. 31-32, Reason 1, and the specifications under it, page 35, No. 2. Orally, see p. 45, p. 49 at close, p. 52, p. 54 top, p. 57, No. 18.

The same positions were fully presented in the application for certiorari. See motion record, p. 84 top, 85 bottom, and pp. 87-88. Also specifically in the assignment of errors in the State Supreme Court, p. 92.

(We shall presently see that the counsel for the defendant in error is mistaken in his statement of practice on certiorari and assignments of error, and in his citation of authorities on that point.)

But aside from the jurisdiction claimed on affirmance within the rule in the Spies case, other federal questions invoking the protection of the Federal Constitution, and this jurisdiction, were regularly made on the original action of the Supreme Court itself, and, too, the seizure on execution of the property of the plaintiffs in error subsequent to the judgment of the State court was regularly and specifically challenged as a seizure without due process of law, in violation of the said article and section of the Constitution of the United States, and that question went up on certiorari, and was fully presented and argued in the Supreme Court itself, but these specific federal questions will be enumerated later, and the method of their presentment pointed out.

The following will be a sufficient statement of the case as a premise under which we may submit to the court how the federal questions arose, and how they were applicable.

The plaintiffs in error owned and managed a large plant within the City* of Detroit, for the manufacture of very fine decorations and artistic finishings in wood made from native and foreign timber. It consisted of the mill, or factory proper, at one place, of a reception and store-yard for raw material, consisting of about seven acres, a short distance away from the mill, and of a large seasoning house, also situated a short distance from the mill, but in a different direction

They had been established for many years, and they showed that their net profits in their business ran from twenty-five thousand dollars per annum, the minimum, to seventy-five thousand dollars per annum, the maximum.

They claimed before the railroads of the defendant in error were built, that the effect of their proximity in taking their front for four great trunk lines of road, would destroy their peculiar business entirely.

That the proposed "taking" by the railroads would also cut their plant in two, i. e., separate their factory from the other parts of their plant, as above stated, and so damage them seriously by interfering with access, etc. And they claimed to have demonstrated in the present record, without contradiction, that since the roads of the defendant in error had been constructed, the effect had been as expected, to completely destroy their peculiar business above described.

They contested the railroad's application to take the property on the ground of public necessity, and upon that question, as well as upon the amount of compensation to go to them, if the jury should find the necessity, a jury disagreed, and was discharged. A second trial was had, in which a jury found the necessity, and assessed the damages to be paid.

*A specific provision of the State Constitution applies to cities.

A trial judge* of the State Circuit Court—the highest nisi prius court—assumed to set aside that verdict, and order a new trial on the application of the railroad company. The Supreme Court of the State thereupon, after full argument, by unanimous judgment delivered by the then chief justice, granted a peremptory mandamus, setting aside the order for new trial as beyond the power of the trial judge.

Backus vs. Gartner, 89 Mich., p. 209.

Then the railroad companies paid the plaintiffs in error the amount of the verdict unconditionally; but subsequently took an appeal to the Supreme Court, and pending the appeal, took possession of the property (without permission), fully constructed their viaducts and railroads, and in every way went through the "taking" of what their petition had prayed for, and proceeded to operate their roads to the fullest extent of enjoyment of possession, which they have continued to do.

The property of the plaintiffs in error was the most valuable property with which the railroad company had to contend. The plaintiffs in error claimed that through the cry for public improvements, the courts deprived them of the protection of every guaranty to the citizen provided in the State Constitution in such cases, and of the safeguards of every provision of law accorded to other citizens, and in all this discriminated against them in order to force through an affirmative decision by a jury on the question of necessity, and to prevent payment to the plaintiffs in error of just compensation, which would be very large, for the taking of their property and injury to their business.

The Supreme Court of the State, notwithstanding the decision in the mandamus case, and after the chief justice, who delivered the opinion in that case, had retired from the bench, heard the appeal above referred to, and as the records here show, without ordering a rehearing on the questions disposed of in the mandamus case, and with the fact before it that the railroad had

*The same judge acted in all these trials, and is no longer on the bench.

taken the property, and was operating its road over it, set aside the award of compensation on the second trial, but affirmed the simultaneous award of the same jury on the question of necessity, and reversing itself in the decision on the mandamus case, sent the case back for a trial on the question of compensation only, so that the trial judge below was left with authority to grant other and unlimited new trials, which the Supreme Court itself could not do under constitution or statute.

Union Depot Company vs. Backus, 92 Mich., 33.

Thereupon the same trial judge proceeded to order a new jury, while the railroad was in full possession and enjoyment by way of a complete "taking," as above stated, operating its roads as fully as if the condemnation proceedings had reached a finality in its favor.

Thereupon the plaintiffs in error at once began to invoke the guaranties of the Constitution of the United States for their protection. The new trial was confined to the question of compensation, and that compensation, by the methods shown by the record, was reduced; and the trial judge entered judgment as in a court of record at common law, against the plaintiffs in error for the difference, and ordered execution to be issued thereon.

Executions were issued, and personal property of plaintiffs in error of the value, as shown by this motion record, of one hundred ten thousand dollars ($110,000) was taken by the sheriff under such executions.

Of course, the proceedings were not in accordance with the course of the common law, and the statute under which they were

taken, even if constitutional in this regard, did not provide for any judgment against the plaintiffs in error in terms (they were not the "party appealing"), and did not provide for any executions against them in any event.

Thereupon the petition was made for a writ of certiorari to the Supreme Court, setting up the federal questions as they had arisen and been presented below, and also setting up the subsequent proceedings of the trial judge in entering the judgment, and issuing the said executions. Also setting up by respectful allegation specifically wherein the trial judge had violated the XIV. Amendment to the Constitution of the United States, and wherein the Supreme Court itself had violated the Constitution of the United States in the premises.

In Michigan the writ of certiorari is confined to cases raising questions of jurisdiction, and to cases of imprisonment. The facts, or mere errors in ruling, do not come up for review, nor do mere irregularities.

Ishpeming vs. Maroney, 49 Mich., 226.
Dunlap vs. Railroad, 46 Mich., 191.
Railroad vs. Backus, 48 Mich., 582.
Grand Rapids vs. Weiden, 65 Mich., pp. 572-576.

Now, in this case, the writ of certiorari was allowed, and the brief and argument of plaintiffs in error wholly confined to these three questions as *jurisdictional* ones.

FIRST.

(1) By the constitution and laws of the State, the proceedings were void.

(2) By the constitution and laws of the State, *as that Constitution and those laws had been before and since uniformly construed by the Supreme Court of the State itself as to all other citizens, than these plaintiffs in error*, the proceedings were void, and consquently :

SECOND.

The proceedings were utterly void under the Constitution of the United States (Section 1, Art. XIV.) because in and by the proceedings, including the action of the Supreme Court itself, the plaintiffs in error, being persons within its jurisdiction, had been denied by the State of Michigan the equal protection of its laws.

THIRD.

That the proceedings were utterly void as repugnant to Section 1, of Article XIV. of the Constitution of the United States, because

(1) The property of the plaintiffs in error had been taken under them, and that from beginning to end of the third trial, so-called, the proceedings were not due process of law.

(2) The executions under which the property was seized was not due process of law.

The Specific Federal Questions, their Application to the Record, and how Raised.

I.

THE DISCRIMINATION AGAINST THE PLAINTIFFS IN ERROR.

(ONE.)

It may be regarded as conclusively settled that the provision of the Federal Constitution, guarantying the equal protection of the laws of a State to any citizen, applies with as much vigor and effect to the judicial branch of the State government, as to the legislative or executive, and that the authorities construing the provision as to legislative action apply with equal force to judicial action.

Virginia vs. Rives, 100 U. S., 313.
Neal vs. Delaware, 103 U. S., 370.
Lavin vs. Bank, 18 Blatchf., 17.

As stated in the case of Missouri vs. Lewis, 101 U. S., 22:

"The clause in question means that no person or class of "persons, shall be denied the same protection of the laws which "is enjoyed by other persons or classes in the same place and "under like circumstances."

And in Hayes vs. Missouri, 120 U. S., p. 68, it was said:

"The fourteenth amendment to the Constitution of the United "States does not prohibit legislation which is limited either in "the objects to which it is directed, or by the territory within

"which it is to operate. It merely requires that all persons "subjected to such legislation shall be treated alike, under like "circumstances and conditions, both in the privileges conferred "and in the liabilities imposed."

See also Barbier vs. Connoly, 113 U. S., p. 27.

In Caldwell vs. Texas, 137 U. S., 692, it was stated:

"No State can deprive particular persons, or classes of per- "sons, of equal and impartial protection under the law, without "violating the provisions of the fourteenth amendment of the "Constitution."

We submit in passing that this court would not have dismissed the case of Marchant vs. Pennsylvania Railroad, 153 U. S., 383, for want of jurisdiction, had a motion been made to do so, because it did clearly appear that the protection had been claimed properly in the State court, as it has been in this case, on this very clause of the Constitution we here discuss.

There the merits were gone into, and it was found upon the record there presented that the Supreme Court of Pennsylvania had not, as a matter of fact, discriminated.

In that case, this court said:

"We are unable to see any merit in the contention that the "Supreme Court of Pennsylvania, in distinguishing between the "case of those who, like Duncan, were shut off from access to "and use of the street by the construction thereon of the elevated "railroad, and the case of those who suffered, not from the con- "struction of the railroad on the street on which their property "abutted, but from the injuries consequential on the operation "of the railroad, as situated on defendant's own property, thereby "deprived the plaintiff of the equal protection of the laws. The

"two classes of complainants differed in the critical particular "that one class suffered direct and immediate damage" * * * "and the other class suffered damages which were consequentiai."

But we shall show, when we come to the merits, that the discrimination here is made against the plaintiffs in error, *in the construction* of the Constitution of the State, which applies to all citizens alike in its guaranties. This is a discrimination against persons, not only by depriving them of the protection of the Constitution of the State, *but also in discriminating against them by applying an exceptional construction of that Constitution to them, and withholding from them the uniform construction of the same clauses of the Constitution accorded for the protection of all other persons, by the uniform decisions of the State court itself.*

Of course, the construction of the Constitution of the State is for the court of the State, and possibly in all cases is binding on this court, and there can be no review here of its construction of its domestic laws, fundamental or other; but in this case, it is alleged, and we shall present to this court, that the uniform construction of the clauses of the Constitution in question by the State court itself in many, and in an unbroken line of judgments; and then we propose to show as a federal question that the benefit of that construction has been denied to these particular citizens, *and denied to them only.*

In this branch of the case, too, we need not appeal to the doctrine of *stare decisis*, because we show by the record, and by the judgments of the Supreme Court of Michigan, that it

has not, as the counsel for the defendant in error suggests, changed its mind, or changed its construction. But it has refused to apply the uniform construction for the benefit of these plaintiffs in error. That is one of the specific questions raised on this record.

To illustrate. Section 15 of Article XV. of the Constitution of this State—"Corporations"—provides:

"Private property shall not be taken for public improvements "in *cities* and villages without the consent of the owner, unless "the compensation therefor *shall* FIRST *be* DETERMINED *by a jury* "*of freeholders*, and actually paid or secured in the manner "provided by law."

This provision of our Constitution, as held over and over again by our own Supreme Court, means just what it says: that the question of how much compensation shall be paid, shall be *ended—"determined"*—finally, before any possession can be taken, even by order of a court; and that if any statute provides for an earlier taking, by any construction, it would be unconstitutional.

Now, on this record, it is seen that under the ruling of the Supreme Court, the railroad company went into full possession, and was operating its four roads as fully and completely as possible *long before the plaintiffs in error were ordered to go to trial on the last hearing on the amount of compensation.*

The late Mr. Justice Campbell, in Railroad Company vs. Chese-

boro, 74 Mich., 469, stated the doctrine and quoted the uniform authorities up to that date, where he said:

"No court has the right to divest possession in advance of "condemnation, *or to legalize it.*" * * * * * "The prin- "ciple is elementary."

And the learned justice cites the cases.

Referring to this provision of the Constitution, in Marquette, etc. R. R. vs. Probate Judge, 53 Mich., p. 226, the court, by Mr. Chief Justice Champlin, states:

"Compensation is a constitutional condition of such taking, "and it can only be lawful when the necessity of the taking, as "well as the measure of compensation, has been *determined* in "a legal way." (Sheldon vs. Kalamazoo, 24 Mich., p. 386.) "The necessities of the corporation for the immediate use of "the land for the purpose of constructing its road are not suf- "ficient to nullify these constitutional safeguards to the rights "of private property. If they may be ignored in one case, under "the plea of necessity, they may be in all, and the railroad com- "pany may proceed to seize upon private property and construct "its road, and leave the questions of the necessity of the taking, "and the compensation to be determined, at its leisure."

Referring to the statute itself, which is set out in the learned counsel's brief, the court of last resort in Michigan has repeatedly said that it was borrowed from some other State, not having similar constitutional limitations on legislative power.

For instance, Mr. Justice Campbell said of it, in Toledo vs. Dunlap, 47 Mich., pp. 456-461:

"This statute is evidently framed in accordance with the laws "of some other States, where the judicial power is not parcelled "out as it is here; and some complications have been caused by "this practice which introduce difficulties. We had occasion in "the case of Michigan Air Line Railway vs. Barnes, 44 Mich., "p. 222, to point out some of these difficulties. It is greatly to be

"regretted that this species of legislation has been so very care-
"lessly framed."

The same learned judge said in the case of Paul vs. The City of Detroit, 32 Mich., p. 109, of these constitutional provisions, that "they are not found in constitutions generally, and were never "known in Michigan until the adoption of the Constitution of "1851."

And again, in Railroad Company vs. Cheseboro, 74 Mich., 466, of this statute, that it was "borrowed from some other region."

But even the statute set out in the brief here of the opposing counsel, does not assume to confer authority to take possession pending appeal. We have seen that if it had made any express provision, it would be held unconstitutional and void, so far as that is concerned, in the State of Michigan, according to the authorities construing our constitutional provisions.

The provision italicized in the counsel's brief, at page 7, has reference only to the *final conclusion of the proceedings*, as it provides upon payment and taking possession for the clear and final passage of the title. The provision italicized at the top of page 8 does not authorize the taking of possession pending appeal, but does *imply* that the money itself may have been paid over.

In this case (as the record in this case will show, but it is not printed on the motion record), the payment was unconditional

at the time it was made, and no claim of possession was made or admitted.

Possession, even without title, is "property" within the meaning of the Constitution of the United States, and requires "due process of law" to take it from another.

Marshal vs. Knox, 16 Wall., pp. 551-557.
2 Hare's Am. Consti. Law. Lecture XXXVII, p. 823.

Possession, even without the appropriation of title, before condemnation and the ***determination*** finally of compensation, cannot be legalized or enforced under our constitution pending appeal.

If the question of compensation then shall not have been finally ***determined***, then it is plain sophistry to say that under the Constitution, the corporation seeking to take property could go through the form of tentative payment as a mere device to get around the constitutional provision, and then go through the form of a trial for the sole purpose of ***refixing and redetermining*** the compensation, by the use of the Constitutional and statutory proceedings for condemnation, merely to recover back the money paid. The suggestion would be grotesque, if the subject were not so grave, in thus dealing with the Bill of Rights.

The defendant in error thus secured everything sought by the proceeding for condemnation—a full and complete taking before the compensation was finally "determined," by the trick of the form of payment required as a prerequisite by the Constitu-

tion, and then was permitted by the Supreme Court to try to get his money back in the form of a proceeding for condemnation.

We submit that one of the most substantial and emphatic guaranties of the fundamental law cannot be got around in that way.

It is a question, not of legislation or statute law, but of the governing and higher law of the Constitution, as construed by the State court itself.

THE NEW YORK AUTHORITIES.

It is true that the Michigan *statute* in question is largely borrowed from New York, but imports a jury, with some other very clumsy additions; *it is not true, however, that the New York practice and authorities are in point, for the simple reason that the provision of the New York Constitution, under which their railroad law is framed, radically differs from ours in every essential on which we raise questions on this record.*

The New York Statute is framed under the following Constitutional provision of the Constitution of 1846, Article I., Section 7:

(See General Statutes of New York, Blatchf. Edition, 1829-1851, Appendix, p. IV.)

"When private property shall be taken for any public use, "*the compensation to be made therefor, when such compensation* "*is not made by the State, shall be ascertained by a jury, or by* "*not less than three commissioners appointed by a court of* "*record, as shall be prescribed by law.*" *

*The remainder of the section refers to "Private Roads," and our Art. VIII., Sec. 14, is a transcript of it. In neither State has that anything to do with railroad legislation, nor is it in any way connected or construed as connected with the articles of the constitutions on the subjects here discussed.

The Railroad Act cited by the counsel is framed under that provision, and it will be seen at once that, unlike the clause in the Michigan Constitution in question, (1) it does not require, before the taking, that the compensation "shall be first determined "by a jury of freeholders, and actually paid or secured." (2) It vests the discretion in the legislature to provide the manner and method of the condemnation proceedings, whether by jury, or commissioners, as it sees fit; and

(3) It does not provide that the question of necessity shall be passed upon by the same jury, as in our statute, but that question is reserved to the judicial function of the courts.

(Matter of N. Y. C. R. R., 66 N. Y., 409.)

The railroad law enacted under it, in fact, confers the function upon commissioners, and provides for no jury. Of course, without the Constitutional prohibition, such as we have, the legislature could pass an act putting a petitioner in possession at once pending the question of compensation, or pending appeal. We import that statute so anomalous under our Constitution, and it is the statute in question.

The New York Railroad Act cited by the counsel, and used in making up the Michigan statute, was passed in 1850.

Now, upon these particular questions, that in this case the court, by granting the new trial, and by all the proceedings of the new trial, deprived us of our Constitutional protection, and also discriminated thereby in not giving us its own uniform construction of the said Constitution, the State Supreme Court treated them as it treated all similar federal questions, hereinafter to be referred to, by simply ignoring them in the opinion on

the judgment of affirmance in certiorari, from which we come here.

Yet the questions were clearly presented in various forms as a federal question. See motion record, p. 34 (3); also in the record (not printed here, where the fact of the possession, and of the unconditional payment, appeared in the proofs, orally); again, after judgment below, see p. 53, and very fully set up in the petition to the Supreme Court for the writ of certiorari, p. 82 middle, p. 84, p. 85 bottom, p. 86, and in the assignment of errors (which was the proper practice, as hereinafter shown), pp. 92-94 (IV. and V.). The latter is the clearest and most compact summing up of all the preceding objections on this point.

(TWO).

THE DISCRIMINATION AGAINST THE PLAINTIFFS IN ERROR UNDER THE CONSTITUTION OF THE STATE, AND UNDER THE UNIFORM CONSTRUCTION OF THAT CONSTITUTION BY THE COURTS OF THE STATE, IN DEPRIVING THE PLAINTIFFS IN ERROR OF AN INDEPENDENT AND ORIGINAL TRIBUNAL OF TWELVE JURORS, BY PERMITTING TO BE FORCED INTO IT A JUDGE WITH PRECISELY, AND IN TERMS, ALL THE POWERS AND CONSTRAINING INFLUENCE OF A COMMON LAW COURT.

Under the peculiar provisions of our Constitution, as construed over and over again by the Supreme Court of Michigan, condemnation proceedings are *not* judicial proceedings, and these propositions are established:

That a judge is no part of the tribunal of condemnation, and can be no part of it.

That if a statute in terms should require him to sit, the statute would be unconstitutional.

That the proceeding is in no respect to be compared with a common law trial, and that if any judge, or court, assumes to, and does sit, as at common law trials, with the jury, the proceedings are void.

The reason of our Constitutional provision in this respect was to remedy the mischief of the old system, when power in such cases rested in permanent bodies, legislative or *judicial*, and the reasons for the change are set out in the case of Paul vs. The City of Detroit, 32 Mich., at page 113, *et seq.*

It is the settled law of this State that it was the intent of the framers of the Constitution to repose the exclusive power of passing on the questions of necessity and compensation in a *temporary* body, organized in each case in the neighborhood or vicinage of men having real property of their own, having an absolute control, by the powers conferred upon them, of the inquiry, and free from any possible influence outside their body on the part of a judge, or any one else.

All criticisms of the statute providing for condemnation in this case, as incongruous and unfitting, apply here, and have been applied in the cases in Michigan, referring to that part of the statute providing for the attendance of a judge or a Circuit Court commissioner, and in so far as that statute could be construed to authorize any such judge to *decide* questions for the jury, or to influence them, the statute would be held unconstitutional.

We will take the case cited on the other side (a decision by Justice Campbell), and quote from it as an early case, where

that provision of the statute was treated with more consideration than in any of the very large number of subsequent cases on the same point.

Toledo Railroad vs. Dunlap, 47 Mich., 462.

"The statute is evidently framed in accordance with the laws "of some other States, where the judicial power is not parcelled "out as it is here; and some complications have been caused by "this practice which introduce difficulties. We had occasion, in "the case of Michigan Air Line Railway vs. Barnes, 44 Mich., "222, to point out some of these difficulties. It is greatly to be "regretted that this species of legislation has been so very care-"lessly framed.

"In the present case some steps appear which could only "have been taken by a court in the regular exercise of judicial "power, while others belong to a different class of functions "entirely, and are governed by different considerations.

"Under our Constitution such powers as are strictly judicial "in their character can only be vested in certain courts, which "are named in the Constitution itself. The Circuit Courts—"as courts—have such powers. The judges, as judges, out of "court, do not possess them, and cannot be vested with them.

"The proceedings to condemn lands, although made under "the railroad laws, subject to judicial review and supervision "for certain purposes, are not in themselves, and never have been, "regarded as judicial proceedings. Our Constitution allows "them to be conducted by highway commissioners, in some "cases, and by specially appointed commissioners or juries of "freeholders. The inquiry in this State, as elsewhere, is an "appraisal, or estimate, of values, and not a contest on litigious "rights, and includes what is not elsewhere included, an inquiry "into the necessity of the proposed taking for public purposes, "which was never made by courts, but always, heretofore, by "the legislature or some unjudicial body of its creation. Had "it not been for the specific provisions in our Constitution the

"State could have provided for these inquiries to be made by "any medium it might select. (People ex rel. Green vs. Mich. "Southern R. R. Co., 3 Mich., 496.) Our present system is "better calculated than the old one, if fairly applied, to secure "the rights of land-owners. But the nature of the proceeding "remains as before, *a special proceeding by a temporary tribu-* "*nal, selected for the occasion, and not a judicial proceeding in* "*the ordinary sense.*

"*As provided for under the railroad laws, there are certain* "*proceedings in court to select a jury, and subsequent proceed-* "*ings to determine whether the action of the jury should be sus-* "*tained. Beyond this the courts have no part in the matter.*"

Whatever of the statute providing for the attendance of a judge is saved by construction, is to this extent only, that the jury may call for advice if they desire it, and only if they desire it. As stated in the case just cited, the jury will undoubtedly "be regarded as accepting and doing what they *permit* to be done."

We have stated the uniform construction as held in this State in an unbroken line of judgments.

Mich Air Line R. R. vs. Barnes, 44 Mich., 222.
Toledo R. R. vs. Dunlap, 47 Mich., 457.
M. C. R. R. vs. Probate Judge, 48 Mich., 638.
Railroad vs. Cheseboro, 74 Mich., 467.
Pt. Huron R. R. vs. Voorheis, 50 Mich., 510.
Railroad vs. Railroad, 64 Mich., 363.
Union Depot vs. Jones, 83 Mich., 415.
Campau vs. Railroad, 83 Mich., 31-33.
G. R. & I. R. vs. Welden, 70 Mich., 390.
Barnes vs. Mich. Air Line R. R., 65 Mich., 251.
D. L. & N. R. R. vs. Probate Judge, 63 Mich., 676.
Paul vs. City of Detroit, 32 Mich., 109.
Crane Case, 50 Mich., 182-187.
Marquette R. R. vs. Probate Judge, 53 Mich., 217.
Pt. Huron, etc. Ry. vs. Callanan, 61 Mich., 12.

The absurdity of any other rule, and of any other possible construction of the statute within the Constitution, is pointed out by Mr. Justice Grant (who delivered the opinion in this case) in Depot Co. vs. Jones et al., 83 Mich., pp. 415-418, where he says:

"These proceedings may be instituted in Probate Courts, the "judges of which are frequently not lawyers, and are unfamiliar "with the rules of evidence."

And so the practice has been to take the proceedings in Probate Courts as well as in common law courts.

Now, there were two federal questions raised under this proposition:

First: That by the decision of the Supreme Court, permitting the Circuit judge to grant new trials, the latter was put in a position to nullify the provision of the Constitution of the State, by repeatedly setting aside verdicts, until one should be reached which would suit him rather than the jury, and

That this was a judgment discriminating against the plaintiffs in error in the construction of this provision of the Constitution of the State, is clearly pointed out in the dissenting opinion of the chief justice in Union Depot vs. Backus, 92 Mich., at p. 59.

The court, in that case, did not reverse the uniform construction of the provision of the Constitution in the courts of the State by the majority opinion, although that was the wish of one of the justices, as appears by his opinion at p. 57 of the same report. The majority of the court merely sought to get round it by referring to cases which touched upon a possible *advisory* function of a judge, as above stated.

This specific federal question was necessarily made at the opening of the proceedings of the third trial, from the proceed-

ings in which the certiorari was taken to the Supreme Court of the State, in the case which comes here.

But *second:* The gravest question under this head appears by parts of the record in the trial court, which are not here, although the errors and federal question are specifically pointed out in the application for the writ of certiorari, and in the assignment of errors.

It will appear by the record not printed, not that the trial judge was "permitted" or desired by the jury, but that he *forced* himself upon the jury, with all the influence, power and devices of a court hostile to the plaintiffs in error, to control the views of a common law jury.

For instance, he told the jury, after it was impaneled, and I quote from the printed record in the State court, p. 213:

"The Court: *I shall regard this jury as a common law jury* "*and shall control them as a court, and they will have to sub-*"*mit to all the orders of the Court.*

Again to the jury:

"The Court—I will hold this jury to the same strict lines "that I would hold any jury."

Again:

"Mr. Dickinson—Let me get my record straight. I under-"stand that your honor purposes to sit here as in a trial at "common law?

"The Court—Yes.

"Mr. Dickinson—And to rule upon testimony, and to advise "and instruct the jury?

"The Court—Yes.

"Mr. Dickinson—To that I object, and not only ask an ex- "ception, but protest against it as a disregard of the Constitu- "tion of the State, and a disregard of the Supreme Court of the "State, the theory being that the jury are to get at the rights "of the question at issue as an independent tribunal, a tribunal "*sui generis*, the best way they can, without the limitations and "restrictions of a common law trial.

"Objection overruled."

Again:

"The Court—The jury will only determine those questions that "I will submit to them, *and I will see that my ruling is carried* "*out by the jury also, Mr. Dickinson.*"

And so on through the record.

By this method and this influence, by the tone and appearance of the Court, he was not merely made an advisory person (who, according to Justice Campbell in the cases cited, could not be clothed with the functions of a court), but he was made a *thirteenth member* of the constitutional tribunal of twelve persons, with more actual power in controling or influencing the jury in its deliberations, as every practitioner and judge knows, than was possessed by the whole twelve, and this without regard to his mere formal instructions and charge, which go up on appeal.

This is not the tribunal given us by the fundamental bill of rights, any more than a jury consisting of two or ten would have

been; and so, as we have seen, has been and is the construction of the Supreme Court of the State, except in the single case of these plaintiffs in error.

This federal question was carefully raised, and pointed out specifically to the Supreme Court of the State.

It was not only the mere fact that he "advised" the jury, of which we complain, but withholding from them the constitutional truth, that they were independent and that his action and advice and participation was only what they "permitted," and after all, that they alone and not himself with them, were responsible for their finding; he enforced upon them that his and their position was precisely like that of court and jury in a common law trial, with himself carrying the compulsion of respect, regard and influence of a court under which they had been accustomed to sit as jurors in ordinary trials at nisi prius.

These, and similar questions raised in the midst of the trial in the court below, have nothing to do with the carefully prepared charge of the judge below, cited with so much approval in the opinion of the Supreme Court of Michigan in this case. That charge was written, well knowing that the record of the long hearing before him, just closing, had been made by the plaintiffs in error with the one end in view, to wit: to get out of the State jurisdiction, and to reach this court on the federal questions, including as the most prominent to *him*—this one.

The mischief, and the violation of the constitution of the United States in this respect, had occurred, and had been pointed out, and the purpose to come here stated, before that charge was made.

It may be said in passing, too, that the opinion of the Supreme Court of the State in the case here, was written with the record

before it, showing that from the beginning to the end of the third trial, we had appeared under protest, and only for the purpose of making a record, to here invoke the protection of the constitution of the United States, by properly raising the federal questions.

We could not come here from the decision in 92 Mich., *supra*, because that was a *reversal*, which is not a final judgment.

Baker vs. White, 92 U. S., 176.
Houston vs. Moore, 3 Wheaton, 433.
Macomb vs. Knox County, 91 U. S., 1.
Mayberry vs. Thompson, 5 How., 121.
Rankin vs. State, 11 Wall., 380.

We do not need to appeal to the doctrine of *stare decisis* on this point. While the Supreme Court of the State does not refer to the error assigned as a federal question, raising the question of discrimination, yet in saying that a judge may preside, that court does not assume to reverse the long line of its own judgments, or to state any new doctrine, *but assumes that its decision is in line with them, and cites the cases relating to the advisory function of the judge that we have above referred to in support of its present judgment.*

Whatever may be the rule as to following the domestic court of last resort upon the construction of domestic legislation, there is certainly no rule which requires this jurisdiction to follow the court of last resort in its construction of the English language in arriving at what its courts *do* hold on the construction of its domestic constitution and legislation.

(THREE.)

DISCRIMINATION AS TO THE RULE OF COMPENSATION.

The question was raised as a federal one below, as shown in the petition for certiorari, and in the objections to the judgment. See motion record, p. 85, top, and objections and assignment of errors. As seen by the record of the State Court, now here, but not printed, as well as by his statement quoted with approval in the 92 Mich., at page 55, from beginning to end, in this and the only case in which such a construction of compensation is held to this day, the jury were confined by the trial judge on the question of compensation, to the injury to the realty only, although the business was peculiarly susceptible to destruction by the proximity of the railroads; also that the separation, that is, of the factory from the necessary connections of yard and dry house, was an injury for which compensation should be made.

Now on the third trial, for the sole purpose of making the federal question, in discrimination, we put in the proof that the profitable business in fine woods carried on by the plaintiffs in error was utterly destroyed, and that they had stopped that part of their business since the railroads were operated. We also showed the damage from the division of the plant.

The courts of Michigan have uniformly held, as stated by Mr. Justice Campbell in Railroad vs. Cheseboro, 74 Mich., p. 474, that under the Constitution,

"The damages in such cases must be such as to fully make good "all that results, directly or indirectly to the injury of the owners "in the whole premises and interests affected, and not merely the "strip taken."

The principle is repeatedly affirmed, as in the case just cited; as for instance, where there was a highway crossing over a railroad company's tracks, where the adjacent warehouse and the lands on which it stood "were rendered less available and less valuable for warehouse purposes," compensation under the Constitution was allowed.

Commissioners vs. R. R., 91 Mich., 291.

There is no question about the doctrine as uniformly held, except in this case, and applied by the Supreme Court of this State.

Commissioners vs. Railroad Co., 91 Mich., 291.
Commissioners vs. Moesta, Id., p. 149.
Grand Rapids vs. Hiesel, 47 Mich., 394.
Pearsall vs. Supervisors, 74 Mich., 558.
Detroit vs. Brennan, 93 Mich., 338.

The Supreme Court of the State in its opinion avoids this specific point, but states generally that we made no requests to charge. Of course we did not. We did not recognize the right of the judge from beginning to end to preside as a court as in nisi prius at common law. We protested against it, and never waived the point. But the record does disclose that the point was clearly made, and the attention of the court below called to it by

a statement made to the court, after an inquiry as to whether he proposed to charge the jury, that the court had been in error throughout as to what was "compensation" under the constitution. The statement was further made that if he proposed to instruct the jury, we desired to call his attention to the uniform rulings (in construction of the Constitution), of the Supreme Court of the State on the question of compensation, and we then read to him the case of Railroad vs. Weiden, 70 Mich., p. 393, above quoted, and other cases.

The language quoted from the 70 Mich., p. 393, then, as the record shows read to the court was:

"The appellants were using their property in lucrative business, "in which the locality and its surroundings had some bearing on "its value. Apart from the money value of the property itself, "they were entitled to be compensated so as to lose nothing by the "interruption of their business and its damage by the change. A "business stand is of some value to the owner of the business, "whether he owns the fee of the land or not, and a diminution of "business facilities may lead to serious results. There may be "cases where the loss of a particular location may destroy business "altogether, for want of access to any other that is suitable for it. "Whatever damage is suffered must be compensated. Appellants "are not legally bound to suffer for petitioner's benefit. Petitioner "can only be authorized to oust them from their possessions by "making up to them the whole of their losses."

The court promptly expressed its doubt of the doctrine in the presence of the jury, and never referred to it again in the charge prepared, and immediately delivered to the jury the felicitous charge as printed in the opinion of the Supreme Court.

In that connection, too, the record discloses that the counsel for the defendant in error was permitted to state to the jury with-

out challenge or reproof, and against our objection and protest, that the Supreme Court of the State had held that the verdict given in the first trial was "grossly excessive"—the amount of that verdict was before the jury.

Thus it will be seen that we were deprived of the Constitutional rule of compensation, as the term compensation has been uniformly construed by the courts of the State, by the action of the lower court, brought clearly and regularly before the Supreme Court of the State, on the certiorari in an appeal to that court for protection under the Fourteenth Amendment of the Constitution of the United States.

The State Supreme Court in its opinion ignored this federal question, and did not touch upon it in any way, although it was most fully argued in the brief and orally.

(FOUR.)

DISCRIMINATION IN DENYING US THE PROTECTION OF THE CONSTITUTIONAL PROVISION AS THE COURTS OF THE STATE UNIFORMLY CONSTRUED IT, EXCEPT IN THIS SINGLE CASE, CONFERRING UPON US THE RIGHT TO HAVE BOTH THE QUESTION OF COMPENSATION AND NECESSITY PASSED UPON BY ONE AND THE SAME JURY.

(Supreme Court assignment of error, VI., p. 95, motion record).

The Constitution of the State provides (Article XVIII., Section 2):

"When private property is taken for the use or benefit of the "public, the necessity for using such property, AND the just com- "pensation to be made therefor, except when to be made by the "State, shall be ascertained by A jury of twelve freeholders resid- "ing in the vicinity of such property, or by not less than three "commissioners appointed by a court of record, as shall be pre- "scribed by law."

This Constitutional guaranty applies to "cities and villages" as well, and in respect to the point here taken, is to be construed as

importing that guaranty into Article XV., Section 15 of the same Constitution, heretofore quoted, as follows:

"Private property shall not be taken for public improvements "in cities and villages without the consent of the owner, unless "the compensation therefor shall be first determined by a jury of "freeholders, and actually paid or secured in the manner provided "by law."

The right to have the same jury determine the question of necessity as well as the amount of compensation is decided in

Paul vs. Detroit, 32 Mich., 108.
Horton vs. Grand Haven, 24 Mich., 465.
Arnold vs. Decatur, 29 Mich., 77.

And these cases also directly on the point that Article XV., Section 15, must "in this respect" be taken together with Article XVIII., Section 2.

There is no question as to this construction of the Constitution by the courts of the State, and the reasoning is given most clearly by Mr. Justice Campbell in delivering the opinion of the court in Paul vs. Detroit, 32 Mich., p. 109, and cases cited at p. 114 *et seq.*

In that case, after referring to the ambiguities and incongruous provisions of the statutes framed under these Constitutional provisions, and stating that the statutes are patterned after laws belonging to a different system, and after reviewing the law as it

existed before the adoption of our present Constitution, the Court says :

"The Constitution has changed this by requiring the whole "subject to be determined by a jury of freeholders. * * * * * * "This question of necessity is the one on which the right "to take private property *entirely depends*, and on which parties "have a full right to be heard. *But this is not all. A jury can "render only one verdict, and that can only be given when the "whole inquiry before them is ended. In cases like this, they "cannot determine the necessity by itself.*"

It will be seen how radically different this fundamental system and this bill of rights are in this regard from the New York Constitution, under which its statute is framed, and under which authorities are cited in the decisions of the Supreme Court of Michigan, and the briefs of counsel, in this litigation.

Our position was, as shown by the record below, that it was essential for the protection of the citizen that both questions should be heard together; and that it is the absolute and constitutional right of the citizen to have the finding on one branch of the subject influenced by the evidence and conclusion upon the other branch. Furthermore, that even if the statute could be construed as providing a separate trial, the statute would be held unconstitutional, as seen by the construction of that Constitution in the uniform decisions of the courts of Michigan.

But we were discriminated against even in applying the statute, unconstitutional and faulty as it is, in so far as it could possibly

be construed as permitting the separate trial of the two questions of necessity and compensation. Its provision in this regard as quoted in the brief of the counsel for the defendant in error (p. 8), states:

"Nor shall it (the appeal) affect any part of said report in any "case except the part appealed from."

Now in this case, as shown by the original record certified to this court on this writ of error, the *defendant in error appealed from the verdict of the jury on both questions*—the question of necessity as well as the question of compensation—and yet the court, in defiance of the constitutional provision that both questions should be tried together, as that constitutional provision has been invariably construed by the courts of the State, and in defiance of the statute as well, directed, and the lower court proceeded to try, the question of compensation separately from that of necessity.

Of course that was a question going to the validity of the whole proceeding under the Constitution, and could not be raised as a preliminary objection on the third trial, nor until it was found that the court below would, in spite of our invocation of the protection of the Constitution of the State, and of the Constitution of the United States, refuse to submit to the jury the question of necessity.

The record discloses that we then made the point clearly on the theory that when the discrimination was shown, the federal Con-

stitution should be applied by the court below, notwithstanding the direction of the Supreme Court of the State upon that question.

The point was then made on the record, and was assigned in the Supreme Court as error, upon the federal question, as will be seen by assignment of error VI., p. 95, of the motion record.

This federal question, distinctly made, and argued fully in the briefs and orally, is also ignored in the opinion of the Supreme Court.

II.

DUE PROCESS OF LAW.

Of course the act of the court is the act of the State, as we have seen under the authorities hereinbefore cited.

"Due process of law within the meaning of the Constitution is "secured where the laws operate on all alike, and no one is sub-"ject to partial or arbitrary exercise of the powers of government."

Caldwell vs. Texas, 137 U. S., 692.

As stated by this court in the learned opinion delivered in Marchant vs. Pennsylvania Railroad, 153 U. S., pp. 380-386:

" It is not necessary to enter into an examination of the origin, " meaning and scope of the phrase 'due process of law,' as found " in the Fifth and Fourteenth Amendments. That has been done " so often and so thoroughly in previous cases that all we need " do is to cite a few of them."

In Hager vs. Reclamation District, 111 U. S., pp. 701, 708, it is said:

" It is sufficient to observe here, that by ' due process ' is meant " one which, following the forms of law, is appropriate to the " case, and just to the parties to be affected. It must be pursued " in the ordinary mode prescribed by law. It must be adapted " to the end to be attained; and *wherever it is necessary for the* " *protection of the parties, it must give them an opportunity to* " *be heard respecting the justice of the judgment sought.*

" The clause in question, therefore, means that there can be no " proceeding against life, liberty, or property, which may result " in the deprivation of either, *without the observance of those gen* " *eral rules established in our system of jurisprudence for the* " *security of private rights.*"

In Missouri Pacific Ry vs. Humes, 115 U. S., 520:

" If the laws enacted by a State be within the legitimate sphere " of legislative power, and their enforcement be attended with the " *observance of those general rules which our system of jurispru-* " *dence prescribes for the security of private rights*, the harshness, " injustice and oppressive character of such laws will not invali-

"date them as affecting life, liberty or property without due pro-
"cess of law."

In Davidson vs. New Orleans, 96 U. S., p. 97:

"It is not possible to hold that a party has, without due process
"of law, been deprived of his property, when, *as regards the issues*
"*affecting it, he has, by the laws of the State, a fair trial in a*
"*court of justice, according to the modes of proceeding in such*
"*a case.*"

Within the rule thus repeatedly laid down, we submit, under the points heretofore made, without anything farther, that we are entitled to invoke the jurisdiction of this Court, and go into the merits on the ground that the procedings were not due process of law, because the laws have not been made to "operate on all alike," and that plaintiffs in error have been subjected to a "partial and arbitrary exercise of the powers of government."

But farther, under the rule quoted from the cases, we submit that among the rights protected, one of the "GENERAL RULES "WHICH OUR SYSTEM OF JURISPRUDENCE PRESCRIBES FOR THE "SECURITY OF PRIVATE RIGHTS," ONE OF THE MOST SACRED AND CAREFULLY GUARDED IS THE RIGHT TO HAVE AN OPPORTUNITY TO BE HEARD IN A COURT OF JUSTICE.

(ONE.)

HEARING DENIED.

We set up in the application for certiorari as a federal question, and in the assignment of errors *in the Supreme Court of the State (see p. 102, motion record, XXXIII.):

(First) That the third trial was had under the decision in the 92d Mich., p. 33, reversing the Supreme Court's own judgment in the 89th Mich., p. 209, without having ordered or suggested a reargument, and without hearing from plaintiffs in error any re-argument thereon.

(Second) That the trial was had under the decision in the 92d Mich., p. 33, and that in the *latter case* the court had reversed the judgment below against these plaintiffs in error upon the most important point in the case on the merits, (to wit: Whether it was error below for counsel for plaintiffs in error to argue that the property of the Michigan Central Railroad Company might be taken under condemnation proceedings when the evidence might show that the property was not in use by the said Michigan Central Company), after notifying counsel not to argue that question because the court was with the plaintiffs in error, against a reversal on that ground.

*In printing the motion record, there is an error in importing the first three lines of this assignment from some other place.

Section 3357 of Chap. 91, of the Michigan Statutes, provides:

"When any part of the land of any railroad company in this "state, in or adjacent to its depot grounds is not in actual use for "depot or other purpose pertaining to the operation of a railroad, "and such land is not needed by said railroad company for the "purpose of a depot or other terminal facilities, it shall be lawful "for any other railroad company, organized as aforesaid, needing "such land for the purpose of a depot or other terminal facilities," etc., to proceed to condemn it as in other cases.

As this question bore on the question of necessity, the Chief Justice of the State Court at the argument at once stopped the counsel for plaintiffs in error upon that branch of the case, and stated that the court did not desire to hear argument on that question, because the verdict of the jury had been unfavorable to the plaintiffs in error, and this was not their appeal. Nevertheless, the court, without having offered to hear counsel for plaintiffs in error further, decided that very question adversely to the plaintiffs in error, and reversed on that very point.

On these two positions we raised the federal question that we were not accorded a hearing on controlling questions, but were deprived of it.

Now, under the decisions of the State Supreme Court itself, due process of law, as above defined by the decisions of this court, required a re-argument before the reversal of the judgment in the 89th Mich., 209.

We may say in passing that there had been a change in the composition of the court in this case. The Chief Justice who delivered the opinion in 89 Mich. having retired before the case in 92 Mich. came up.

The universal doctrine is that there can be no change in a decision of a court in a case between the same parties unless the court itself desires a re-argument and orders it.

See discussion of the question by Mr. Justice Cooley in Jacobson vs. Gunsburg, 42 Mich., pp. 90-93 bottom, *et seq.*

See same judge in McCutcheon vs. Common Council, 43 Mich., p. 483.

Hickox vs. Railroad, 94 Mich., p. 237, quoting Chief Justice Cooley, in Motz vs. Detroit, 18 Mich., p. 522, as follows:

"A due respect to our predecessors, I think, and to uniformity "and stability in judicial action demands that we recognize this "point as no longer open to controversy." * * * "The im- "portance of adhering to judicial decisions except when unmis- "takably wrong and mischievous, can certainly require no illus- "trations at our hands"—and see other cases cited.

In Damon vs. De Bar, 94 Mich., 594, the court quoted the Michigan authorities, and stated that it was the settled rule of law that the rule laid down by a court in the decision of a cause is to be applied in all subsequent proceedings in the cause, unless a re-hearing is called for and had. See cases quoted.

This was a plain case, not of *stare decisis*, but of *res adjudicata*, binding on the parties and their privies.

The doctrine applies to intermediate mandamus proceedings.

In Weed vs. Mirrick, 62 Mich., 414, where, in the course of the proceedings, certain questions had come up and been decided by the Supreme Court upon mandamus against the judge, as in

this case, pending the main litigation, that court held when it came to a final judgment in the cause, that the rulings of the court in the mandamus proceedings on questions there passed upon were *res adjudicata* at the final hearing of the cause.

Now, the fact that there was *no rehearing ordered or had* before the delivery of the judgment of reversal of the 89th Mich., in 92 Mich., appears:

(First) By the full and complete return on this very point in the record now here, but not printed on the motion.

(And second) By the statements in the application for certiorari to the Supreme Court of the State, standing uncontradicted by the return. (And if uncontradicted, its allegations must be taken as true. See Wilson vs. Board, 87 Mich., p. 248, Sec 4, top).

On the other point regarding the right to condemn unused Michigan Central property, we insist that it is the universal law, binding on all courts without exception, that counsel and parties cannot be refused a hearing on an essential point by a court, on the ground that the court is satisfied in their favor on the point, and then be defeated and condemned by that court upon the very question in which a hearing is so denied.

To do this is a violation of a fundamental right now guaranteed to every citizen under civilized governments everywhere.

We raised both questions as federal questions, regularly and specifically, and these are ignored in the opinion of the Supreme Court of the State.

The right to a hearing is announced over the door of the Place of Justice as a first assurance to every citizen, and he is advised of it as an elementary right which the Constitutions protect him in as the first and absolute requisite of "Due process of law."

The Judgments and Execution were not due process of law.

Aside from all other questions arising on the conditions of this record as to the constitutionality of any statute (as the provisions of our Constitution are construed by the State court itself) which should authorize a judgment against a citizen whose property is sought under the power of eminent domain, *the statute itself puts no jurisdiction anywhere to enter a judgment against him unless he himself has appealed from the award of compensation and goes into a new trial in which the award is reduced.*

The language of the statute is, "If the amount is diminished the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor, and for costs of the appeal shall be rendered "AGAINST THE PARTY SO APPEALING."

The next line expressly refers to the case where a citizen appeals.

Now, the plaintiffs in error were NOT "THE PARTY APPEALING" in this case.

The defendant in error *was* the "party appealing."

We shall insist on the argument that this language of the statute is no clerical error, but is the law under the decisions of the State Supreme Court construing our Constitutional provisions.

The citizen brought into court by compulsion, owing no duty which he has violated, knows that under the Constitution of his State, as construed by her courts, no verdict for his compensation can be disturbed (except in case of acts *going to the jurisdiction* of the special tribunal for condemnation), unless he himself *waives* the verdict by appealing.

No verdict for the citizen, in such cases, was ever before vacated in Michigan on an appeal by *the condemning corporation* except for causes going to the jurisdiction. Never for excessive damages or alleged irregularities.

See all the Michigan cases supra, of which 83 Mich., 415; Union Depot vs. Jones, and Crane's Case, 50 Mich., 182-187, are fairly representative.

The reasoning of the court below on the question of costs (61 N. W. R., 791 top) under this statute, is, we submit with due respect to the State court, logically absurd. There is no provision for costs against the citizen "appealing," unless the award is finally "diminished." None, by the letter or by our State's construction of the statute, in case the award is "increased."

But of this on the oral argument.

The Execution.

The action of the court in issuing the writ, and the seizure under it of $110,000.00 in value of personal property was before the court, as shown by the motion record, on our allegation that it was not due process of law.

The statute providing for judgment, did not provide in what court it should be entered, and *did not provide for execution at all*. Judgments do not imply executions (Freeman on Judgments, p. 4; Kramer vs. Redman, 9 Iowa, 114).

In Michigan, as elsewhere, it is the law, that when proceedings are statutory, within the statute, which must be strictly pursued, must be found authority for every act, remedy and process. If the statute fails to provide any proceeding essential to execute its purposes, the statute must fail for want of that essential. Nothing can be imported into it, to help it out, from other statutory and common law remedies. The remedies provided are exclusive.

The case of *Derby v. Gage, 60 M., 1.* The statement of the case and in the decision, is a restatement of this principle, and not, as the court below deems necessary to explain, an authority merely that an execution could not issue against a petitioning corporation in the case stated.

To get an execution in this case it was necessary to go for alleged jurisdiction to the statute of practice applying to common law nisi prius courts and the Supreme Court. (Howell Comp., § 3468.)

This the Supreme Court does without further reference to the subject.

Yet the Probate Courts are under the law used for condemnation proceedings.

If the Supreme Court is right here, then the Probate Courts may issue execution under the same statute, although that court holds uniformly that the Probate Court has no powers of a common law nature. (Holbrook vs. Cook, 5 Mich., at p. 228.)

And in D., L. & N. R R. vs. Probate Judge, 63 Mich., 676, Justice Campbell passes on the powers of Probate Courts in this class of proceedings for condemnation, and holds that they have no common law powers, and that such powers cannot be conferred by statute in aid of the jurisdiction.

PRACTICE IN THE STATE SUPREME COURT ON CERTIORARI.

The Supreme Court of the State gets its jurisdiction to issue the writ of certiorari from the Constitution of the State, and not by statute.

Specht vs. Detroit, 20 Mich., 168.
Lantis Case, 9 Mich., 324.
Farrell vs. Taylor, 12 Mich., 113.

The practice on certiorari is, therefore the common law practice.

The 16th rule of the Supreme Court of the State requires an assignment of errors in accordance with that practice. That rule is as follows:

"Rule 16—If the plaintiff in error fails to have the writ of "error, *or certiorari* returned on or before the return day thereof, "or to *assign errors*, and serve copies of such assignment within "the time allowed for that purpose, the defendant in error may "move the court to have the writ of error, or *certiorari* dismissed "for want of prosecution."

Stokes vs. Davis, 10 Mich., p. 290, cited by counsel for defendant in error, is not an authority. It is a *per curiam* statement consisting of a line without any statement of the case, and simply to the effect that an amendment was not required.

An assignment of errors is necessary, and doubtless may be inserted in the application for certiorari, as was done in the case cited by the counsel from 69th Mich., pp. 572-576—Grand Rapids vs. Weiden. For aught that appears an assignment of errors was in the application for the writ in the case of Stokes vs. Davis, *supra.*

The case of Witherspoon vs. Clegg, 42 Mich., 485, and cited by counsel, and other similar cases on certiorari from *justices' courts*, are not in point at all, for the simple reason that certiorari

proceedings to justices' courts are *purely statutory*, and the *statue requires* that the errors shall appear on the face of the affidavit for certiorari. How. Stat., Section 7032, et seq.

"Statutory certiorari is special, and the proceedings to obtain "a review thereby must be strictly complied with."

Sherwood vs. Allegan Circuit Judge, 80 Mich., 270.

All that is meant in the 65 Mich., 572-576, *supra*. as to the practice in the Supreme Court is this: That the application for certiorari must present a record showing the errors complained of, afterwards to be assigned, "as in a bill of exceptions."

Knapp vs. Gamsby, 47 Mich., 375.

Of course, an assignment of errors set out in the application for certiorari would be considered, but inasmuch as the application for certiorari must be sworn to, it is not the proper practice to make the petitioner for it swear to a lot of assignments of error in law. The proper practice is, under the jurisdiction of the *Supreme Court* in certiorari, to assign errors precisely as was done in this case, and as is required by the rule.

THE ERRORS OF LAW IN THE OPPOSING BRIEF ARE

(1) In ignoring the federal questions presented and argued below, as we have seen, on the evident ground that the Supreme Court of the State avoided passing upon them in its learned opinion.

(2) In his statement of the practice in certiorari.

(3) In assuming that to raise the federal questions, we must show discriminating *legislative* action, or that we allege that the statute is a violation of the Fourteenth Amendment, rather than that the same principle applies to *judicial* acts, and that we allege discriminating judicial action in giving one construction of the Constitution of the State to others, and another to plaintiffs in error.

(4) In assuming that we contend, or that it is necessary that we contend, that the Supreme Court of the State has no power to overrule or reverse prior decisions; whereas we allege that it has not reversed or overruled prior decisions at all, nor assumed to do so, but has adhered to the former decisions on the construction of the Constitution, and still adheres to them, but denies to us the benefit of that construction.

(5) In assuming that we attack the application or construction of the *statute*, rather than the failure to apply and construe as usual the provisions of the fundamental law—the *Constitution* of the State.

(6) In the misapprehension and misapplication of the statute and authorities in New York, under a radically different Constitution, to cases arising under the Michigan Constitution.

THE STATE COURT OPINION IN THE JUDGMENT APPEALED FROM.

This was a case in certiorari.

(Depot Co. vs. Backus, 61 N. W. R., p. 788.)

Postponing until the hearing on the merits some further discussion of that decision, and of the exceptionally well prepared

charge of the trial judge below, quoted in that opinion, we desire in this place to make one other comment upon the latter. We quote:

"The case was afterwards brought to this court by appeal, "and is reported in 92 Mich., 33, and 52 N. W. R., 790. After "that decision, the case was again tried before a jury, resulting "in a verdict for Absalom Backus, Jr., for $15,000, and for "Backus, Jr., & Sons for $48,000. For a full statement of the "case reference is had to the former decisions. The case is "now brought before us on a writ of certiorari, and *substantially "the same questions are involved and argued as are stated in "the opinion in the 92 Mich. and 52 N. W. R.* No motion "was made for a re-hearing of that decision. The case was "remanded for new trial under the rulings then made. The "respondents will not now be heard upon the questions then "decided, and we shall not argue them. By entering upon a "new trial without a motion for a re-hearing, both parties "adopted that decision as the law of the case, and conducted "the trial under it. All the questions are, therefore, *res judicata*, "and are not now open for review!"

This on certiorari—not error or appeal. ("Certiorari is not a flexible remedy, as *it only admits of quashing the proceedings reviewed or of refusing to do so.*" Whitbeck vs. Common Council, 50 Mich., 86.—"Condemnation proceedings" on certiorari, 1 Jacobs & Ch. Mich. Dig., p. 182.)

We have seen before at page 11 of this brief that the Supreme Court of the State reviews only jurisdictional questions on certiorari. The principles applied to the review of cases at common law, or in equity, on mere questions of error in the admission or exclusion of evidence, or upon the usual issues heard in such cases, can hardly be ruled as applying to us on this record. No new trial was sought or could be sought in the case by plaintiffs in error.

We have also seen at page 30 of this brief that after the decision referred to in the 92d Mich., which was a *reversal*, we could not come here as from a final judgment, under R. S., 709. Our position was that every direction given in the 92d Mich., and all subsequent proceedings in the State court, were absolutely void, including the execution, because without jurisdiction, and in direct violation of the Constitution of the United States.

After the decision in the 92d Mich., all parties and courts fully understanding that we proposed to assert their void character under the Fourteenth Amendment, we had two courses open to us.

(First) We could have abstained from attending the third trial at all, waited until some action was taken sequestering our property, or attempting to do so, and then have sued the officer of the State court as a trespasser in the Circuit Court of the United States, under the Act of Congress of March 3, 1887, amending the Act of 1875, giving that court original jurisdiction in any suit of a civil nature at law or in equity, arising under the Constitution or laws of the United States, and so raised these questions, bringing on an undesirable conflict of jurisdiction.

(Or second) Having regard to the rule of comity, we could enter the State court, under protest against the jurisdiction, raise the same federal questions, get to the Supreme Court for a final judgment on these federal questions, and come here in a way more preferable under the circumstances, under Section 709 of the Revised Statutes, on precisely the same record which we might have made in an original suit for trespass in a federal court.

This latter course we have taken.

To say, or to suggest, that by so doing, we have waived any of the jurisdictional questions, or the federal questions, or by not making a motion for re-hearing in the 92d Mich., we have waived anything, or that we are bound by anything said in that case by the court, in any way, manner or form, is not the law.

Neither can we be obstructed on such questions as these by any possible application of the doctrine *res judicata*. The record will show that we protested the jurisdiction at every stage in regular and due form, and that we went into the proofs under protest, and then only, as stated, to establish our position under the Constitution of the United States, as discussed at pages 31-34 of this brief.

We submit that the motion must be denied.

DON M. DICKINSON,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

Filed Jan. 3, 1898.

ABSALOM BACKUS, JR., and A. BACKUS, JR. & SONS (a corporation),

Plaintiffs in Error,

vs.

THE FORT STREET UNION DEPOT COMPANY.

Error to Supreme Court of Michigan, October Term, 1897.—No. 55.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

DON M. DICKINSON,
Of Counsel for Plaintiffs in error.

DETROIT:
JOHN P. BEST, PRINTER.
1897.

Supreme Court of the United States.

ABSALOM BACKUS, JR., and A. BACKUS, JR. & SONS (a corporation), Plaintiffs in Error, vs. THE FORT STREET UNION DEPOT COMPANY.	Error to Supreme Court of Michigan, October Term, 1897.—No. 55.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

PARTIES.

Absalom Backus is a citizen of the State of Michigan and of the United States, residing in the City of Detroit;

A. Backus, Jr., & Sons is a corporation created and existing under the laws of the State of Michigan, and having its principal office and carrying on its business in the City of Detroit;

The Fort Street Union Depot Company is a corporation created and existing under the laws of the State of Michigan.

This case has been before this Court on the motion of the defendant in error to dismiss the writ of error for want of jurisdiction. On that motion, printed briefs were filed, and the questions on the motion to dismiss were reserved for the final hearing.

Since the motion to dismiss was so disposed of, all the essential questions there presented have been ruled in favor of the plaintiffs in error by this Court in its judgment delivered on March 1st, 1897, in the case of Chicago, Burlington & Quincy R. R. vs. Chicago, 166 U. S., page 226. The motion to dismiss for want of jurisdiction is discussed and passed upon in that case commencing at the bottom of page 230.

As in that case, the proceedings in the courts of Michigan, now brought here, were instituted by the defendant in error for the condemnation of property for alleged public purposes.

THE PROPERTY AND BUSINESS INVOLVED AND ITS RELATIVE SITUATION TO THE RAILROAD.

The business of A. Backus, Jr., & Sons was manufacturing the finest of woodwork, and in that it had been engaged for many years, and in that had accumulated its plant in the City of Detroit. It manufactured fine moldings in fancy woods, in oak, ash, clear pine and white woods for inside house finishings, casings, car sidings, car roofing, and general house building lumber for finishings, all for oil finish; also fine moldings for pictures, wainscotings, ceilings, moldings and floorings in houses. (R., p. 1213, folio 2063—pp. 1493-4.)

While it has been also called a box factory sometimes by the *nisi prius* Judge (Gartner) and counsel, to depreciate the character of the business, the box business was but a tenth of the business, and the boxes were made from the lower grades of lumber, strippings from it, and odds and ends. (R., pp. 1488-1493.)

The machinery was of the most delicate description, and the work required not only skilled men, but the utmost

alertness in directing the delicate tools, the best of light, and above everything in the product, cleanliness.

Sales were made all over the United States and Canada; the competition was very great; the profits exceedingly narrow, and success depended upon fine work and volume of business.

The plant was all situated in the City of Detroit, and consisted of three parts: (1) The manufacturing establishment or mill, situated on the northerly side and fronting on River street, which is the oldest of the public streets of Detroit, and is the first street inland from the Detroit River, with which it is parallel. This mill covered one and three-fourths acres of land, with a front on River street of two hundred thirty-eight and forty-hundredths feet, extending back through the block to the next steeet—Fort, which street is fifteen feet higher than the level of River street; (2) A large lumber yard, consisting of seven acres, with a dockage front on Detroit River, and a city front on the opposite side of River street, below the mill, and was the reception place for receiving and seasoning the raw lumber, and for shipments of product by water. (3) The remaining part of the plant was a short distance above the mill on Fort street, covering nearly a block, and consisted of a large brick structure for the clean storage and sale of the fine product of the mill.

The Michigan Central railroad furnished railroad accommodations for shipment *at grade*. That road passes under Fort street, and approaching River street obliquely, passes the northwesterly side of the Backus property, contiguous to it, with its main tracks eighty feet distant at the extreme end, and continually receding until it is three hundred feet from the Backus property as it passes into River street. The mill is of brick, forty-five to forty-eight feet high, and the mill was built and arranged, as

shown by the record, with reference to its relative situation to the Michigan Central Railroad, and for the protection of the property from that road, a stone wall was built the whole length of the factory between it and the Michigan Central road. (R., p. 551.)

The interest of the parties was as follows: The fee of the realty was in A. Backus, Jr., the originator of the business, and was rented by him to the corporation by a lease made in 1885 for $18,000.00—$5,000.00 for the factory site, $12,000.00 for the lumber yard property, and $1,000.00 for the warehouse. The cost and value of the plant and its volume of business will be referred to later.

The structure of the defendant in error—the Union Depot—fronts upon Third and Fort streets, and with its local freight house covers about six acres. To reach it by the Union Depot Company approach, their elevated railroad structure enters fully into full possession of River street at Twelfth—a street running at right angles with River street just below the Backus factory. It pursues River street past the Backus front toward the center of the city to Seventh street, and then curves out of the street to its new depot. Shortly before reaching Twelfth street, in its approach to the Backus factory, the structure begins an elevated grade and passes Twelfth street, with an ascent of fifty-two and eight-tenths feet per mile, and continues ascending more gradually until reaching and passing the Backus property, through its entire front, it is at an ascending grade of twenty-two feet to the mile. The elevated structure spans the entire width of River street, both in front and below and above the Backus factory, from curb to curb. In front of the Backus property there are three broad gauge tracks. There is a switch in front of the Backus property, and a switching house. Added on to the width of the railroad viaduct itself, and contiguous to it, there is an elevated viaduct

for teams, solidly made, of the width of twenty-four feet. All three tracks are laid upon ties, and the space between the ties is six inches. The cars in passing project over the elevated structure from one to two feet. The top of the rails on the structure in River street is twenty-five feet from the roadway.

The enormous business—freight and passenger—passing over the road up that grade in front of the Backus property per day, is shown by the testimony of Daniel R. Griswold and his associates, at the last hearing, who took daily observations for a period (R., pp. 1228-1229 et seq.), which is in no manner contradicted or challenged.

The grade above stated up which locomotives must labor is shown by the admission at pp. 1233-4 of Record. Freight of the heaviest description is carried over that road, and trains are made up in front and stand there. (R., p. 1235.)

The fatal effect upon the peculiar nature of the business is shown hereafter under the proper head.

THE PROPERTY TAKEN.

In Michigan, as elsewhere, the land-owner upon a street, or any public highway, as upon a stream, owns to the center of the street or stream as a part of his freehold. This is the presumption and the rule without any qualification, unless an express limitation is inserted in his grant. Cooley, J., in G. R., etc., R. R. vs. Heisel, 38 Mich., pp. 62-72; Watson vs. Peters, 26 Mich. (Ann.), p. 508, note 1 and cases; Purkiss vs. Benson, 28 Mich., pp. 537, 540, 542 (Campbell, J.); and in such cases "the gen-"eral principles on which damages will be assessed would "be the same that they would have been had no highway "previously existed, and the existence of the highway "would only be a circumstance tending to diminish the "recovery."—Cooley, J., in 38 Mich., 69.

But furthermore, his property right, in addition to that, extends to the easement on the other half of the street and up and down the street for light, air and movement.

"'The constitutional provision is adopted for the pro-
"'tection of and security to the rights of the individual
"'as against the government,' and the term 'taking'
"should not be used in an unreasonable or narrow sense.
"It should not be limited to the absolute conversion of
"property, and applied to land only; but it should in-
"clude cases where the value is destroyed by the action
"of the government, or serious injury is inflicted to the
"property itself, or exclusion of the owner from the en-
"joyment, or from any of the appurtenances thereto. In
"either of these cases it is a 'taking' within the meaning
"of the provision of the Constitution."—Pearsall vs. Supervisors, 74 Mich., 558, which was a discontinuance of a state road.

In Grand Rapids vs. Heisel, 47 Mich., 394, it was held that the use of a street by a railroad as to an adjacent owner was a "taking" such as could only be acquired by condemnation proceedings, and the authorities are there cited.

In Riedinger vs. Marquette R. R., 62 Mich., 29, the City of Marquette granted the use of a street to a railroad and the railroad company was enjoined. The Court says that "the purchaser of a lot fronting a street has a right "to have the street kept open for the usual and custom-"ary methods of travel. The grantor cannot, thereafter, "withdraw or change the use of such public spaces, to "the detriment of the grantees and the destruction of "their right in the street or public grounds on which their "lots abut."

To same effect Taylor vs. Railway, 80 Mich., 77 (Grant, J.)

So far as the other half of the street is concerned, the Supreme Court of Minnesota said, in Lamm vs. Chicago

R. R., 45 Minn. R., p. 71: "The very groundwork upon "which recovery is based is that an abutting owner has, "in the *opposite half of the street*, not a fee, but an ease- "ment for light and air for the benefit of his premises."

The leading case in New York is the Elevated R. R. case of Lahr, 104 N. Y., 268, to the effect that the property of the abutter in the street consists of his easement up and down the highway on each side, and beyond him, as well as for the entire width of the street. To the same effect see the large number of cases cited in the 36 Eng. & Am. Railroad cases, page 16 and note.

THE PROCEEDINGS.

The proceeding was commenced in the usual form by petition filed January 24, 1891, in the Circuit Court for the County of Wayne. The respondents demanded a jury. Under the Constitution of the State of Michigan, the jury and the same jury must pass on the question of necessity as well as of compensation.

The first hearing before a jury, which was, in accordance with the fundamental law and practice in Michigan, without an attending judge, was commenced on February 25, 1891, and terminated on March 18, 1891, in a disagreement of the jury on both issues—that of necessity and compensation.

A second hearing before a jury, also without an attending judge, was commenced on June 10, 1891, and resulted on July 16, 1891, in the following verdict:

> "In favor of the railroad company on the ques- "tion of public necessity, assessing the damages of "the respondents as follows:
> "To Absalom Backus, Jr., as the owner "of the fee.....$17,850.00.
> "To the corporation, A. Backus, Jr., & "Sons ..... 78,293.00."
> (Record, p. 847.)

Thereupon the petitioning railroad company made a motion, before Circuit Judge Gartner, to set the award of the jury aside, and to order a new trial before another jury, which order was granted on October 26, 1891.

Thereupon the respondents—the plaintiffs in error—applied to the Supreme Court of the State for writ of mandamus to compel the Circuit Judge to set aside the order vacating the award and for a new trial, as being unprecedented and beyond the jurisdiction of the Circuit Judge under the Constitution and Statutes of the State.

On a full hearing by a unanimous bench, the mandamus was granted on November 19, 1891—Chief Justice John W. Champlin delivering the opinion. (R., p. 931.) Backus et al. vs. George Gartner, 89 Mich., 210.

Thereupon, on November 27, 1891, without waiting for any action on the part of the respondents—these plaintiffs in error—*the railroad company* moved for a confirmation of the award before the same Circuit Judge, and served a copy of the proposed order, novel in form, set out at page 945 of this Record.

That order provided for the deposit of the amount of the award in the Detroit National Bank, to remain on deposit in said bank "subject to be drawn therefrom and "to be paid to the parties entitled to the same on orders "signed by one of the judges of this court and counter-"signed by the clerk;" and further providing that on such deposit that the railroad company should be "entitled to "enter upon and take possession," and that the respondents should be "divested and barred of all right, estate "and interest in such right of way."

Plaintiffs in error appeared and objected to the form of the order and insisted on the usual form (Rec., p. 943), but were overruled and the order as proposed entered on November 30, 1891. (R., p. 945.)

Two days thereafter, on December 2, 1891, the defendant railroad company appealed to the Supreme Court "from the verdict, award and report of the jury in this "cause and from the confirmation thereof." (Rec., p. 947.)

It is to be observed in passing that the appeal was from the award and confirmation on both questions—that of *necessity* as well as that of compensation.

On January 26, 1892, the railroad company took complete possession of the property sought to be condemned, constructed its railroad in every respect as sought in its proceedings, operated the roads to their full capacity, as hereinafter shown, and on the same date paid over directly to the respondents—plaintiffs in error—the total amount of the award. (Rec., pp. 1151-1152.)

These facts as to the possession and construction of the railroad were fully before the Supreme Court on the certiorari record, as well as the fact of payment of the award.

On March 3, 1892, the appeal was argued, and on June 10, 1892, after having heard the appeal, the Supreme Court of the State entered an order setting aside the verdict and award of the jury in so far as the same fixes and determines the compensation and damages, and *confirming* the award of the jury on the question of public necessity, and further ordered a new hearing before a new jury on the question of compensation alone (Rec., 968, fol. 1670)—the Chief Justice dissenting in a full opinion.—Union Depot Company vs. Backus, 92 Mich., p. 33—dissent, p. 59.

In its judgment, the Supreme Court of the State held that its unanimous judgment in the case of Backus vs. George Gartner, 89 Mich., 210, delivered by Chief Justice Champlin, who had since left the bench, was erroneous, and reversed it, although no rehearing between the parties in the case of Backus vs. George Gartner, 89 Mich.,

p. 210, had been ordered, directed or permitted. (Rec., p. 1831, fol. 3069 bottom.)

Thus, by the reversal of the mandamus judgment in 89 Mich., p. 210, the case went back to Judge Gartner, in effect conferring upon him power to grant one or more new trials in his discretion until a verdict should be reached to his satisfaction. There could be no other or further appeal to the Supreme Court of the State, even under the incongruous statute hereinafter set out. The Supreme Court itself if it could grant a retrial at all under that statute, was limited to but one exercise of that power.

Up to the decision in 92 Mich., p. 33, no federal question could have been raised, as that case was a *reversal*, from which we could not come here under Revised Statutes, sec. 709—Baker vs. White, 92 U. S., 176; Houston vs. Moore, 3 Wheaton, 433; Macomb vs. Knox County, 91 U. S., 1; Mayberry vs. Thompson, 5 How., 121; Rankin vs. State, 11 Wall., 380.

On the mandate of the Supreme Court of the State going down, a motion was made before Circuit Judge Gartner for an order to impanel a new jury and for a retrial. (Rec., p. 970.)

Whereupon the respondents—the plaintiffs in error—filed a sworn plea and protest in their own proper persons, challenging the jurisdiction on the following grounds:

That the order and direction of the Supreme Court and of the court below, directing a re-trial and the proposed re-trial did and would constitute a denial by the State to the plaintiffs in error of the equal protection of the laws, contrary to Article XIV. of the Constitution of the United States, specifying and pointing out the violation of the Constitution of the State, and the discrimination on the part of the State against the plaintiffs in error in hold-

ing one construction of the constitution and laws of Michigan as to the plaintiffs in error, and another construction for other citizens of the State; and also setting out that the proceedings sought to be taken were not Due process of law, and were in violation of Section 1 of Article XIV. of the Amendments to the Constitution of the United States, in that behalf, with three specifications thereunder. The plaintiffs in error interposed these federal questions as their only defense upon this hearing. See plea and protest. (Rec., pp. 971-974.)

The plea and protest were overruled by Circuit Judge Gartner on April 17, 1893, and an order was entered to proceed with the hearing before a new jury (Rec., pp. 974-975), and the trial was ordered to proceed on September 5, 1893.

Thereupon the plaintiffs in error renewed and repeated the protest and the hearing proceeded with Circuit Judge Gartner sitting as a controlling judge and a member of the tribunal as hereinafter shown, the former protest and others raising the federal questions being made at every stage of the proceedings as the hearing went on, as hereinafter shown. (Rec., pp. 980, 1150, 1152, 1784.)

The judge refused to submit the question of necessity, and under his direction and charge, at all times sitting, the jury so impaneled returned a verdict, assessing the damages of Absalom Backus, Jr., at the sum of $15,000.00, and of A. Backus, Jr., & Sons at $48,000.00.

Then the Union Depot Company moved the said Judge Gartner that a judgment should be entered against Absalom Backus, Jr., for $2,850.00, with interest from the 23d day of January, 1892 (the date of payment of the original amount by the railroad company), and against A. Backus, Jr., & Sons for $30,293, with interest from the 23d day of January, 1892, and also a judgment against

the plaintiffs in error for costs of the second trial and costs of the appeal. (Rec., p. 1784, fol. 2985.)

Whereupon the plaintiffs in error, appearing against the entry of the judgment, formally repeated their former objections in which they had raised the federal questions heretofore referred to, claiming that the proceedings were void on those grounds, and specifying other federal questions that had arisen in the progress of the trial, including that of jurisdiction to enter a judgment at all. (Rec., p. 1786, No. 4, No. 18.)

The objections to the entry of judgment were overruled, and on December 28, 1893, Circuit Judge Gartner ordered a judgment against the plaintiffs in error, in accordance with the aforesaid motion, and taxed the costs of the defendant in error at $4,168.20. (Rec., pp. 1791-93.)

Special objection was made to the taxation of costs as being beyond even the statutory power. (Rec., p. 1794.)

Special objection was also made to the ordering of an execution, as being beyond the jurisdiction of the court, and as not, therefore, being due process of law, but the objection was overruled, and three writs of execution were issued, one against Absalom Backus, Jr., for the amount above stated, one against A. Backus, Jr., & Sons for the amount of said costs, and the other against A. Backus, Jr., & Sons for the amount of the judgment as aforesaid against them. (Rec., pp. 1796 to 1800.)

These executions were levied upon the personal property in their business of the respective plaintiffs in error, and upon thir real estate. The property in their business levied upon was all their steam engines, boilers and machines in their planing mill, and all of their lumber, manufactured and unmanufactured, in the City of Detroit, of the value of one hundred thousand dollars, and pine and hardwood lumber and other personal property belonging to Absalom Backus, Jr., of the value of ten

thousand dollars. (Rec., pp. 1797, 1798, 1800, 1801, and p. 1806.)

Whereupon, on the 26th day of June, 1894, the plaintiffs in error filed their petition in the Supreme Court of the State of Michigan (Rec., p. 1802), setting up all and singular the premises, and prayed for the writ of certiorari, wherein and whereby they set up all the federal questions as heretofore presented in the court below and others, as shown in their application for the writ at folios 3019, 3021, 3022, 3023 of Record.

This writ was allowed by the Supreme Court of the State of Michigan on June 27, 1894, and brought to that court the return of this record with the assignment of errors (Rec., 1808-1809), which assignments distinctly and specifically raise all the federal questions by specifications hereinafter discussed. (See Assignments of Error, at pages 1809 to 1815 of Record.)

The judgment and executions with the sheriff's return of seizures were taken up and error alleged upon them that they and each of them were not due process of law under the fourteenth amendment. The proceedings were wholly statutory and, of course, within the statute, must be found authority for every process and proceeding. There is no provision there for execution. There is no authority there for any judgment against a respondent citizen unless he shall have waived his constitutional right to the award paid by *appealing from it himself*, with the result of reducing the amount of the award.

There being no other questions raised except the federal questions on the last hearing, as shown by the record on certiorari, the Supreme Court of the State, in an opinion which did not refer to these questions, affirmed the proceedings below with costs on January 8, 1895.

The opinion is reported in 103 Mich., page 556.

Whereupon we come here on the allowance of the writ of error by an Associate Justice of this court made on March 15, 1895, and assign errors in this court as set out at page 1823 *et seq.* of the Record.

SUMMARY OF THE FEDERAL QUESTIONS RAISED ON THIS RECORD.

The plant of the plaintiffs in error was practically the first private property encountered by the railroad after its route left its own, or the old depot grounds, and entered River street. It was the first case for trial (R., 148), although the Railroad Company before finishing with them, proceeded with condemnations beyond them. From the beginning of the matter, when the first jury disagreed on the question of necessity, and later at the second hearing (R., p. 21) until the close, the plaintiffs in error made the contest in accordance with their rights, as hereinafter shown, on the question of the necessity of pursuing the route by their property. A majority of the second jury, as appears, was against that necessity. They believed, as was finally demonstrated at the last hearing by the results of the practical operation of the railroad enterprise on that route, that it would destroy their exceptional and peculiar business.

Their claim here is that owing to that fact, and to the further fact that anything like just compensation to them in the conditions would be extremely burdensome to the railroad enterprise, their fundamental rights were lost sight of, and under the whip and spur of the clamor for public improvements they were denied every protection guaranteed in such cases to the individual citizen by the Constitutions of the State and of the Nation.

The points will be discussed under the following heads:

I. They were denied the fundamental right to have an ascertainment and determination of the amount of compensation and its final payment before being deprived of their property.

Assignments of error, Nos. 1, 3, 5 and 6 (R., p. 1824, et seq.); Assigned in State Supreme Court, No. IV., V., XIII., XXIX. and XXXI. (R., p. 1810, et seq.); Petition for certiorari (R., pp. 1803-5-6); Set up in the trial court (R., p. 973); R., pp. 1785-1788, No. 18.

II. They were denied the protection of that guaranty of the State Constitution providing that the question of compensation and necessity should be passed upon by one and the same jury, and of the settled, uniform and unreversed construction of the Constitution to that effect by the State Judiciary in respect of all other citizens.

Assignments of error, Nos. 7, 2, 5 (R., p. 1824, et seq.); Assigned in State Supreme Court, No. VI.-I.-II.-IV. (R., p. 1810, et seq.); Petition for certiorari (pp. 1804-5-6); Set up in the trial court (R., p. 971, No. 1, p. 973-(2) (2); R., p. 1786, No. 5-6-7, p. 1788, No. 18.)

III. They were denied the protection of a trial on the questions of necessity and compensation by the Tribunal guaranteed by the Constitution of the State, in accordance with the settled, uniform and unreversed construction of that Constitution in respect of all other citizens.

Assignments of error, No. 4 (R., p. 1825); Assigned in the State Supreme Court, No. 3 (R., p. 1810), and No. 11; Petition for certiorari (R., pp. 1804-5-6); Set up in the trial court (R., p. 973, No. (1); R., p. 1786, No. 4.

IV. They were denied that measure of just compensation for their property taken, guaranteed by the Consti-

tions, Federal and State, as the same was and is accorded to all other persons than themselves.

Assignments of error No. 8 (R., p. 1827); Assigned in the State Supreme Court, No. VII. (R., p. 1811; Petition for certiorari (R., p. 1805); Set up in the trial court (R., p. 372, No. 2); R., p. 1787, Nos. 8-9-10-11, p. 1788, No. 18.

V. They were denied a hearing and deprived of a hearing guaranteed by the Constitutions, Federal and State, as "Due process of law," when summoned into court as appellees to defend their property rights and themselves from imputations upon them.

Assignment of error, No. 12 (R., p. 1828). The first three lines of this assignment of error down to the word "because" is an error in printing, they having been imported from some other place.) Assigned in State Supreme Court. No. 33 (R., p. 1815.) Petition for certiorari (R., p. 1806, bottom.)

VI. Finally, having been deprived of their property sought by the railroad company for its purposes, their personal assets of the value of one hundred and ten thousand ($110,000.00) dollars, were taken from them under the color of a judgment and process unknown to the Constitution and Statutes of Michigan, and unknown to jurisprudence, whereby they were deprived of their property without "Due process of law."

Assignments of error, Nos. 9, 10, 11, 6 (R., p. 1827); Assigned in State Supreme Court, XXXI., XXXII. (R., p. 1814); Petition for certiorari (R., p. 1806); R., p. 1785, No. 1.

Under these heads, wherever we contend that the plaintiffs in error have been denied the equal protection of the laws by discrimination, we do not appeal against the construction by the Supreme Court of the State of the Michigan Constitution or Statutes. (Merchants' Bank vs. Pa.,

167 U. S., 461; Long Isl. Water Sup. Co. vs. Brooklyn, 166 U. S., 685.) On the contrary, we appeal to that construction. We call marked attention to the fact that the record discloses that on all these questions we challenged the attention of the State Court to its own uniform and settled construction of the fundamental law and statutes involved; and that in the opinion in 103 Mich., p. 566, there is no departure from or modification of, much less a reversal of the court's settled positions in respect of any of those questions. The constitutional questions, although distinctly presented, are for the most part entirely avoided, and we appeal to and rest upon the repeated adjudications of that court where they *have been* passed upon.

On two single points cases are referred to in the opinion, but the court assumes that its decision is in line with them. It does not reverse or modify, or indicate a purpose to do so, and we will submit, after presenting the judgments of the Michigan Supreme Court, that in the absence from this opinion of any modification of or departure from their uniformity in construction of the fundamental and statute laws of Michigan, this Court will construe the language of those judgments for itself.

THE STATE COURT OPINION, 103 MICH., 556.

In limine, we submit that we come to this court under Section 709, on the final *judgment* or decree of the highest court of the State of Michigan, on a record which in that court involved nothing but the federal questions pointed out in that section. We do not come here on an appeal from the *opinion* of the Supreme Court of the State delivered in the case where such judgment was rendered. Enlightenment upon this distinction is not yet so universal as to reach the deep-seated conviction of many that if the

opinion of a state court is so framed as not to draw in question in terms the right of a citizen under the constitution and laws of the United States, then he cannot reach this jurisdiction.

Inasmuch as this record on the final judgment of the Supreme Court was a record on *certiorari*, and as the state court in its opinion in 103 Mich., page 556, treats the case, as it seems to us, precisely as if it were thereby appealed, it becomes necessary at the outset to refer briefly to that opinion in connection with the distinction in rights, jurisdiction and practice on *certiorari* in Michigan as uniformly held by its Supreme Court; otherwise, that opinion, standing by itself, might perplex, if not mislead.

From the date of the decision of the State Court of last resort on June 10, 1892, reported in 92 Mich., page 33 (from which, as has been seen, we could not have come here), the plaintiffs in error, as shown by this record, have persistently contended, by due claim and specification, that every order and direction of that judgment, and everything done under it by the Circuit Judge below, from the issuance of the mandate to the taking of their property under the writs of execution, were absolutely void for want of jurisdiction, on two general grounds; (one), because in and by such proceedings the plaintiffs in error were denied the equal protection of the laws by the State of Michigan, in violation of Section I. of Article XIV. of the Constitution of the United States; and (two) because by the said proceedings the plaintiffs in error had been deprived of their property without due process of law, in express violation of the same section and article of the Constitution of the United States.

Careful specifications under these two general heads, as has been seen, appear by this record at every stage of the proceedings, from the decision in 92 Mich., p. 33, on

June 10, 1892, until the only decision from which we could appeal to this court was made on January 8, 1895, —103 Mich., 556.

Even the testimony that was taken in behalf of the plaintiffs in error under protest, as shown by the record, was taken, as shown, to bring out this question of jurisdiction, raised immediately after the decision on the appeal case, to wit:

That the Supreme Court of the State and the court below, under its direction, had adopted a rule as to compensation which was not only in violation of the Constitution of the State, but discriminated against the plaintiffs in error by denying them, and denying *them only*, the rule and measure of just compensation accorded to all other citizens of the State.

These jurisdictional questions going to the validity of all the proceedings were set up in the court below at every stage of the proceedings, as the proper practice required, as held in Spies case, 123 U. S., pp. 131-181, and in Oxley vs. Butler, 166 U. S., 648; and these questions alone were presented in the petition to the Supreme Court for the writ of certiorari, which was allowed, and in the assignments of error, argued as shown on the Record, on which the opinion in the 103 Mich., 556, was rendered.

We now quote from that opinion, so far as we desire to comment upon it in this place in connection with the distinction above referred to:

"This case is now before us for the third time. It was "commenced February 7, 1891. The first jury disagreed. "The second jury found a verdict for the respondents of "$96,143. This verdict was set aside by the Circuit Court "in which the proceeding was tried. The respondents "applied to this court for the writ of *mandamus* to set "aside this order. (89 Mich., 209.) The case was after- "wards brought to this court by appeal and is reported

"in 92 Mich., 33. After that decision the case was again "tried before a jury, resulting in a verdict for Absalom "Backus, Jr., for $15,000, and for A. Backus, Jr., & Sons "for $48,000. For a full statement of the case, refer- "ence is had to the former decisions. The case is now "brought before us on a writ of *certiorari*, and substan- "tially the same questions are involved and argued as "are stated in the opinion in 92 Mich. No motion was "made for a rehearing of that decision. The case was "remanded for a new trial, under the rulings then made. "The respondents will not be heard upon the questions "then decided, and we shall not argue them. By enter- "ing upon a new trial without a motion for a rehearing, "both parties adopted that decision as the law of the "case, and conducted the trial under it. All these ques- "tions are therefore *res judicata*, and not now open for "review. That case was very ably and fully argued by "counsel, and received the most careful consideration by "the Court, of which four of the present members were "then members. A re-examination shows no reason for "doubting the soundness of the conclusions then reached.

"We will now proceed to determine some questions "which were not fully disposed of on the former hearing.

"Complaint is made because the Circuit Judge presided "at the trial, ruled upon questions of evidence, and "charged the jury. No errors are assigned upon his rul- "ings on either the admission or rejection of evidence."

* * * * * * * * * *

"The fact that no errors are assigned upon his rulings "upon the testimony removes that question from discus- "sion. The judge, in both his rulings and his charge, "was very careful not to encroach upon the functions of "the jury. The charge was so clear, so appropriate to "an important litigation (which had been conducted with great ability and vigor on both sides), and so carefully

"guarded the rights of both petitioner and respondents,
"that we here give it in full."

* * * * * * * * * * *

"It is proper here to note that no requests to charge
"were presented on behalf of the respondents."

These quotations from an opinion rendered in a case in that court on certiorari—not on error or appeal!

Now, the Supreme Court of the State, unlike the lower courts on certiorari to Justices' Courts, gets its jurisdiction to issue the writ from the Constitution of the State of Michigan, and not by statute—Specht vs. Detroit, 20 Mich., 168; Lantis case, 9 Mich., 324; Farrell vs. Taylor, 12 Mich., 113.

In Michigan, the writ of certiorari is confined to cases raising questions of jurisdiction, especially in statutory proceedings like this, and to cases of imprisonment. The facts or mere errors in ruling cannot come up for review, neither can mere irregularities.

The Supreme Court of the State in 50 Mich., 88, through Justice Cooley, said: "It is not a flexible rem-
"edy. All we can do under it is to quash or refuse to
"quash the proceedings."

In Dunlap vs. Toledo R. R., 46 Mich., 190 (which was certiorari from condemnation proceedings like this), the proceedings were quashed on certiorari. The court, through Judge Campbell, said: "It is objected that cer-
"tiorari is an improper remedy, and that resort should
"have been had to an appeal. While it is true that cer-
"tiorari should not be favored where any other remedy is
"adequate, it will undoubtedly lie for want of jurisdic-
"tion."

In Lake Shore R. R. vs. Hunt, 39 Mich., 470, it was held by Judge Cooley that certiorari was the appropriate remedy to get rid of a void judgment.

In Farrell vs. Taylor, 12 Mich., 113, Judge Campbell held that only jurisdictional questions, and nothing on the merits can be disposed of on certiorari.

In Specht vs. Detroit, 20 Mich., 171, Justice Graves, delivering the opinion, held that the authority of the Supreme Court to issue this writ results "from the con-"stitution and cannot be taken away by legislative en-"actment;" affirming the 12 Mich., 113, supra, where the proceedings were quashed for want of jurisdiction. Wilson vs. Bartholomew, 45 Mich., 41.

In Withington vs. Southworth, 26 Mich., 381, which was originally a proceeding before a justice, it was contended that certiorari would not lie from the Supreme Court because there is a statutory remedy by appeal or certiorari to the Circuit Court from the justices. Judge Cooley held that notwithstanding the statutory remedy by certiorari referred to was gone by limitation of time, the Supreme Court had jurisdiction to bring up the proceedings by certiorari, and to hold the judgment void for want of jurisdiction. See Lantis Case, 9 Mich., 323. Gentle vs. Board, 73 Mich., at page 46. Held that irregularities are not considered.

Questions which do not go to the jurisdiction are not considered on certiorari—condemnation case, G. R. R. R. vs. Weiden, 69 Mich., p. 580, and see Ryerson vs. Brown, 35 Mich., 332.

(1) To clear the way for the discussion of the fundamental questions here, it is thus necessary to point out that the opinion of the State Court, in its opinion upon the record involving the same questions, is incongruous and confusing. Such points as are there discussed, as if it were a case at common law or in equity, are, as we have seen by the Michigan authorities, radically irrelevant, and cannot be considered on a common law certiorari like this. No new trial was sought or could be sought in the case by plaintiffs in error.

(2) "Substantially the same questions" could *not* be involved as are stated in the opinion in 92 Mich., 33.

(3) The respondents could not conceive before the actual delivery of the opinion in 92 Mich., 33, that the State Court would give directions to the court below which from our point of view would render the proceedings void as repugnant to the Constitution of the United States, or that, without rehearing, it would, in its ultimate decision in 92 Mich., 33, reverse its unanimous judgment in 89 Mich., at page 209, in a case between the same parties.

(4) Naturally, "no errors were assigned" upon mere errors of law, or upon anything except jurisdictional questions. Indeed, in another condemnation case instituted by this defendant in error, the same court, by the same learned judge who wrote this opinion, delivered this unanimous opinion: "These proceedings may be in-"stituted in probate court, the judges of which "are frequently not lawyers, and are unfamiliar with the "rules of evidence. If they were to be set aside on ac-"count of errors in the admission or rejection of testi-"mony, the difficulty of obtaining a finding by the jury "which could stand the test would be apparent" (Union Depot Company vs. Jones, 83 Mich., 418), and in which case the same learned judge quoted from the opinion of the same court delivered by Mr. Justice Campbell in Toledo R. R. vs. Dunlap, 47 Mich., 456, wherein it was said:

"Under our constitution such powers as are strictly "judicial in their character can only be vested in certain "courts which are named in the constitution itself. The "circuit courts—as courts—have such powers. The "judges, as judges, out of court, do not possess them, and "cannot be vested with them. The proceedings to con-"demn lands, although made under the railroad laws, "subject to judicial review and supervision for certain

"purposes, are not in themselves and never have been "regarded as judicial proceedings."

* * * * * * * * * * *

"If a jury has been summoned under proper circum- "stances, has conducted its inquiries legally, and with "due regard to private rights, and has reached a legiti- "mate conclusion as to the necessity of the condemnation "and the compensation, the appropriation of the land, "upon payment of that compensation, will be lawful, and "will not be affected by collateral action by the judge or "court, which may be unlawful. This distinction between "the different tribunals is essential." * * * "*The "judge formed no part of this special tribunal.* The stat- "ute indeed allows the judge to 'attend said jury, to de- "'cide questions of law and administer oaths to wit- nesses.'" * * * "Whatever the language of this "statute literally construed may mean, it is very clear that "any such functions must at most be advisory. *The jury "will undoubtedly be regarded as accepting and doing "what they permit to be done.* But in all such cases the "Constitution as well as the principles of the common "law, makes them judges of law and fact. Their conclu- "sions are not based entirely on testimony."

And the same court, through Judge Cooley, said, in a similar condemnation proceeding, in Detroit R. R. vs. Crane, 50 Mich., 182, that, "We have examined the record "in the light of these objections, and it seems highly "probable that if the evidence had been taken under strict "legal rules, some which was received would have been excluded. * * * But we have shown in previous "cases that we cannot set aside these awards for such a reason. * * * The statute plainly assumes that the "jury may conduct the inquiry *without the aid of any legal "expert.*"

In a condemnation case—Peninsular R. R. Co. vs. Howard, 20 Mich., 18, the same court, through Justice Christiancy, said that in condemnation proceedings "the jury "act in effect as judges in the absence and *beyond the con-"trol of the court.*"

The same court said, speaking through Mr. Justice Campbell, in Railroad Company vs. Chesebro, 74 Mich., 471:

"We held in Toledo, etc., Railway Company vs. Dunlap, "47 Mich., 456, where the jury was impaneled in a circuit "court, that the only functions of the court were to set the "proceedings in motion by organizing a jury or appoint-"ing commissioners, and affirming or vacating the award; "and we held, further, that the jury were judges of law "and fact, and *not subject to interference by the judge*, should "he undertake to accompany them. The statute, which "probably was in this respect borrowed from some other "region, while it does authorize a judge to go with and "decide questions of law and swear witnesses, also allows "him to deputize a circuit court commissioner to do the "same thing. *It would be absurd to consider such action as "valid judicial action. It was held there, as it has been uni-"formly held, that the jury cannot be made subject to any such "instruction*, and must act on their own judgment."

(5) To the statement in the opinion that "no requests "to charge were presented in behalf of the respondents," in addition to the foregoing as to the nature of the procedings, we beg to quote from the unanimous judgment of the same court in the case of F. & P. M. R. R. vs. D. & B. C. R. R., 64 Mich., at page 363, the following:

"I do not consider that any error was committed by "the Court in refusing to instruct the commissioners at "the request of the respondents. The Court might have "done so had it thought proper. But it was not a duty "imposed by law, *and its instructions would not have been*

"binding upon the commissioners had it done so. This has "been settled by our previous adjudications, which were "based upon satisfactory reasoning, and I see no good "object to be accomplished in overruling them."—(Citing at length Michigan cases holding the same doctrine as to juries.)

(6) As to the statement in the opinion that no rehearing was applied for after the decision in 92 Mich., 33, and as to the conclusiveness of that judgment upon the plaintiffs in error for that reason, we respectfully submit our understanding that the only jurisdictional defect that may be so waived is one going to the jurisdiction of the person. A failure of jurisdiction in matter of substance in statutory proceedings going to the bottom of the jurisdiction on fundamental and constitutional grounds, cannot well be waived by appearing before the statutory tribunal under protest, setting up the distinct grounds of total failure of jurisdiction, especially when it is essentially necessary to so enter the tribunal to enable the party to specify the fundamental questions before it in order to invoke the protection of the Constitution of the United States before this tribunal.

Therefore the statement that the decision in 92 Mich., 33, is *res judicata* as to the questions raised on the certiorari in 103 Mich., 566, and brought here, requires no comment.

The doctrine of *res judicata* does appear in this case in connection with the reversal of the unanimous judgment of the Court in this case in 89 Mich., 209, by the Court in 92 Mich., 33, without a rehearing, and it will be pointed out, under the uniform decisions of the Supreme Court of Michigan, except as to these plaintiffs in error, that in respect of it, this is assigned as error below and here as one of the fatal objections to the proceedings, as not being due process of law.

THE PROVISIONS OF THE MICHIGAN CONSTITUTION AND THE STATUTES THEREUNDER.

The provisions for the taking of private property in the Constitution of 1851 are unlike those of other states, as will be seen from the Michigan cases to be reviewed, and the statutes under them, as will be seen by the same cases, are incongruous and in many respects fatally inconsistent with the fundamental law.

The following are the provisions of the Constitution to be considered:

Article XVIII., Section 2. "When private property is "taken for the use or benefit of the public, the necessity "for using such property, AND the just compensation to "be made therefor, except when to be made by the State, "shall be ascertained by a jury of twelve freeholders, "residing in the vicinity of such property, or by not less "than three commissioners, appointed by a court of rec- "ord, as shall be prescribed by law."

Article XV., Section 15. "Private property shall not be "taken for public improvements in cities and villages "without the consent of the owner, unless the compensa- "tion therefor shall first be determined by a jury of free- "holders, and actually paid or secured in the manner pro- "vided by law."

Article XV., Section 9. "The property of no person shall "be taken by any corporation for public use without com- "pensation being first made or secured, in such manner as "may be prescribed by law."

The Supreme Court of Michigan has uniformly held that Sections 9 and 15 of Article XV. of the Constitution must each be read, construed and controlled by the first provision above quoted, Section 2 of Article XVIII.

So held in Campau vs. Detroit, 14 Mich., 283; People vs. Brighton, 20 Mich., 69; Paul vs. Detroit, 32 Mich., 108; Horton vs. Grand Haven, 24 Mich., 465; Arnold vs. Decatur, 29 Mich., 77; and as to condemnation proceedings, Marquette R. R. vs. Probate Judge, 53 Mich., 226; Grand Rapids R. R. vs. Weiden, 70 Mich., 393, and cases cited *infra.*

In construing Section 2 of Article XVIII., which is universally held to apply to condemnation proceedings, the Supreme Court of Michigan (Cooley, Campbell and Graves, JJ.) said of it in Paul vs. Detroit, 32 Mich., at page 113: "This provision is not found in constitutions "generally, and was never known in Michigan until the "adoption of the Constitution of 1851. Before that, nei- "ther jury nor commissioners had any duty to perform "except assessing damages, and the prerogative of taking "property on their own estimate of its necessity was exer- "cised by legislatures or those persons or corporations "whom they allowed to act in the matter.

"The change was made from a well founded belief, "founded on experience, that private property was often "taken improperly and without any necessity."* * * * "The sacredness of private property, and its immunity "from any interference not required by actual public exig- "encies, ceased to be respected.

"The Constitution has changed this by requiring the "whole subject to be determined by a jury of freehold- "ers; so that each case shall be determined by a separate "tribunal summoned expressly for the purpose, who must "be unanimous in their views before any land can be "taken; who must act openly and before all concerned, in "hearing and receiving testimony." * * * "The fact "that the rules formerly existing here, and still in force "elsewhere, vesting the discretion of passing upon neces- "sity in other hands, are not applicable, has been disre-

"garded, and statutes regulating the condemnation of "lands are copied or patterned after laws belonging to a "different system, or patched and interwoven with incon- "sistent and incongruous provisions, which render them "obscure and ambiguous."

In Toledo R. R. vs. Dunlap, 47 Mich., at p. 461, the Court refers to the railroad condemnation statute in these words: "The statute is evidently framed in accordance "with the laws of some other states where the judicial "power is not parcelled out as it is here."

In Railroad vs. Chesebro, 74 Mich., at p. 471, the Court refers to the condemnation statute as "borrowed from "some other region."

In fact, the statute under consideration in respect of the proceedings for condemnation was borrowed from the State of New York, where it was framed under the following provision of New York's Constitution, radically different from ours: Constitution of 1846, Article I., Section 7:

"When private property shall be taken for any public "use, the compensation to be made therefor, when such "compensation is not made by the state, shall be ascer- "tained by a jury, or by not less than three commission- "ers appointed by a court of record as shall be prescribed "by law." (General Statutes of New York, Blatchf. Edition, 1829-51, Appendix, page iv.)

The State Supreme Court and the counsel here to sustain some of its rulings, cite the New York authorities on the statute enacted under this provision.

Among other radical distinctions, three should be noted: (One) The New York law permits a taking before compensation shall be first determined and paid; (two) It does not provide that the question of necessity shall be passed upon by a jury or commissioners at all; (three) It does not provide that the question of compen-

sation and the question of necessity shall be passed upon by the same jury. (Matter of the N. Y. C. R. R., 66 N. Y., 409.) And see Cooley, J., Chicago R. R. vs. Sanford, 23 Mich., at p. 423.

The Union Depot act of Michigan (1 How. Ch., 93) under which the condemnation proceedings were taken in this case, as to the forms and method of procedure for the taking of private property, reproduces the general railroad act practically verbatim (1 How. Comp., Sec. 3332 *et seq.*).

The repeated construction of the above provisions of our Constitution by the Michigan Supreme Court has been for the most part directed at the latter statute, but the Union Depot act, doubtless in view of those decisions, does contain the following provision, differing in phraseology from that in the general railroad act (and it bears directly upon the conditions in this case).

§ 3461. * * * "And in case of the construction of "such tracks on any public street, lane, alley, or high- "way, the same shall be on such terms and conditions "as shall be agreed upon between the company and the "common council of any city, or the village board of "any village, or the commissioner of highways in any "township in which the same may be; *provided, that such "tracks shall not be constructed on any public street, lane, alley, "highway, or private way, until compensation be made by the "company therefor to the owner or owners of property adjoin- "ing such street, lane, alley, highway or private way, and oppo- "site where such tracks is to be constructed, either by agreement "between the company and each owner, or ascertained and paid "as hereinafter prescribed for obtaining property or franchises "for the purpose of its incorporation."*

The essential part of the Union Depot statute to be considered, after providing that commissioners may act, if no jury be demanded, is as follows:

§ 3466—Sec. 9. "The commissioners shall take and "subscribe the oath prescribed by article eighteen of the

"Constitution. Any of them may issue subpoenas, ad-
"minister oaths to witnesses, and a majority of them may
"adjourn the proceedings before them from time to time
"in their discretion. Whenever they meet, except by ap-
"pointment of the court or judge, or by previous adjourn-
"ment, they shall cause reasonable notice of such meet-
"ing to be given to the parties who are to be affected by
"their proceedings, or the attorneys or agents of such
"parties. They may view the premises described in the
"petition, and shall hear the proof and allegations of the
"parties, and shall reduce the testimony, if any is taken
"by them, to writing, if requested to do so by either party,
"and after the testimony is closed in such case, and with-
"out any unreasonable delays, and before proceeding to
"the examination of any other claim, all being present
"and acting, shall ascertain and determine the necessity
"of taking and using any such real estate or property
"for the purposes described; and if they deem the same
"necessary to be taken, they shall ascertain and deter-
"mine the damages or compensation which ought justly
"to be made by the company therefor to the party or par-
"ties owning or interested in the real estate or property
"appraised by them. They shall also determine and cer-
"tify what sum ought to be paid to the general or special
"guardian of an infant, idiot, or person of unsound mind,
"or to said court, to be held for an unknown party in
"interest not personally served with notice of the pro-
"ceedings, and who has not appeared, for damages and
"cost or expenses and counsel fees. They shall make a
"report to said court or judge, signed by them, of the
"proceedings before them, if any, which may be filed with
"the clerk of the court, either in vacation or term time, or
"the probate court, as the case may be. Said commis-
"sioners shall be entitled to two dollars a day for each
"day they are engaged in the performance of their duties,
"to be paid in the first instance by the company.

"In case a jury shall have been demanded and ordered
"by the court, pursuant to section eight of this act, the
"said jury shall proceed to ascertain and determine the
"necessity of taking and using any such real estate or
"property, and the damage or compensation to be paid
"by the company therefor, in the same manner and with
"like effect as is provided in this section in the case of
"commissioners, and as is further provided in said sec-

"tion eight; but they shall all be present and act together "during the proceedings, and before acting shall take and "subscribe an oath that they will justly and impartially "ascertain and determine the necessity of taking and "using any such real estate or property for the purposes "proposed; and if they deem the same necessary to be "taken, will ascertain and determine the damages or com- "pensation which ought justly to be made by said com- "pany to the owners of or persons interested in each par- "ticular description of real estate mentioned in said peti- "tion who have demanded said jury; and they shall be "entitled to two dollars for each day they are engaged in "the performance of their duties, to be paid in the first "instance by the company. The said judge, or a circuit "court commissioner to be designated by him, may attend "said jury, to decide questions of law and administer "oaths to witnesses, and he may appoint the sheriff or "other proper officer to attend and take charge of said "jury while engaged in said proceedings. And the jury "shall proceed to determine the amount of damages to be "awarded, and shall have all the powers hereby conferred "upon commissioners; and a report signed by the jury, "whether the judge is or is not in attendance, shall be "valid and legal. At any time before the report of the "jury or commissioners shall be made to the court, it "shall be competent for the company, after sufficient "cause has been shown and with leave of the court, to "discontinue all pending proceedings in any case and to "institute new proceedings at any time thereafter; but "the company in all such cases shall pay all the costs "of all proceedings so discontinued, with an attorney fee "to be taxed as in cases at law.

§ 3467—Sec. 10. "On such report being made by the "commissioners or jury, the court, on motion, shall con- "firm the same on the next or any subsequent day when "in session, unless for good cause shown by either party; "and when said report is confirmed, said court shall make "an order containing a recital of the substance of the "proceedings in the matter of the appraisal, and a de- "scription of the real estate or property appraised, for "which compensation is to be made, and shall also direct "to whom the money is to be paid, or when and where it "shall be deposited by the company. Said court, as to

"the confirmation of such report, shall have the powers "usual in other cases.

§ 3468.—Sec. 11. "A certified copy of the order so to "be made shall be recorded in the office of the register "of deeds for said county, in the book of deeds; and there- "upon, on the payment or deposit by the said company of "the sum to be paid as compensation for such land, fran- "chise, or other property, and for costs, expenses, and "counsel fees as aforesaid, and as directed by said order, "the company shall be entitled to enter upon and take "possession of and use the said land, franchise and other "property for the purpose of its incorporation; and all "persons who have been made parties to the proceedings, "either by publication or otherwise, shall be divested and "barred of all right, estate, and interest in such real es- "tate, franchise, or other property, until such right or "title shall be again legally vested in such owner; and all "real estate or property whatsoever acquired by any "company under and in pursuance of this act, for the pur- "pose of its incorporation, shall be deemed to be acquired "for public use:

"*Provided*, the said sum to be paid as damages and com- "pensation, and costs, expenses, and counsel fees as afore- "said, shall be paid by the company, or deposited as pro- "vided in this act, within sixty days after the confirma- "tion of said report by the said court; and in case said "company fail or neglect to do so, such failure or neglect "shall be deemed as a waiver and abandonment of the "proceedings to acquire any rights in said land or prop- "erty. Within twenty days after the confirmation of the "report of the commissioners or jury, as above provided "for, either party may appeal, by notice in writing to the "other, to the Supreme Court, from the appraisal or re- "port of the commissioners or jury; such notice shall "specify the objections to the proceedings had in the "premises, and the Supreme Court shall pass on such ob- "jections only, and all other objections, if any, shall be "deemed to have been waived; such appeal shall be heard "by the Supreme Court at any general or special term "thereof, on notice thereof being given according to the "rules and practice of the court. On the hearing of such "appeal, the court may direct a new appraisal before the "same or new commissioners or jury, in its discretion. "The second report shall be final and conclusive upon all

"parties interested. If the amount of the compensation "to be allowed is increased by the second report, the dif- "ference shall be a lien on the land appraised, and shall "be paid by the company to the parties entitled to the "same, or shall be deposited as the court shall direct; and "in such case, all costs of the appeal shall be paid by the "company; but if the amount is diminished, the difference "shall be refunded to the company by the party to whom "the same may have been paid, and judgments therefor "and for all costs of the appeal shall be rendered against "the party so appealing. On the filing of the report, such "appeal, when made by any claimant of damages, shall "not affect the said report as to the right and interests of "any party, except the party appealing; nor shall it "affect any part of said report in any case, except "the part appealed from; nor shall it affect the possession "of such company of the land appraised; and when the "same is made by others than the company, it shall not "be heard except on a stipulation of the party appealing "not to disturb such possession during the pendency of "such proceedings."

§ 3463.—Sec. 6. "In case any such company is unable "to agree for the purchase of any real estate, property or "franchises required for the purpose of its incorporation, "it shall have the right to acquire the title to the same in "the manner and by the special proceeding prescribed "in this act; but there shall be no power, except for cross- "ing, to take the track or rights of way of any other rail- "road company without the consent of said railroad com- "pany."

At the same session of the legislature that passed the Union Depot act (1881), but not added on in form as a part of that act, the following act was passed, drawn by the promoter of the Union Depot Company—Mr. Joy—as appears by this record:

§ 3357.—Sec. 44. "When any part of the land of any "railroad company in this State, in or adjacent to its "depot grounds is not in actual use for depot or other pur- "pose pertaining to the operation of a railroad, and such "land is not needed by said railroad company for the "purpose of a depot or other terminal facilities, it shall

"be lawful for any other railroad company organized as "aforesaid, needing such land for the purpose of a depot "or terminal facilities, to acquire the same in the same "manner as may now be done for such purpose from in- "dividuals. The question of actual use and of necessity "for the aforesaid purposes by said railroad company "owning and not using said land, shall be determined in "addition to other questions as provided by law in cases "of condemnation of lands for the purpose aforesaid, and "the same proceedings in all respects, as near as may be, "shall be had for the aforesaid purpose as now provided "by law where land is acquired for such purpose from in- "dividuals."

1.—THEY WERE DENIED THE FUNDAMENTAL RIGHT TO HAVE AN ASCERTAINMENT AND DETERMINATION OF THE AMOUNT OF COMPENSATION AND ITS FINAL PAYMENT BEFORE BEING DEPRIVED OF THEIR PROPERTY.

The record that went to the Supreme Court of the State in the case reported in 92 Mich., p. 33, covered the proceedings had upon the first verdict up to December 2nd, 1891, when the appeal in that case was taken, and ends at page 948 of the Record. Up to that time, while the plaintiffs in error contended that the railroad company had possessed itself of the property sought to be condemned, yet it was contended by defendants in error, and held by the Circuit Judge of that possession, that "The occupancy by the petitioner of the half of the street "has not been for any such purpose as contemplated by "the proceedings, nor has such occupancy been under "such proceedings. This, as is shown, petitioner has care- "fully endeavored to avoid. The entry, as well as the "occupancy, was under the authority granted by the City "of Detroit for a temporary purpose only, and not for the "purpose of erecting in front of respondents' lands the "aqueduct or superstructure contemplated by the insti- "tution of the proceedings, and the right to erect, which

"was sought to be obtained under and by virtue of such "proceedings. The right of the city to give licenses to "occupy the streets is provided by ordinance," etc., etc. (R., p. 897.)

Thus it may be admitted that that possession was then a qualified possession, but by the subsequent proceedings, appearing by the record and the hearing below, it is shown beyond question, as has been seen, that in January, 1892, the railroad company took complete possession of everything sought by its petition, built its permanent structures, laid its tracks, and that at the outset of that proceeding, when the plaintiffs in error set it up in bar by their sworn plea on April 14, 1893 (R., pp. 971-973), the railroad company had maintained and operated the railroads upon the property taken for the period of a year; that the freight and passenger business of four trunk lines (the Wabash, the Canadian Pacific, the Flint & Pere Marquette, and the Detroit, Lansing & Northern) was passing over it continuously. The magnitude of the operations of the road was demonstrated in detail without challenge in any way, at length at p. 1229 and following of the record.

It has been seen that the railroad company itself moved for the confirmation, obtained it, and paid the amount of the verdict unconditionally to the plaintiffs in error in January, 1892. (R., pp. 1151-1152.)

If the statute itself had provided for possession before a final assessment of the amount and final payment of the compensation, such a statute, as we shall show by the uniform construction of the State Constitution by the Supreme Court itself, would be unconstitutional, but the statute *provides* for no such thing.

Section 10 and the first part of Section 11 are provisions only (and they are the only provisions for that purpose

in the entire statute) for the final passing of the title *on the conclusion* of the condemnation proceedings. The appeal provision, copied from the General Railroad Act, although "inartificially" and "carelessly" framed, as frequently stated by the Court, *does assume* that after a confirmation, which he may not prevent (and it *assumes* that it may have been taken after he has received the money), he may waive his constitutional title to the money, even if possession has been taken on payment, and appeal; and that in that case, he must abide the result of the second trial, and refund if the award shall be decreased. But there is no provision for possession in the statute, *and even that is not even assumed by the statute in case of an appeal by the condemning corporation.*

Indeed, the statute makes a futile attempt to compel him as a condition of appeal to waive his right to possession by a "stipulation." (Last paragraph Sec. 11.)

The constitutional provision in Michigan (Art. XV., Sec. 9) is imperative that compensation shall "first" be made before the taking, and § 3461 of the Union Depot Act, heretofore quoted, is specific that the railroad shall not be constructed "until compensation be made" by the company therefor to the owner or owners of the property, "and *paid* as hereinafter prescribed."

And as Art. XVIII., Sec. 2, is uniformly held to be a further limitation upon railroad condemnations, the necessity, as well as the amount of the compensation, must of course be ascertained as a prerequisite of a "taking."

There is no such phrase "or secured" in the statute, and wherever that term is used, it is in reference to settling disputes about title to the fund, and like questions, as provided in every railroad act and in this act. (See Sec. 12 and following.) (R. R. vs. Clark, 23 Mich., 523, top.)

In the whole history of juridical procedure it was never before suggested that under a provision for an assessment

of an amount to be paid or secured as a precedent condition to an end sought, that its payment or security could take place until the amount was fixed, and finally fixed.

The right of payment and of final payment before a "taking" is fundamental.

This court said, in Bauman vs. Ross, 167 U. S., pp. 548-598: "Under the Constitution, and by the express pro-"vision of Section 18 of this act, the United States are "not entitled to possession of the land until the damages "have been assessed and actually paid. The payment of "the damages to the owner of the land and the vesting of "the title in the United States are to be contemporane-"ous."

In Michigan it is held that notwithstanding the general railroad statute provided for the deposit of money in bank, the deposit was not sufficient to entitle the condemning party to possession. "In regard to the deposit of money in bank" (pending an appeal) "the statute has no provision which would com-"pel the landowner to take the risk of any deposit or de-"prive him of his rights *until he is paid.*"—Campbell, J., for the Court in R. R. vs. Dunlap, 47 Mich., at p. 464. And in that State the rule is strictly enforced under the exceptional provisions of our Constitution.

The Supreme Court of the State has made short work of arguments based on any supposed implications of the statute.

In Railroad vs. Chesebro, 74 Mich., at p. 468, that Court, speaking through Mr. Justice Campbell, said:

"There can be no doubt, under our decisions and under "the Constitution of this State, that there can be no pos-"sessory right in a railroad company adverse to the real "owner, without either a license or a payment or tender "after a valid condemnation. It is a land-owner's abso-"lute right not to be disturbed in his freehold. No Court

"has the right to divest possession in advance of condem-
"nation *or to legalize it*"—citing cases.

In Detroit R. R. vs. Probate Judge, 63 Mich., 676, the proceedings were in the Probate Court and under the statute here involved, the proceedings may be instituted in either the Probate or the Circuit Court.

Chicago R. R. vs. Sanford, 23 Mich., at p. 427: "He can-
"not be compelled to yield up a right of way until it has
"been declared by competent and impartial authority
"necessary, nor if necessary, *until his compensation has*
"*been fixed.*" (Campbell, J.)

In reviewing similar statutes under the general rail-road law, the Court, in Derby vs. Gage, 60 Mich., at page 4, said: "These proceedings are purely statutory, and
"the remedies therein provided are exclusive, and cannot
"be extended byond those contained in the act. The stat-
"ute places the damages and compensation awarded by
"the jury or commissioners, and costs and counsel fees
"upon the same footing, and unless these are all paid
"within the sixty days, the title of the owner is not di-
"vested and does not vest in the company."

In Toledo R. R. vs. Dunlap, 47 Mich., at page 461, the statement in the opinion as to the conditions in respect of the question here is as follows: "It appears that im-
"mediately after the confirmation of the proceedings,
"which were afterwards set aside by this Court, the com-
"pany took possession of Dunlap's land, and built its
"road across the part sought to be condemned. This was
"done in December, 1880, and led to a series of legal con-
"troversies not yet determined." * * * "The statute
"is evidently framed in accordance with the laws of some
"other States where the judicial power is not parceled out
"as it is here." * * * "It is greatly to be regretted
"that this species of legislation has been so carelessly
"framed."

At page 464 the Court says that "The necessity of tak-"ing, as well as the amount of compensation, must be *de-"termined* before land can be taken." * * * "He (the "land-owner) cannot be compelled to determine at his "peril whether a jury will regard the land as necessary "for public use, and he cannot be in fault for refusing a "tender when he can have no assurance that the proposed "improvement will be sanctioned. But the statute is "fatally defective if such an infliction could be imposed, "because it provides no means and no tribunal for deter-"mining the question of tender."

In Paul vs. City of Detroit, 32 Mich., at page 113, the Court, in construing Article XVIII., Section 2, which is there applied and held to be binding in cities and villages as to streets, in connection with Article XV., Section 15, discusses the historical reasons for its adoption, and says at pp. 118-119: "Until the jury determine, not only that "the improvement is desirable, but that it is worth to the "public or to the parties chargeable all they must sever-"ally pay to fully remunerate the owner, the necessity "cannot be established, and the property cannot be law-"fully taken." * * * "And it can never be lawful to "compel any man to give up his property, when it is not "needed, or to lose it, whether needed or not, without be-"ing made whole." * * * "Any system may have its "defects, but all of the constitutional rules must be pre-"served and enforced."

But even the almost exact conditions involved here have been passed upon in construing the constitutional provisions in reference to this statute. In Michigan, under Section 10 of this Act, after the verdict of the jury, the only office of the Circuit Judge is to confirm or refuse to confirm. If he confirms, and there is no appeal, he has the powers as to such confirmation usual in other cases. If he refuses to confirm, there is no provision for appeal,

and the remedy is, on the record as presented to the Circuit Judge for confirmation to apply to the Supreme Court of the State for mandamus to compel confirmation. Or, because of an exigency, or urgency, the Supreme Court may be applied to by certiorari or mandamus to set aside an improper confirmation. Proceedings before commissioners and jury are treated on the same footing in the statutes and by the courts. The record that is in any case presented to the Supreme Court is that which is presented to the judicial officer below before confirmation.—Peninsular R. R. vs. Howard, 20 Mich., 24; R. R. vs. Voorhies, 50 Mich., 506.

In 53 Mich., 217—Marquette R. R. vs. Probate Judge, an unanswerable case was made against confirmation before the *nisi prius* judge. In that case objections were filed before the lower court, setting up that the damages and compensation found by the commissioners were excessive and exorbitant; that there were included a large number of grossly improper items, specifying them; that the commissioners arrived at the total award by agreeing to add together the several sums arrived at, and divide the sum by three and make the quotient their award, and that the commissioners received private information from the respondents in the case undisclosed to the railroad company.

The Supreme Court says of the grounds of objections to the confirmation, that there were sufficient grounds for setting aside the report (p. 222). The court below, having refused to receive affidavits and testimony in support of a motion to set aside the report, the railroad company applied to the Supreme Court of the State for a mandamus to compel their reception and to set aside the confirmation.

The order to show cause was granted, and the Supreme Court states (p. 224) that on the showing there would have

been no hesitation in granting a peremptory mandamus. But the railroad company desired immediate possession, and as in this case, pending the proceedings, appeared in court, and itself "moved to confirm the report of the "commissioners, protesting (unlike this case), nevertheless, that the award was unjust, exorbitant, unwarranted "and illegal, and praying that the motion might not in "anywise prejudice the petitioner's right to question and "attack said report on appeal, or by other proper proceeding, and not waiving or in anywise relinquishing or "impairing the motion theretofore made for an order to "the Court to show cause why said report should not be "set aside." And thereupon the Probate Judge ratified the report of the commissioners and the confirmation.

The railroad company then "paid the amount of the "award" to the respondents, "under protest, and stated "that the petitioner reserved all its rights to recover the "same or any part of the same back, should said award "be set aside, diminished or quashed by proceedings had "theretofore upon the same, and all other rights that it "had or may have for the recovery of said money or any "part thereof, and that the money was paid then because "the railroad company *needed the land for the purpose "of building its track thereon at once, and further delay "in acquiring that right would result in great loss to it "and inconvenience to the public.* The petitioner went into the immediate possession of the land. Afterwards the railroad company dismissed the appeal on the ground that it was taken through inadvertence and resumed the proceeding by mandamus.

The Court comments upon this record as follows: "Un-"der these circumstances the order of confirmation and "the proceedings based thereon cannot be disturbed. The "Constitution expressly provides: 'The property of no "'person shall be taken by any corporation for public use

"'without compensation being first made or secured, in "'such manner as may be prescribed by law.' Art. XV., "Sec. 9. Another provision of the Constitution requires "the necessity for taking the property for the public uses "as well as the compensation, to be ascertained by a jury "or commissioners. *These requirements are conditions "precedent to the taking, and must first be complied with "before an individual can be compelled to part with the " title or possession of his property. 'Compensation is a " 'constitutional condition of such taking, and it can only " 'be lawful when the necessity of the taking, as well as " 'the measure of compensation, has been determined in " 'a legal way.'* (Sheldon vs. Kalamazoo, 24 Mich., 386.) "The effect of setting aside the report of the commis- "sioners would be to leave the compensation undeter- "mined, and the owners divested of their property.

"The necessities of the corporation for the immediate "use of the land for the purpose of constructing its road "are not sufficient to nullify these constitutional safe- "guards to the rights of private property. If they may be "ignored in one case, under the plea of necessity, they "may be in all, and the railroad company may proceed to "seize upon private property and construct its road, and "leave the questions of the necessity of the taking and "the compensation to be made to be determined at its "leisure." The application was denied.

We submit that in Michigan, as elsewhere, it is the universal rule that the compensation shall be first paid before compensation is taken, and necessarily the amount of the compensation must be first *determined.* That "no court can legalize a possession" before the constitutional requirement has been fulfilled, and giving a railroad company everything it seeks by its proceedings, throw open the question of compensation for *re-fixing* and *re-determination.* That would be to say, that under the Con-

stitution the corporation seeking to take the property can go through the form of a tentative payment as a mere device to get around the constitutional provision, and then go through the farce of a new trial in the statutory proceeding to recover the money paid. It is within bounds to say that such a proposition would be grotesque, if the subject were not so grave, in thus dealing with the Bill of Rights.

It is universally held that the appropriation of the property is a waiver of any objection to the verdict, and is a confirmation by the petitioner at the respondent's election. Lewis on Eminent Domain, Sec. 531; 2 Dillon's Municipal Corporations, Sec. 614 and Sec. 609, notes.

The same principle applies to respondents and bars their appeal if they take their money after verdict. In re Woolsey, 95 N. Y., 135. The same general rule applies in chancery. 2 Daniels' Chancery Practice (5 Am. Ed.), p. 1279; Hindle vs. Bacons, Cooper's Chan. Rep. (Eng.), 378.

It must be an error of fact, not a misconception of the law, which would prevent possession, or any similar act, from constituting a waiver. Massie vs. Brady, 41 La. An., 553; Rorer on Judicial Sales, Sec. 161; Tooley vs. Gridley, 3 Snade & Marshall, 493 (515).

Moreover, it is the universal rule in all jurisprudence, that the taking payment after appeal is a waiver of the appeal by the party receiving payment, and that the corresponding taking of the *res* after appeal is a waiver of the appeal by the party seeking to possess it. See Morse, C. J., in 92 Mich., at p. 59, and cases.

II.—THEY WERE DENIED THE PROTECTION OF THAT GUARANTY OF THE STATE CONSTITUTION PROVIDING THAT THE QUESTIONS OF COMPENSATION AND OF NECESSITY SHOULD BE PASSED UPON BY ONE AND THE SAME JURY, AND OF THE SETTLED, UNIFORM AND UNREVERSED CONSTRUCTION OF THE CONSTITUTION TO THAT EFFECT BY THE STATE JUDICIARY IN RESPECT OF ALL OTHER CITIZENS.

The constitutional provision here involved, Article XVIII, Section 2, was fully considered by the Supreme Court of the State in Paul vs. Detroit, 32 Mich., 108. It was there held to be an added prohibition to a taking under Article XV, Section 15, precisely as it is held under the railroad condemnation statutes to be an added prohibition under Article XV, Section 9.

The section (Art. XVIII, Sec. 2) in question is as follows: "When private property is taken for the use or "benefit of the public, the necessity for using such prop-"erty *AND* the just compensation to be made therefor "* * * shall be ascertained by a jury of twelve free-"holders."

The Court held that a statute providing for condemnation in cities and villages, under Article XV, Section 15, was unconstitutional, because it did not provide for the concurrent finding by the jury of the necessity for the taking under the quoted section. The decision was by Campbell, Cooley and Graves, JJ. After commenting upon Article XVIII, Section 2, as not found in other constitutions, the Court says: "This question of necessity is the "one on which the right to take private property at all en-"tirely depends, and on which parties have a full right to "be heard. But this is not all. *A jury can only render "one verdict, and that can only be given when the whole*

"inquiry before them is ended. In cases like this, they "cannot determine the necessity by itself. It depends on "the other facts, as well as on the question of convenience."

That it is the constitutional right of the citizen to have both questions tried together, in accordance with the conjunctive phrasing of the constitutional provision, is again apparent from the following language of that judgment: "The owner of the property taken is entitled to receive full "compensation for any damages done him. The jury have "no right, without forswearing themselves, to give him "any less than just compensation. If the damages are "to be charged on property according to its benefits, that "property cannot be charged with more than its benefits, "and if the benefit does not equal the cost, that ends the "inquiry. It can never be legally necessary to take "property unless the result of the taking is a benefit equal "to the cost, and it can never be legal to compel an owner "to receive less than just compensation. *Until the jury "determine, not only that the improvement is desirable, "but that it is worth to the public or to the parties "chargeable all they must severally pay to fully remuner- "ate the owner, the necessity cannot be established, and "the property cannot be lawfully taken."*

The same constitutional provision is applied to the taking of private property by railroad corporations. In Mansfield Coldwater R. R. vs. Clark, 23 Mich., 519, Cooley, J., delivering the opinion of the Court, said: "The report "of the jury or commissioners must distinctly cover this "point in every case; and they cannot properly make one "which will warrant the taking of the land, unless satis- "fied not only that the particular land is needed for the "construction of the work, but also that the work itself "is one of public importance."

In Chicago R. R. vs. Sanford, 23 Mich., at p. 427: "When "the property taken is not for the state, every one is en-

"titled to have some impartial tribunal pass, both upon "the necessity of the taking, and the proper compensation "to be made for it." (Grand Rapids R. R. vs. Van Driele, 24 Mich., 409; McClary vs. Hartwell, 25 Mich., 138.)

In Grand Rapids R. R. vs. Weiden, 70 Mich., 393, Judge Campbell, delivering the opinion of the Court, said: "It "seems to be imagined that railroad companies are to be "presumed entitled to condemn lands at their own option, "and that nothing more than a formal effort is required "to give them the right to do so. But under our Consti- "tution this is not a correct view of the subject. Under "the old Constitution, when the Legislature chartered a "railroad, the right to build it became fixed, and could "not be questioned, and consequently land-owners were "obliged to acquiesce. But, under our present Constitu- "tion, there is never any presumption that a railroad is "necessary, or that any particular land ought to be given "up to it for its uses. Every land-owner, therefore, had a "perfect right to object to giving up his land, and is not "confined to objections depending upon price or value. He "may object to the lack of necessity for the road at all, or "for its location or extension over his land, at any price, "or on any conditions. In law, his use is presumptively "as important as that of a railway company, and it must "devolve on any such company to establish affirmatively "all that is needful to make out a clear case of necessity."

In Toledo R. R. vs. Dunlap, 47 Mich., 456, the Court says: "The inquiry in this State, as elsewhere, is an appraisal "or estimate of values, and not a contest on litigious "rights, *and includes what is not elsewhere included*, an "inquiry into the necessity of the proposed taking for "public purposes, which was never made by courts, but "always heretofore by the Legislature or some unjudicial "body of its creation." And see Horton vs. Grand Ha- ven, 24 Mich., 465; Arnold vs. Decatur, 29 Mich., 77; Com-

missioners vs. Moesta, 91 Mich., 149; Grand Rapids vs. Railroad, 58 Mich., 644.

The Supreme Court of the State is of course in error as a matter of fact on the record when it states, in the opinion in 92 Mich., 33, that the appeal before it was only on the question of compensation. The appeal was from the entire award, including the question of necessity (R., p. 947); and so far as this question is concerned, the opinion in that case rests upon that mistake, and not on any novel construction of constitution and statute; otherwise, even in the carelessly drawn statute, would be found not even a pretense of authority for sending back the question of compensation to be decided separately. This point was made in the trial court below as a federal question as soon as it appeared that the question of necessity was not to be submitted to the third jury and in the Supreme Court. (R., pp. 1786-1787-1659-1784.) There is nothing in any opinion of the Supreme Court in the premises conflicting with the construction of the Constitution or statutes here contended for; and nothing in the opinion in this case.

There is no precedent in the jurisprudence of the State of a separate award on the two questions.

III.—THEY WERE DENIED THE PROTECTION OF A TRIAL ON THE QUESTIONS OF NECESSITY AND COMPENSATION BY THE TRIBUNAL GUARANTEED BY THE CONSTITUTION OF THE STATE, IN ACCORDANCE WITH THE SETTLED, UNIFORM AND UNREVERSED CONSTRUCTION OF THAT CONSTITUTION IN RESPECT OF ALL OTHER CITIZENS.

Two features of the proceedings are to be discussed under this head: (1) The forcing in of Judge Gartner as the thirteenth and cont ling member of the tribunal; and (2) the sending back the record with authority to that judge to grant further new trials in his discretion.

1. Nothing can be considered settled in Michigan unless this is settled—that the provisions of our Constitution of 1851 took from all permanent official bodies, legislative and judicial, and from all official functionaries, judicial or otherwise, the power of passing upon the questions of necessity and of compensation in condemnation proceedings, and committed it as a prerogative power to a temporary body, to be organized in each case from the vicinage, of men having real property of their own; and to that body by the powers conferred upon them, was given absolute control of the inquiry, free from any *possible controlling influence or interference outside their body on the part of a judge, or any one else.*

"The proceedings, while subject to judicial review and "supervision for certain purposes, are not in themselves "judicial proceedings."

It is "a special proceeding by a temporary tribunal se- "lected for the occasion."

This Circuit Judge, as a judge, as to this tribunal possessed no judicial power, and could not be vested with judicial power.

"There are certain proceedings in court to select a jury, "and subsequent proceedings to determine whether the "action of the jury shall be sustained. Beyond this the "courts have no part in the matter."

These propositions are excerpts from the particular judgment (47 Mich., 462, supra) cited by the Supreme Court of Michigan in the opinion in the case (103 Mich., 556) from which this appeal is taken.

So that there may be no mistake as to the meaning of the decision in 47 Mich., we now quote fully from another judgment of the Court delivered by the same Justice, in which the language of the Court in that case is construed—Railroad vs. Chesebro, 74 Mich., pp. 466-470:

"The Constitution in such cases as the present allows "either commissioners appointed by a court of record or "a jury of freeholders to determine the necessity of public "use, and to ascertain the damages. Commissioners form "no part of the machinery of a court, and a jury of in-"quest is not a court. It has always been settled that the "appropriation of private property did not come under "the 'judicial power,' as it is located under the Constitu-"tion in courts, and except for the Constitution the nature "of the tribunal of condemnation would have been dis-"cretionary with the Legislature. Highway commis-"sioners act on the location of highways, and under the "old Constitution public commissioners condemn land for "State railroads. In the railroad special charters there "was no instance of action by a common-law trial jury. "Then, as under our present statutes, the jury was a jury "of inquest, specially created, and not a trial jury. "*We held in Toledo, etc., Railway Co., vs. Dunlap, 47* "*Mich., 456, where the jury was impaneled in a circuit* "*court, that the only functions of the court were to set* "*the proceedings in motion by organizing a jury or ap-*"*pointing commissioners, and affirming or vacating the*

"award; and we held, further, that the jury were judges "of law and fact, and not subject to interference by the "judge, should he undertake to accompany them. The "statute, which probably was in this respect borrowed "from some other region, while it does authorize a judge "to go with and decide questions of law and swear wit-"nesses, also allows him to deputize a circuit court com-"missioner to do the same thing. *It would be absurd to "consider such action as valid judicial action. It was* "held there, as it has been uniformly held, that the jury "cannot be made subject to any such instruction, and "must act on their own judgment."

In Chicago & Mich. R. R. vs. Sanford, 23 Mich., pp. 418-421, the constitution of the jury is discussed, and it is held that it is a "jury of inquest;" that a jury of twelve was intended, and that if any less than a jury of twelve found an award, the award would be a nullity.

In Western R. R. vs. Crane, 50 Mich., p. 188, Cooley, J. held that "the jury may conduct the enquiry without the "aid of any legal expert." (And see excerpts from judgments, p. 23 *et seq.*, this brief.)

The historic reasons for the adoption of Article XVIII., Sec. 2, are fully set out and discussed in the leading case of Paul vs. City of Detroit, 32 Mich., commencing at the bottom of page 113, and where also the independence of the jury is pointed out, even in a city case.

There has been no departure in Michigan from the rule of construction as stated in the text. See D. L. & N. R. R. vs. Probate Judge, 63 Mich., 676; Mich. Air Line R. R. vs. Barnes, 44 Mich., 222; Toledo R. R. vs. Dunlap, 47 Mich., 457; M. C. R. R. vs. Probate Judge, 48 Mich., 638; Railroad vs. Chesebro, 74 Mich., 467; Pt. Huron R. R. vs. Voorheis, 50 Mich., 510; Railroad vs. Railroad, 64 Mich., 363; Union Depot vs. Jones, 83 Mich., 415; G. R. & I. R. vs. Weiden, 70 Mich., 390; Barnes vs. Mich. Air Line R. R., 65 Mich.,

251; Crane Case, 50 Mich., 182-187; Marquette R. R. vs. Probate Judge, 53 Mich., 217; McClary vs. Hartwell, 25 Mich., 138.

Matter of Converse, 18 Mich., 459: "These appraisals "bear no resemblance to ordinary legal trials." (Campbell, J.) Pen. R. R. vs. Howard, 20 Mich., 18-25: "The "jury act in effect as judges in the absence and beyond "the control of the Court"—(Christiancy, J.). In the Dunlap case in 47 Mich., 456, there was no contention that the jury were misled, as to their own prerogative and responsibility, or were not fully conscious of their authority, or were misled as to their absolute independence of the judge who was with them, and conscious of it, and it was held in that case that the jury "will undoubtedly be "regarded as accepting and doing *what they permit to "be done*," and it is distinctly held that the function of the judge, if he attends, is purely advisory. This is the case cited in the opinion sustaining the ruling here, and we repeat that the Court below does not *assume* to antagonize, much less reverse, the uniform construction of Article XVIII., Section 2, by that Court. It ignores it.

The uniform practice under these decisions was followed in the *second* trial of this case, and when the jury desired the advice of a judge, they asked for it. In some cases on that trial they received advice from Judge Gartner, who did not attempt to preside, but sometimes sent in his views in the form of a letter (R., p. 696) and sometimes appeared and gave oral advice.

It is apparent that the constitutional provision for this inquiry aimed directly at dispensing with the judicial body composed of a court and jury as the tribunal; that it was intended that the judicial officer clothed with the dignity, the power, and the influence of a court, and so impressing the jury of inquest, should, with that impression, be eliminated; to permit the old system, then, which

was struck down by this provision of the Constitution, is to emasculate that provision, and make the poor pretense of applying it a farce.

But under it, the citizen is entitled to have the jury of inquest take the full responsibility and have the necessary conscious authority to do so pending the inquiry; and to make this radical change in method of any effect, or worth anything at all to the citizen, it is clear that the jury of inquest itself should know that the responsibility and the authority were theirs. If the responsibility and authority are conferred by the Constitution on them, the citizen is entitled to have the jury fully conscious of it and to take the duty and exercise it. But in defiance of the Constitution and of its settled construction by the courts of Michigan, the jury of inquest were relegated to the position of a common law jury, sitting under a common law judge, in authority as such, with all the powers and influence of a court, and that this was their position was impressed upon them by a person who, in respect of the hearing, was not a judge, a judicial officer, or a juror. A few references to the record will suffice to demonstrate this.

In addition to the objection to the judge sitting at all, counsel objected before the jury was called, under the specific instructions in writing of the plaintiffs in error, to Judge Gartner, on the ground that he was "prejudiced "against them, and on account of the influence which your "honor will be under consciously or unconsciously, for the "petitioner." (R., p. 981—Fol. 1692.)

In the first place, as soon as the jury was formed, he gave them a charge not to hold any conversation about the case, either among themselves, or to permit any conversation with any outsider with reference to the matter: "You must keep your minds entirely free and clear from

"any influence. You want to listen to the testimony and "the arguments of counsel as they are made in court, and "after you retire to the jury room, then, and then only, to "talk the matter over and consider the testimony offered "in the case, together with the arguments of counsel, in "arriving at a conclusion of such questions as may be pre-"sented to you." (R., p. 983.)

At page 1082 he stated to the jury: "The Court: I shall "regard this jury as a common law jury, *and shall control "them as a court, and they will have to submit to all the "orders of the court.* I do not know as I can state it any "more fairly or more concisely. I want to give you the "benefit of an exception. I know there is some question "about it, and I will say that the jury will have to conform "to the orders of this court."

Again: "The Court: I will hold this jury to the same "strict lines that I would hold any jury." Again: "Mr. "Dickinson: Let me get my record straight. I under-"stand that your honor proposes to sit here as in a trial at "common law? The Court: Yes. Mr. Dickinson: And "to rule upon testimony and to advise and instruct the "jury? The Court: Yes. Mr. Dickinson: To that I ob-"ject, and not only ask an exception, but protest against "it as a disregard of the Constitution of the State, and as "a disregard of the Supreme Court of the State—the "theory being that the jury was to get at the rights of the "question as an independent tribunal, a tribunal *sui "generis*, the best way they can, without the limitations "and restrictions of a common law trial. The Court: "Objection overruled." Again: "The Court: The jury "will only determine those questions that I will submit to "them, *and I will see that my rulings are carried out by the "jury also*, Mr. Dickinson." (R., pp. 992-1153.)

Again, substantially the same objection as above stated, by counsel for plaintiffs in error, was made at page 1152,

when, in the presence of the jury, counsel stated: "I am "asserting the theory which I propose to hold until the "end of this litigation, which I think to be the right one, "that the jury in this proceeding is a constitutional tribu- "nal *sui generis* with power to determine under the Consti- "tution." The Judge said: "That may be very true, but the "jury will only determine those questions which I will "submit to them." Again, the Judge was disposed to demonstrate to the jury that he could and might punish counsel for contempt (R., pp. 1152-1082); and so on through the record, in the presence of the jury.

At page 1137 of Record grossly incompetent testimony was admitted, and the plaintiffs in error ignored when objection was stated; and see Protests and "rulings" (R., pp. 1150, 1152, 1217, 1659, 1727). In this connection we have not referred to the disclosures in the record as to the gross impropriety of Judge Gartner sitting in the case at all. There was no good reason, even if a judge were permitted to advise, why he should be forced into the hearing rather than any one of his then four colleagues on that bench, from which he not long afterwards retired. We objected to him in the second hearing (R., p. 663), even as an adviser of the jury, if the jury desired advice. He had shown partisan feeling in this case throughout, and we point out his language on the first verdict, among other things. (R., p. 945, top.)

His unfounded imputations upon counsel on points considered essential by the Supreme Court of the State and sent up to it as to the hearing which he did not attend, are demonstrated by the record, hereinafter referred to, and we shall also call attention to page 929. Assuming to charge the jury, having permitted counsel for the railroad company to state to the jury that the Supreme Court of the State had held the amount of the former verdict to be "excessive, exorbitant and unjustified" (R., p. 1690), he

promised to remove that impression from the jury's mind in his charge, which he did not do (R., pp. 1690-1691).

On our reading three leading cases from Michigan as to what would be the due measure of just compensation, in the argument before the jury, counsel for plaintiffs in error used the following language to the Judge, after he had stated that he would charge the jury: "I call your honor's attention to this so that in "the instructions your honor contemplates giving "(the jury) they may follow, not our construction of the "decisions, but the language of the decisions of the Su- "preme Court speaking through such learned justices as "Justice Campbell and Justice Cooley" (R., pp. 1691-1692), and said (folio 2828): "I shall mark the passages and ask "your honor's attention to them in giving your views of "the law to the jury." These were the decisions in Pearsoll vs. Supervisors, 74 Mich., 558; Grand Rapids R. R. vs. Heisel, 47 Mich., 398; and Grand Rapids R. R. vs. Weiden, 70 Mich., 393 (see pp. 1692-1693-1694-1695 of Record). The judge did charge the jury in that most felicitous charge so highly thought of by the Supreme Court of the State, wherein the true principle of compensation, as stated in those cases, and counsel's requests were ignored, but he warned them against "exorbitant or grossly excessive compensation."

But the basic question here has nothing to do with the improprieties or misconduct of a judge. Far and away above such considerations is the radically fundamental objection heretofore discussed.

2. The Supreme Court sent back the case to this judge with full license to grant new trials, something that even under this statute, the Supreme Court itself could do but once, and never once, under the authorities, for objection to the amount of an award or for anything else than a

clear departure by the jury, under the constitutional conferment of power upon them from the fundamental delimitations of their functions. The statute contains no provision for the granting of new trials by a Circuit Judge, and we shall see under caption VI. *infra*, that in Michigan, as elsewhere, the proceedings to condemn private property are in derogation of the common law, and that within the statutes providing them must be found authority for every remedy, process and step in the proceedings, and that these so provided are exclusive of all others.

It would be another instance of farcical dealing with the fundamental law if it be true that "a judge can form no part of the tribunal,"—can take no part in fixing the measure of compensation,—and yet have unlimited power to grant new trials until an award shall be arrived at, which he, in his judgment, shall deem reasonable and not excessive. If the third trial were authorized at all, the plaintiffs in error, in entering upon it, were absolutely certain that any view of just compensation held by the jury, and any award they might make, could not, in the circumstances, be permanent, unless it should be according to the notion of the judge. Thus they were launched into what might be an interminable proceeding.

IV. THEY WERE DENIED THAT MEASURE OF JUST COMPENSATION FOR THEIR PROPERTY TAKEN, GUARANTEED BY THE CONSTITUTIONS, FEDERAL AND STATE, AS THE SAME WAS AND IS ACCORDED TO ALL OTHER PERSONS THAN THEMSELVES.

1. In this case, on both hearings, it was demonstrated that the lumber yard, storehouse and the factory was one and the same plant, built and established as one plant and constructed and placed one to the others, relatively, for the needs of the plant. This is the testimony, not only of the Backuses (R., 1483, 1552, 1555), but the testimony of disinterested planing mill men, and dealers with the plaintiff in error (R., 1275, 1281, 1306, 1449). There was no contradiction, or testimony the other way, on this point.

2. It was proved, without contradiction, by the Backuses, by dealers, by the artisans employed, and by planing mill men, that the business of the plant in which the profit was made, was destroyed by the railroads and their operation; (R., 1552, 1554, 1556, et seq.), and that for that reason the plant, which had been a paying business, earning a large net profit on the great volume of business, had become a failure (R., 1447, 1448, 1449, 1461, et seq.—1466, 1467, 1492-3-4). It was not disputed that the net profit had been from $25,000.00 to $70,000.00 per year, and that up to the time of the building of the structure, the profits had been $34,000.00 per year for sixteen years (R., 1524 and 1525, 1526, 1552, 1553, et seq.). The business prevented by the railroad's operation was the profitable part of the business (p. 1555, folio 2608) (p. 1556, folio 2609).

The impossibility of doing the fine work of the factory, in which the profit was, is demonstrated by the actual ex-

perience of the workmen, commencing at R., 1331, by the dealers and planing mill men (R., 1283, 1303, et seq.—1309, 1344, 1447, 1463, 1466, 1362, 1583, 1413, et seq.—1463, 1553).

Although it was held at various places in the record by the Circuit Judge that the railroad company had the burden of proof as to damages, it offered no testimony, except as to the value of the realty, the machinery in the mill, and the danger from fire, either direct or in rebuttal, and they rested their entire case upon the value of the land per foot front and the value of the fixtures, machinery and the buildings of the factory alone.

To further show the radical and fatal failure to accord a just measure of compensation in respect of the injury to the parts of the plant, other than the factory itself, and to the business, and in respect of damages to the business itself and to the whole plant from the necessary change, I call marked attention to the language of Judge Gartner, in his opinion in the record, in the case passed upon by the Supreme Court in 92 Mich., wherein it is approved (R., p. 928): "The damages awarded are most remark-"able. The right of way sought to be acquired is the right "of way for an elevated railroad along River street in "front of the property of respondents. They have a front-"age on the street of some 238 feet, and on Fort street of "about 75 feet. At $150 a foot, which is a large estimate, "the land itself is worth $46,950. The testimony of re-"spondent, Absalom Backus, Jr., is to the effect that the "buildings and improvements *had cost $150,000*, and are "worth that now. But, deducting 25 per cent for depre-"ciation, which is usual on buildings and improvements "of some years' standing, we have a valuation of $112,500, "or a total valuation for the entire property of $159,450. "And yet for simply going in front of this property a jury "makes a total award of $96,144. Comparing this award

"with what has been voluntarily accepted or awarded in "other cases on River street, we have some striking con- "trasts:

"Geo. H. Hammond, 45 feet frontage, $2,500, or $55.55 per foot.
"Diamond Match Co., 210 feet frontage, $1,600, or $76.18 per foot.
"Union Mills, 140 feet frontage, $21,250, or $157.78 per foot.
"Geo. Kunze, 25 feet frontage, $1,000, or $40 per foot.
"Geo. C Wetherbee, 25 feet frontage, $1,500, or $60 per foot.
"Hylet Barker, 25 feet frontage, $1,000, or $40 per foot.
"Frank Hildebrand, 25 feet frontage, $1,500, or $60 per foot.
"Mich. Cent., 166 feet frontage, $1,660, or $10 per foot.
"Mich. Cent., 47 feet frontage, $470, or $10 per foot.
"Barbara Steadley, 65 feet frontage, $2,615.20, or $42.30 per foot.
"Louis J. Specht, 27½ feet frontage, $1,100, or $40 per foot.
"Mary Specht, 27½ feet frontage, $1,100, or $40 per foot.
"Barbara Baxter, 23 feet frontage, $690, or $30 per foot.
"Margaret Specht, 23 feet frontage, $713, or $31 per foot.
"John Winister, 51 feet frontage, $1,530, or $30 per foot.
"Jacques Ruhlman, 20 feet frontage, $1,000, or $50 per foot.
"Rachel Ruhlman, 20 feet frontage, $1,000, or $50 per foot.
"Catherine Harpfer, 40 feet frontage, $1,600, or $40 per foot.
"Boynton & Boutell, 45.87 feet frontage, $917.40, or $20 per foot."

It will be observed that his rule of measurement is the price paid per front foot to vacant land-owners and others whose business could not be injured by the railroad, and that he assumes that the measure of value must be fixed on the value of the real estate per front foot, and upon this reasoning, he says that the first verdict was "a trav- "esty upon justice." The Supreme Court of the State comments upon this in its decision setting aside the award (see Record, p. 961): "The Court below well remarked: "'The damages awarded are most remarkable,'" and proceeds to quote Judge Gartner as above, commenting on the front foot valuation of the factory alone, and on that theory as one of the two chief reasons, the Court held that the award should be set aside. Again, in that carefully prepared charge to the jury on the third hearing, Judge

Gartner confined the jury's attention to the same considerations, to wit: "*The damages to A. Backus, Jr., as the "owner in fee of the land described,*" (*the land on which the factory stood alone*); "*and the amount to be allowed "to A. Backus, Jr., & Sons as tenants in possession of such "lands*" (*the same land on which the factory stood*).

As has been seen, we called the marked attention of the Court to the true rule of damages as laid down by the Supreme Court itself, which is the universal rule.

That is that nothing less than damage to all the parts of the plant remaining, and nothing less than full compensation for injury to the business, is just compensation, and anything less is depriving the plaintiffs in error of just compensation and is a taking of their property without Due process of law. This is apart from the question of discrimination, which was and is also made under this head.

We do not ask this Court to re-examine and weigh the evidence at all, or any errors of the jury in that matter. (Railroad vs. Chicago, 166 U. S., pp. 226-242.) But we submit under that judgment that this Court will "Inquire "whether the trial court prescribed any rule of law for "the guidance of the jury that was in absolute disregard "of the fixed right to just compensation" (Id., p. 246). The rule of law adopted by the trial court and by the Supreme Court as above quoted, and which the jury must be presumed to have taken, both under the charge, and as their knowledge of the law derived from their presumptive knowledge of the decision in this case of the Supreme Court of the State, excluded the principle of just compensation just as much as if the same influence had prevented a recovery at all.

The general rule is laid down by Cooley on Constitutional Limitations, as follows: "The statutory assess-

"ment of compensation will cover all consequential dam-"ages which the owner of the land sustains by means of "the construction of the work, except such as may result "from negligence or improper construction, and for which "an action at the common law will lie, as already stated." (Ch. XV., p. 570, Second Edition.)

The leading cases in Michigan, summing up the applications of the principle always held by the courts of that State theretofore, and affirmed subsequently, are as follows:

In Grand Rapids R. R. vs. Hiesel, 47 Mich., p. 398, it was held: "It need hardly be said that nothing can "fairly be termed compensation which does not put the "party injured in as good a condition as he would have "been if the injury had not occurred. Nothing short of "this is adequate compensation. In the case of land ac-"tually taken, it includes its value, or the amount to "which the value of the property from which it is taken "is depreciated, and in Jubb vs. Hull Dock Co., 9 Q. B., "443, it was held where the property taken was a brewery "in operation, the damages included the necessary loss in "finding another place of business. In cases where dam-"age is by injury aside from the actual taking of property, "the rule has been to make the party whole as nearly as "practicable, and where it affected the rental value or en-"joyment, the same principle has been applied as in other "cases."

This is held in that case of the rule of damages in cases open to consideration by a jury of inquest called on to assess compensation under the statute (see Id., p. 398).

Grand Rapids R. R. vs. Weiden, 70 Mich., p. 391. This was a railroad condemnation case. "Both of the appel-"lants were using their property in lucrative business, in "which the locality and its surroundings had some bear-"ing on its value. Apart from the money value of the

"property itself, they were entitled to be compensated so "as to lose nothing by the interruption of their business "and its damage by the change. A business stand is of "some value to the owner of the business, whether he "owns the fee of the land or not, and a diminution of busi- "ness facilities may lead to serious results. There may "be cases when the loss of a particular location may de- "stroy business altogether, for want of access to any "other that is suitable for it. Whatever damage is suf- "fered, must be compensated. Appellants are not legally "bound to suffer for petitioner's benefit. Petitioner can "only be authorized to oust them from their possessions "by making up to them the whole of their losses." (Camp- bell, J.)

We call attention to the opinions both of the trial and appellate courts that the factory structure cost outside the realty $150,000.00, and to the unchallenged testimony that by the change wrought by the petitioner it must move, and thus render the investment in the factory itself worthless.

In Railroad vs. Chesebro, 74 Mich., 466-474. This was a condemnation case. "An owner has a right to be in- "demnified for anything that he may have lost. The "farming test, which is the one petitioner sought to apply, "would be of no particular use in a great many cases of "suburban lands." * * * * "The mere taking of four "acres for a right of way could not be regarded, in any "sensible point of view, as compensated by one-tenth of "the value of the forty acres, taking acre for acre. The "damages in such a case must be such as to fully make "good all that results, directly or indirectly, to the injury "of the owners in the whole premises and interests af- "fected, and not merely the strip taken"—citing the Michigan cases. Further: "The jury here as in all cases "where no certain measure exists, must trust somewhat

"to their own judgment. That is one of the purposes for "which juries of inquest are provided. They are expected "to view the premises and use their own senses." * * * "But the purpose throughout is to give all the damages "which they reasonably discover, past or present, and to "result, but no more. No one can read this record with- "out seeing that the jury did not deal fully with the case. "It is manifest that they gave no damages beyond what "they assumed to be the price of four acres by the acre." * * * "It cannot be said there is any real conflict as "to the damages arising from the cutting off one part "from the other of the forty acres, and this was left out "altogether, unless they regarded the proofs of value wan- "tonly, which we cannot believe." (Campbell, J.)

Champlin, J. (Id.): "There can be no doubt that the "railroad crossing respondent's land in the manner it "does, is a serious injury to the parcel, aside from the "value of the land taken, and that the parcel on the east "side of the track is affected by reason of the fact that a "railroad must be crossed to enter upon or leave it by the "owner of the other parcel. This is an element of damages "that must necessarily enter into the award of the jury, "and the compensation therefor must be determined by "them."

In the same report (74 Mich.), in the case of Pearsall vs. Supervisors, speaking of the taking for public use, the Court says on this subject, at page 561: " 'The constitu- " 'tional provision is adopted for the protection and secur- " 'ity to the rights of the individual as against the govern- " 'ment,' and the term 'taking' should not be used in an "unreasonable or narrow sense. It should not be limited "to the absolute conversion of property and applied to "land only; but it should include cases where the value is "destroyed by the action of the government, or serious "injury is inflicted to the property itself, or exclusion of

"the owner from its enjoyment, or from any of the appur-
"tenances thereto." * * * * "If the public take any
"action which becomes necessary to subserve public use,
"and valuable rights of an individual are thereby inter-
"fered with, and damaged or destroyed, he is entitled to
"the compensation which the constitution gives therefor,
"and such damage or destruction must be regarded as a
"'taking.'"

In Port Huron vs. Voorheis, 50 Mich., 506, it is said of the citizen in such circumstances: "He was entitled not "only to compensation for the land taken, but also for "such other actual damages to his homestead as he sus-
"tained by reason of the taking, and necessarily arising "from the use to be made of the parcel taken." In that case is cited a large number of cases outside of Michigan, as well, to the point that this is the universal rule.

In Barnes vs. Michigan Air Line, 65 Mich., 251, Judge Campbell said: "The jury should consider and the land-
"owners should lay before them, all the consequences of "the appropriation of the land, and *the manner in which "the company will use it*" (citing Michigan cases). "The "same principle is familiar in many shapes."

In Commissioners vs. Railroad, 91 Mich., 291, the court (Grant, J.) after stating that when the lands of railroad companies are condemned, they are entitled to the same measure of damages as any other owners, said: "If, there-
"fore, their adjoining land is rendered less valuable by "the location of a public highway, or another railroad "across its property, there is no reason why they should "not recover compensation therefor. *Situated near this "crossing is a small tract of land used for warehouse pur-
"poses. It is insisted by the respondents that, by reason "of this crossing, this land, with the warehouse thereon, "is rendered less available and less valuable for the pur-
"poses for which it was constructed and used.* This was

"a proper element of damage, and should have been sub-
"mitted to the jury."

In Commissioners vs. Moesta, 91 Mich., 154, the Court, quoting with approval Grand Rapids R. R. vs. Weiden, 70 Mich., 295, *supra*, said: "The constitution provision en-
"titling the owner of private property, taken for public
"use, to just compensation, has uniformly been construed
"to require full and adequate compensation. The rules
"to be applied in fixing the compensation are not neces-
"sarily the same as obtain in fixing damages in actions
"upon contracts. The correct rule of compensation in
"such cases is more nearly analogous to the remedy af-
"forded in an action in tort in which property rights have
"been interfered with without the owner's assent. *In*
"*such cases damages for the interruption of the owner's*
"*business are allowed*—Allison vs. Chandler, 11 Mich.,
"549." And see directly in point on the use of a street, Riedinger vs. Railroad, 62 Mich., at pp. 44-45.

The same doctrine has been repeatedly affirmed in condemnation cases against railroads. It is the universal doctrine. Grand Rapids R. R. vs. Railroad, 58 Mich., 641-648; Toledo R. R. vs. Railroad, 62 Mich., 564; Chicago R. R. vs. Huff, 61 Mich., 507-508; Commissioners vs. Chicago R. R., 91 Mich., 291; Commissioners vs. Railroad, 90 Mich., 385. And most recently in the City of Grand Rapids vs. Bennett et al., 106 Mich., 529-537, where the rule of damages in the above cases as to railroads was again affirmed.*

The decision in 92 Mich. on this ruling complained of as being discrimination against these plaintiffs in error, was rendered on June 10, 1892. On October 27, 1892, in a judgment delivered in the case of the City of Detroit vs. Bren-

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*The single dissent in this case is there printed first, but the judgment of the other four justices on this question is given at page 537.

nan, 93 Mich., 338, the principle applied in all the other cases heretofore cited on this question that "The full "measure of compensation and the injury done to the "business, should be allowed" was again affirmed, and the statement of it there approved was as follows: "The law "considers the rights of the property and business carried "on by the respondent as of equal consideration and en- "titled to as much protection as the right of the city to "take the property and interfere with the business; and "will not permit the property to be taken and the busi- "ness to be interfered with, unless an actual public ne- "cessity exists for the making of the improvement." * * * * "The elements of damage are: (1) The value of the "property taken for the opening of the street; the injury "to the works and property not taken, and left in the "parcel of land from which the property is taken; (2) "The injury to the business of the owner; (3) Compensa- "tion for all prospective loss or injury resulting from the "opening of the street, and the taking of the property for "that purpose." (Id., p. 341.)

V.—THEY WERE DENIED A HEARING AND DEPRIVED OF A HEARING GUARANTEED BY THE CONSTITUTIONS, FEDERAL AND STATE, AS "DUE PROCESS OF LAW," WHEN SUMMONED INTO COURT AS APPELLEES TO DEFEND THEIR PROPERTY RIGHTS AND THEMSELVES FROM IMPUTATIONS UPON THEM.

We present two features of the case under this head:

(1) The denial by the Supreme Court of the State of a hearing on the substantial and essential question, of whether counsel for plaintiffs in error abused their privilege as counsel by arguing to the jury *on the question of necessity* that the margin of the depot grounds that

belonged to the Michigan Central Road could be taken for the elevated structure; and (2) the reversal of the unanimous judgment of the Supreme Court of the State in 89 Mich., p. 209, without a re-hearing, by the judgment in 92 Mich., p. 33.

1. It appears by the record that when counsel for the plaintiffs in error began the argument on this question, they were stopped by the Court with the statement that inasmuch as the jury had found against the plaintiffs in error on the question of necessity, the Court would hear no argument from plaintiffs in error on that point,

The practice in Michigan as to the order of arguments of counsel is this: opening for the appellant, reply for the appellee, and close for appellant. No opportunity was given to answer the grave imputations of the Court below on this point, but, nevertheless, in the opinion and judgment of the appellate court, it was treated as the chief, or one of the chief grounds for the adverse disposition of the large property interests of these citizens. We raised the federal question at the first opportunity, when ordered to the re-hearing by the Supreme Court, in the trial court. We presented it again in the written motion against the entry of judgment, and directly to the Supreme Court itself in the application for the writ of certiorari; again in the assignments of error there, and in the argument in that Court on this record on certiorari. It was ignored by the State Supreme Court, with the other federal questions, and we come here at this, the first opportunity since we were denied the hearing.

At the time when this hearing was denied, the plaintiffs in error were not before the court as applicants for favor, as in the case of Allen vs. Georgia, 166 U. S., 138, and other cases of that nature discussed by this Court in Hovey vs. Elliott, 167 U. S., at pages 425 to 444. On the contrary, the plaintiffs in error were sum-

moned into the Supreme Court of the State to answer and defend their private property, and we stand upon the principle stated by this Court, in the latter case, as follows:

"In Windsor vs. McVeigh, 93 U. S., 274, the Court, "speaking through Mr. Justice Field, again said (pp. 277, "278): 'The principle stated in this terse language lies "'at the foundation of all well-ordered systems of juris-"'prudence. Wherever one is assailed in his person or "'his property there he may defend, for the liability and "'the right are inseparable. This is a principle of "'natural justice, recognized as such by the common in-"'telligence and conscience of all nations. A sentence "'of a court pronounced against a party without hearing "'him, or giving him an opportunity to be heard, is not a "'judicial determination of his rights, and is not entitled "'to respect in any other tribunal. That there must be "'notice to a party of some kind, actual or constructive, "'to a valid judgment affecting his rights, is admitted. "'Until notice is given, the Court has no jurisdiction in "'any case to proceed to judgment, whatever its authority "'may be, by the law of its organization, over the subject-"'matter. *But notice is only for the purpose of affording "'the party an opportunity of being heard upon the claim "'or the charges made. It is a summons to him to appear "'and speak, if he has anything to say, why the judgment "'sought should not be rendered. A denial to a party of "'the benefit of a notice would be in effect to deny that he "'is entitled to notice at all, and the sham and deceptive "'proceeding had better be omitted altogether. It would be "'like saying to a party, appear and you shall be heard; "'and, when he has appeared, saying, your appearance "'shall not be recognized, and you shall not be heard.* "'In the present case, the District Court not only in effect "'said this, but immediately added a decree of condemna-

"'tion, reciting that the default of all persons had been "'duly entered. It is difficult to speak of a decree thus "'rendered with moderation; it was in fact a mere "'arbitrary edict, clothed in the form of a judicial "'sentence.'

"'*This language but expresses the most elementary con-*"'*ception of the judicial function.* At common law no man "was condemned without being afforded opportunity to be "heard. Thus Coke (2 Inst., p. 46), in commenting on the "29th chapter of Magna Charta, says: 'No man shall be "'disseised, etc., unless it be by the lawful judgment; that "'is, verdict of his equals (that is, of men of his own con-"'dition) or by the law of the land (that is to speak it once "'for all), by the due course and process of law.'" * * * "In Capel vs. Childs, 2 Cromp. & Jer., 558 (1832) * * * "Lord Lyndhurst, C. B., at p. 574, said: 'A Party has "'a right to be heard for the purpose of *explaining his* "'*conduct.*'" * * * *"Can it be doubted that due pro-*"'*cess of law signifies a right to be heard in one's defense?* "If the legislative department of the government were to "enact a statute conferring the right to condemn the citi-"zen without any opportunity whatever of being heard, "would it be pretended that such an enactment would not "be violative of the Constitution? If this be true, as it "undoubtedly is, how can it be said that the judicial de-"partment, the source and fountain of justice itself, has "yet the authority to render lawful that which, if done "under express legislative sanction, would be violative of "the Constitution? If such power obtains, then the judi-"cial department of the government, sitting to uphold "and enforce the Constitution, is the only one possessing "a power to disregard it. If such authority exists, then "in consequence of their establishment, to compel obedi-"ence to law and to enforce justice, courts possess the "right to inflict the very wrongs which they were created

"to prevent. In Galpin vs. Page, 18 Wall., 350, the Court "said (p. 368): 'It is a rule as old as the law, and never "'more to be respected than now, that no one shall be "'personally bound until he has had *his day in court, by* "'*which is meant, until he has been duly cited to appear,* "'*and has been afforded an opportunity to be heard.* Judg- "'ment without such citation and opportunity wants all "the attributes of a judicial determination; it is judicial "'usurpation and oppression, and can never be upheld "'where justice is justly administered.' Again, in ex "parte Wall., 107 U. S., 265, 289, the Court quoted with "approval the observations as to 'due process of law' made "by Judge Cooley, in his Constitutional Limitations, at "page 353, where he says: 'Perhaps no definition is more "'often quoted than that given by Mr. Webster in the "'Dartmouth College case: By the law of the land is most "'clearly intended the general law; a law which *hears* "'before it *condemns*, which proceeds upon inquiry and "'renders judgment only after trial. The meaning is that "'every citizen shall hold his life, liberty, property and "'immunities under the protection of the general rules "'which govern society.'"

Moreover we still maintain, and shall submit that we here demonstrate, that the arguments of both counsel before the jury were right, and that the property of the Michigan Central in question could be taken for this structure. But even if we were wrong in that contention, we shall show that it was oppressive and unjustifiable to make the imputations upon the two counsel that have passed permanently into the law reports of the State, and to found thereon the denial of valuable rights to the plaintiffs in error. We shall show by the record that the most serious stricture in that opinion has nothing what-

ever to rest upon except a clear perversion of the statements of counsel by Judge Gartner, which we were about to show when stopped in the argument.

On the question of the abuse of counsel's privilege before the jury, the Supreme Court of the State, in the case of Prentis vs. Bates, 93 Mich., 236, said: "The first ques-"tion considered was whether counsel for the contestants "abused his privilege in his opening statement to the "jury. On the former hearing the sitting members of the "Court were impressed with the view that the trial judge "had not sufficiently restricted contestants' counsel in "this case, but a fuller argument and examination have "convinced us that the statements of counsel, both as to "the propositions of law contended for in his opening, and "as to the facts which he expected to prove, were made "in the utmost faith." * * * "It is unnecessary to "determine whether the contestants' position on the law "of the case was wholly sound or not, as counsel has the "right under the rulings of the Court, to state in good "faith his claims as to the law, in so far as it was neces-"sary to give the jury an understanding of his theory. As "was said in Fosdick vs. Van Arsdale, 74 Mich., at page "305: 'Counsel have the right both in opening the case "'to the jury, before the testimony to support their case "'is offered, and when closing the argument after the "'testimony is in, to state to the jury that they claim the "'law thus and so.'"

So that the ground for reversal in the present case is this, that, notwithstanding the jury found against us on the question argued, yet in some way not clear, the argument increased the damages, and, most grave and important of all, was made in *bad faith.*

Now, it appeared by the record, on the testimony of the railroad company's own witnesses, that the Michigan Central Depot grounds in question, in the center of the city,

extended between Third and Twelfth streets, along and fronting on River street the entire distance between those streets, with a depth to the river, comprising forty acres: and what was called the "old depot grounds" extended below Twelfth street, comprising forty acres. (R., pp. 128, 151, 159.) That in addition, within the city, and three miles from these grounds, the Michigan Central had a mile square of territory for yard purposes. (R., p. 265, Fol. 455.) It is testified by the railroad company's witness Mulliken, who was superintendent of the Detroit, Lansing & Northern, which used the Michigan Central grounds, that the best and most direct route for the petitioner's road was along the margin of the Michigan Central grounds. (R., p. 257.) And that if the elevated structure should run along the margin of the Michigan Central holdings and the Michigan Central desired to put a track for business in there, the business could as well be done under the proposed elevated structure as without it. (R., p. 260.) The projector of both union depots—Mr. Joy—testified that that would be the most direct route for the union depot approach. (R., pp. 145-152.) It appeared by the testimony of the Michigan Central superintendent that in the forty acres, the Michigan Central Road had two great elevators. (R., p. 265.) It further appeared by the testimony of the depot company's engineer, Ellis, that under his elevated structure, the ordinary railroad trains could pass without interference in "the slightest degree," (R., p. 64. Fol. 112.) To the same effect, Mr. Joy (R., p. 170, top.) It also appeared that formerly in these Michigan Central grounds the Great Western Road and the Grand Trunk used them and had since retired from the use of them. Further, that the roads now engaged in this union depot enterprise, including the Flint & Pere Marquette and the Detroit, Lansing & Northern, were still using the Michigan Central grounds, but were about to

retire on the completion of this particular union depot, and that the Michigan Central had added to its ground the former holding of the Detroit, Lansing & Northern (p. 180—Folio 312, p. 260, Folio 447).

There was not a particle of evidence that there were any tracks of the Michigan Central along the proposed margin on River street, but that there were along there old buildings and sheds.

The provision for the Michigan Central Company's "track and rights of way" in its charter is that the total width for such purposes is limited to "150 feet through "the entire line thereof." Section 5, (299) Railroad Laws of Michigan, 1890, p. 117.

With these conditions, we have the provision of the Union Depot Act as follows:

"§ 3463.—Sec. 6. In case any such company is unable "to agree for the purchase of any real estate, property or "franchises required for the purpose of its incorporation, "it shall have the right to acquire the title to the same "in the manner and by the special proceeding prescribed "in this act; but there shall be no power, except for cross-"ing, to take *the track or rights of way* of any other rail-"road company without the consent of said railroad com-"pany."

The depot grounds were certainly not "the track or right of way." This is a clear implication that any other property which is not "Track or rights of way" of a railroad company may be taken.

Aside from that question, the Union Depot Company approach was made an elevated structure from the time it entered River street at Twelfth street until it came down to grade again to pass into the Union Depot itself for the purpose of *crossing* or going over the mass of tracks of the Michigan Central Railroad on River street. (This theory was presented to the jury, R., p. 800, f. 1375.)

Now, it may be said generally that "In our country, it "is believed that the power" (to take property for public use) "was never, or at any rate, rarely questioned, until "the opinion seems to have obtained that the right of "property in a chartered corporation was more sacred "and intangible than the same right could possibly be in "the person of a citizen; an opinion which must be with- "out any grounds to rest upon until it can be demon- "strated, either that the ideal creature is more than a per- "son, or the corporeal being is less; for, as a question of "the power to appropriate to public uses the property of "private persons resting upon the ordinary foundations "of private right, there would seem to be room neither for "doubt or difficulty." West Bridge River Company vs. Dix et al., 6 How., at page 533.

In 124 Mass., p. 370, Boston R. R. vs. Lowell R. R., the general rule against such taking is stated as strongly as it is held anywhere by Chief Justice Gray, as follows: "The general principle is well settled and has been applied "in a great variety of cases, that land already legally ap- "propriated to a public use, is not to be afterwards taken "for a like use, *unless the intention of the Legislature that it "should be so taken has been manifested in express terms, or by "necessary implication.*"

But in Michigan the basic principle of that opinion does not obtain. The uniform holding of the court of last resort in that State is that the business of a railroad company is private business, and that the taking of private property for its uses is an exceptional application of the power of eminent domain, made necessary, it is true, by changed conditions, but that the theory that the taking is for public use is a fiction.

See People vs. Salem, 20 Mich., 496, and the several opinions of Cooley, Campbell and Christiancy, JJ. In Grand Rapids R. R. vs. Railroad, 35 Mich., pp. 264, 273, it is

said that the "theory that land taken under the power of "eminent domain is taken for public use, has really caused "much mischief." * * * "Corporations have fre- "quently, in order to accomplish their purposes, sought to "give this term its broadest meaning, and then using it as "a foundation to erect structures thereon, wholly at vari- "ance with all well-known legal principles. In this they "have derived encouragement and support from the "courts in holding that property thus taken and held by "a private corporation is taken for a public purpose, in "order to find some ground upon which to authorize its "being taken *in invitum*."

The conclusion reached in that case was: "Our conclu- "sion upon this branch of the case is that the franchises or "property of one railroad may be taken for the construc- "tion of another, *in all cases where the property of an indi- "vidual might be, upon making compensation therefor*." And see Toledo R. R. vs. East Saginaw R. R., 72 Mich., 206.

(In these citations we will also cover the point that the question of "necessity" involves not only the public need, but also the necessity of the particular route selected by the condemning corporation.)

In Grand Rapids R. R. vs. Weiden, 70 Mich., 393, it was said: "It seems to be imagined that railroad companies "are to be presumed entitled to proceed to condemn lands "at their own option, and that nothing more than a for- "mal effort is required to give them the right to do so. "But under our constitution this is not a correct view of "the subject. Under the old constitution, when the Leg- "islature chartered a railroad the right to build it became "fixed, and could not be questioned, and, consequently, "land-owners were obliged to acquiesce. But, under our "present constitution, there is never any presumption "that a railroad is necessary, *or that any particular land "ought to be given up to its uses*. Every land-owner, there-

"fore, has a *perfect right to object to giving up his land, and "is not confined to objections depending upon price or value. "He may object to the lack of necessity for the road at all, or for "its location, or extension over his land, at any price or on any "conditions. In law, his use is presumptively as important as "that of a railway company, and it must devolve on any such "company to establish affirmatively all that is needful to make "out a clear case of necessity.* And a road already estab- "lished has no better claim than any other to extend or "change its lines. Although railroads are allowed by "public policy to condemn land, because they cannot exist "otherwise, nevertheless the enterprise is, under our laws, "which prohibit public ownership of railways, one of *pri- "vate interest and emolument*, and must show its claims to "legal assistance."

And see general discussion by Judges Cooley and Campbell on this power, in Ryerson vs. Brown, 35 Mich., 332. This language is used by Judge Cooley: "It is always an "invasion of liberty and of right when one is compelled to "part with his possessions on grounds which are only "colorable. A person may be very unreasonable in in- "sisting on retaining his lands, but half the value of free "institutions consists in the fact that they protect every "man in doing what he shall choose, without the liability "to be called to account for his reasons or motives, so long "as he is doing only that which he has a right to do."

(And see Powers' Appeal, 29 Mich., at p. 509; People vs. Brighton, 20 Mich., 57, *certiorari*.)

In Grand Rapids vs. Railroad, 58 Mich, 646, Judge Campbell said: "It has often happened that juries have "been led or allowed to evade their own responsibility in "passing on the necessity for the work itself. That is, as "we have frequently pointed out, their most essential "duty, because, *if it is taken for granted the road is to be laid "out, the position of the particular parcels on the line is fixed*

"when the road is fixed. The object of the Constitution is to "prevent all needless appropriations of private property, "which are too often made for ends in which the public "are in no strait, and for private fancy or emolument "rather than the general welfare."

We submit with confidence that there can be no doubt (irrespective of the general railroad statute, Paragraph 3357, quoted at page 34 *supra*) that under the last cited section, the grounds of the Michigan Central Road could be taken for public use and can be taken by another railroad company upon paying compensation.

Grand Rapids R. R. vs. Railroad, 58 Mich., 641; Toledo R. R. vs. R. R., 62 Mich., 564; Chicago R. R. vs. R. R., 61 Mich., 507-8; Commissioners vs. R. R., 91 Mich., 291; Commissioners vs. Rd., 90 Mich., 385; Grand Rapids vs. Bennett, 106 Mich., 528.

In a case decided since 92 Mich., 33, and 103 Mich., here in question, the Supreme Court of the State—in the case of Cinn. R. R. vs. Bay C. R. R., 106 Mich., at page 473, which was very fully and elaborately argued by able counsel, held: "Section 3331, 3 How. Stat. subjects railroad prop- "erty to condemnation excepting (under some circum- "stances) the track and right of way. The argument is "made that this is an attempt to condemn the track and "right of way, and if this appeared from the petition and "answer, it might be necessary to try it again. But it "does not, and we think the Circuit Judge was right in "declining to allow the question to be raised."

Now, Section 3331 is in the words of the union depot section last above quoted, so far as this matter is concerned. An amendment (1882) has been added giving some *further power* as to tracks and rights of way in case the track and right of way has not been finished or used for five years, but the amendment does not change the part here construed. § 3350 Howell—cited as having

some bearing in 92 Mich. at page 50—has no bearing, but if it had it clearly provides for a taking by the usual condemnation proceedings.

Finally and conclusively, it appears by this record that the Michigan Central Railroad owned the "front on River street" from Third to Twelfth street for the depot grounds in question. It has been shown that its ownership extended to the center of the street, and the most valuable property right in "depot grounds" in Detroit was its front and property interest in the street as a part of those grounds on that front.

The Michigan Central, as shown by Mr. Joy, was hostile to this petitioner's enterprise, and fought it. (R., p. 152, Fol. 262, and elsewhere in the record.)

But the first case commenced for condemnation was this depot property of the Michigan Central on River street (R., p. 148). As to the contest, Mr. Joy states as follows: (R., p. 154). Q. "When you came to condemn, "although the Backus was the first trial except the Mich- "igan Central, when you came to condemn the rights of "the Michigan Central on River street, you must come up "from the Union Depot to your passenger depot; when "you elected to condemn the rights of the Michigan Cen- "tral and came along River street, the Michigan Central "did not urge the question of necessity very much, did "they? Mr. Joy: *They argued the case in every possible form.* "They brought up the question of necessity; it was before "commissioners, and Mr. Pond and Mr. Russell raised the "question of necessity, and assumed that they were going "to win on that question."

Now, at page 303, Folio 520, to page 305, Folio 525, *appears the proceedings and findings* of the commissioners in that hotly contested proceeding, appointed under this very statute to condemn this Michigan Central depot

ground front. As the result they *did* condemn: (1) The triangular piece of land belonging to the Michigan Central on River and Twelfth street, a part of these grounds. (2) They condemned the front from the east line of Twelfth to the westerly end of the passage-way for teams along this elevated structure. (3) They condemned 1,500 feet in length above the crossing of the Michigan Central tracks toward Third street. (4) They condemned the front of the Michigan Central Company to their flour shed and freight houses on the north side of River street, 166 feet. And so they condemned the depot property of the Michigan Central Rail road for this enterprise from the place of entering River street at Twelfth street throughout the occupation of River street by these defendants in error.

In view of this testimony, and of the law, we submit that we were right in arguing that there was no necessity for this road to pass up River street against the Backus property; that whether we are wrong or right, the counsel were absolutely entitled to a hearing on the good faith of the argument, before bad faith could be found by the Court, and that the denial of that hearing was a gross violation of a fundamental right of these citizens and of the counsel as their representatives.

As further evidence of good faith, while we at all times denied the right of a judge to constrain or control the jury, we repeatedly suggested to the jury that it call in any of the other circuit judges than Judge Gartner for advice upon the law. R., pp. 669-670, and so on throughout the case.

Without, in the printed argument, pursuing at length the instances of misrepresentation of the counsel for plaintiffs in error, we take one as illustrative and typical, which the Supreme Court discussed chiefly in disposing of

the case without permitting us to be heard upon the subject.

To premise, the civil engineer, Ellis, in charge of the construction for petitioner, under examination of petitioner's counsel had sworn to the advice he had received, that as a matter of law the petitioner had no right to go on the margin of the Michigan Central property (R., p. 48, Fol. 84).

Mr. James F. Joy, called for petitioner, was examined and sworn as to his opinion of the law, as a lawyer, at great length at p. 112 of Record, Fol. 195; p. 113, Fol. 196; p. 188, folio 290; p. 616, folio 1054; p. 623, ff. 1065, 1066, et seq. He was asked such questions as this: "Q. You "say you were a member of the bar for a number of years, "and the attorney and president of the Michigan Central "Company, and connected with all these different enter- "prises, and you say you know of no law to condemn the "right of way across that property?"

After such testimony as to the law of the case, when *petitioner's* witness, Superintendent Mulliken, was on the stand, the counsel for plaintiffs in error *in the cross-examination* discovered that Honorable George V. N. Lothrop had given advice on the subject, and ventured to call it out. Mr. Lothrop was subsequently called by petitioners, and testified (R., p. 634) that he had no recollection of any such conversation with Mr. Mulliken as testified to by the latter, or, as he put it: "As I have no recollection of the "question ever having arisen, of course I have no recollec- "tion of ever having given any advice to anybody on the "subject."

It turned out that he was not familiar with the Act of 1881 at all, and his conclusion was, as stated, that if there was a general railroad law authorizing it, he did not see any objection to such condemnation, "*so that it will op- "erate within the rule that would govern the taking of pri-*

"vate property for public purposes." (R., p. 637.) On the general question he says: "Before I should dare to an-"swer a question of that kind (as to what might be done "under the Act of 1881) I should give the matter of juris-"diction of the tribunal a very quite careful examination, "which I never did." (R., p. 638.) And in reply to petitioner's counsel, Fol. 1091, said that he had been long out of practice, and so on at page 639 of Record.

Now, the following was the actual comment made before the jury by counsel for plaintiffs in error on Mr. Lothrop's testimony, in respect of the course of the petitioners in calling him as a witness. R., p. 816, folio 1403:

"There was nothing improper about putting Mr. Lo-"throp on, inasmuch as Mr. Mulliken had testified as to "what he was advised by legal counsel. I did not criti-"cise the action of the gentleman in putting Mr. Lothrop "on. The testimony of Mr. Lothrop was that he was not "aware of any statute at that time. There was no statute "at that time, and so far as my having criticised Mr. Lo-"throp, I said, railroad lawyer that he was, and counsel "for the Michigan Central, and counsel for the Detroit, "Lansing & Northern, nothing could make him say that "that property could not be taken under the statute. I "waived the oath of Mr Lothrop, and I think he would "tell you that the counsel who now addresses you, who "followed him when there were few to follow him, in the "old days, who had followed him wherever his white "plume shone, etc., would be the last man to reflect in the "slightest degree upon G. V. N. Lothrop."

Judge Gartner pretends to review this whole matter in his return to the Supreme Court. He omits all reference to the testimony as to the law put in by the petitioners. Without referring to the context, he then brings out strongly the testimony of Mulliken as if called out without excuse by counsel for respondent. He recites the

calling of Mr. Lothrop to show that he does not recollect the advice testified to by Mulliken; he omits all reference to counsel's actual comment on Mr. Lothrop's testimony. He omits the immediately preceding context showing that what he quotes is an immediate reply, and does not refer to Mr. Lothrop's testimony in that connection at all. And thus he falsely represents to the Court that respondent's counsel, with intent to mislead the jury, attack petitioner's counsel for introducing Mr. Lothrop, and Mr. Lothrop himself for taking the stand in reply to Mulliken on that law.

Judge Gartner says, in that statement which is so carefully reviewed and followed in the opinion of the Supreme Court:

"*After the testimony of Mr. G. V. N. Lothrop had been intro-*
"*duced, the attorney for the respondents made the following ar-*
"*gument or statement to and before said jury relative to the tes-*
"*timony of said witness:* For the first time in a somewhat
"long professional career, although a young man, counsel
"have seen fit to call upon the witness-stand lawyers to
"testify what the law is. Nothing was ever heard of it
"the time before, and for the first time in a long profes-
"sional career we have been charged, or I have been
"charged, with not doing my duty, because I would not do
"such an unprofessional thing as to call a lawyer to testify
"as to the law. Now, gentlemen of the jury, will sound
"make you believe or disbelieve the evidence of your own
"ears and the testimony of Mr. Lothrop? Did Mr. Lothrop
"tell you, or would he tell you, or could he be brought to
"tell you—counsel of the Detroit, Lansing & Northern,
"formerly counsel for the Michigan Central, a railroad
"lawyer from the crown of his head to the sole of his feet,
"could he be brought to tell you that you could not con-
"demn that margin of the Michigan Central under that
"statute?" (R., p. 909.)

Now, that language was imported by the Circuit Judge from the following place, where it was a direct reply to counsel for petitioners on the same page (made immediately), where counsel for the petitioner had stated, *in reference to the testimony of Mr. James F. Joy* (not Mr. Lothrop), "The leader of the Michigan bar for at least 25 "years," and of respondent's failure to call lawyers as witnesses in reply to Mr. Joy's sworn views of the law:

Mr. Baker: "I have already presented to you the best "possible evidence, the gentleman who was the leader of "the Michigan bar for at least 25 years, and he sustains "every proposition that I have made in regard to the law "of this case; there is no doubt about it. They have rested "their case. *Where is there a member of the bar in this city "that has come here to testify that we have any such power?* "I have proven it by James F. Joy, a man who was in the "active practice of law in this city for years, before he "went to railroading, who was the legal adviser and the "president of the Michigan Central Railroad for years. "He tells you he never heard of any such power or any "such statute, for it does not exist." (R., p. 667), and so on (without mentioning Mr. Lothrop).

Immediately the counsel for respondents replied to that statement, and to that statement only, with the language quoted by the trial judge: (R., p. 667, Fol. 1138-9-40).

We submit these extracts from the record without characterizing the use made of them or its motive.

2. The decision in 89 Mich., p. 209, was *res judicata.*

There can be no change in the decision of a court in a case between the same parties, unless the court itself desires a re-argument and orders it. See 2 Jacob & Chaney's Mich. Digest, p. 12, 3 Id., p. 505.

The rule of law as laid down by the Supreme Court in the decision of a cause is to be applied upon the same

state of facts in all the subsequent proceedings in the cause. Mynning vs. Detroit R. R., 67 Mich., 677. And a change in the composition of the court will not warrant a re-opening of the controversy, unless the court itself orders a re-argument. (McCutcheon vs. Homer, 43 M., 483.) An adjudication is conclusive in respect to (1) the subject-matter of the litigation, and (2) the point of fact or law, or both, necessarily settled in determining the issue on the subject-matter. Jacobson vs. Miller, 41 Mich., 90.

The distinction is clear between the decision in the same proceeding and a judgment in a different suit, though between the same parties, involving other facts.

In Hickox vs. Railway Company, 94 Mich., 237, the Court said, after quoting Judge Cooley, in Motz vs. City of Detroit (18 Mich., 522):

"It is a well-settled rule that courts will not review for-
"mer decisions made by the same court in the same cause,
"and on the same facts. Wells, Res. Adj., Sec. 613; Stacy
"vs. Railroad Co., 32 Vt., 552; Washington Bridge Co. vs.
"Stewart, 3 How., 425, and authorities there cited."

In Damon vs. DeBar, 94 Mich., 594, in reviewing a prior decision under such circumstances, the Court said: "It is "insisted that the Court was misled upon the former hear-
"ing as to the points in dispute, and counsel for defend-
"ants close their brief with the following:

" 'We respectfully insist that the charge of the Court
" 'on the other trial was correct.'

"If counsel entertained the impression that the Court "was misled upon the former hearing, it was their duty, "both to their client and this Court, to ask for a rehearing. "*It is well settled that a rule of law, as laid down by this Court "in the decision of a cause, is to be applied upon the same state "of facts, in all subsequent proceedings in that cause.* New-
"berry vs. Trowbridge, 13 Mich., 278; Mynning vs. Rail-
"road Co., 67 Mich., 677."

A notably hard case of the application of the doctrine of *res judicata* is related by Judge Cooley in his opinion in Jacobson vs. Miller, 41 Mich., 90.

The case in 89 Mich., 209, was an intermediate mandamus proceeding in this condemnation suit, and as to such proceedings, which are always conducted by the parties to the original litigation, the adjudication of the Court in them is binding upon them in all future proceedings in the matter. The law of *res judicata*, as we have stated it, applies to such a case, and it is so held in Michigan.

In Weed vs. Mirick, 62 Mich., 414, a mortgagee of personal property was garnished; whereupon, upon the petition of the plaintiffs, alleging that the mortgagee had advertised the goods for sale, *and denying the validity of the mortgage*, and asking for the delivery of the property to a receiver to be appointed by the Court, an order was made by the Circuit Court appointing such receiver and for the transfer of the goods to him, and staying the mortgage sale; application to set aside the order was made to the Supreme Court by mandamus to set aside the order by the garnishee. The validity of the mortgage was involved in the mandamus proceeding. Afterwards, upon the trial of the issue in assumpsit, the Circuit Judge directed a verdict for the plaintiff, and the case again went to the Supreme Court by writ of error. The Court said, at page 419: "The counsel for the defendants insisted all through "the trial in the court below, and argue here, that the "validity and good faith of this mortgage was decided in "this court, orally, upon the mandamus proceedings, and "that such is the evident purport of the peremptory writ "as issued; that such decision is *res judicata*, and that the "garnishee proceedings should have been quashed." Held, that the decision in the mandamus case in the Supreme

Court was *res judicata* in the subsequent proceedings in the original case in that court on error.

It should be stated that on the return in the mandamus proceeding decided in 89 Mich., 209, every authority was presented that was presented later, or which is considered by the Supreme Court in 92 Mich. The decision of Judge Gartner granting a new trial and embracing in this record from page 878 to page 929, covering the same matter precisely reviewed and passed upon in 92 Mich., 33, was sent up as the return to the mandamus.

VI. FINALLY, HAVING BEEN DEPRIVED OF THEIR PROPERTY SOUGHT BY THE RAILROAD COMPANY FOR ITS PURPOSES, THEIR PERSONAL ASSETS OF THE VALUE OF ONE HUNDRED AND TEN THOUSAND ($110,000.00) DOLLARS, WERE TAKEN FROM THEM UNDER THE COLOR OF A JUDGMENT AND PROCESS UNKNOWN TO THE CONSTITUTION AND STATUTES OF MICHIGAN, AND UNKNOWN TO JURISPRUDENCE, WHEREBY THEY WERE DEPRIVED OF THEIR PROPERTY WITHOUT "DUE PROCESS OF LAW."

We will consider: 1. The judgment, and 2. The execution.

1. We have shown at page 41 (*et seq. supra*) that where possession has been taken and the owner of the private property has accepted payment, there can be no valid appeal at all. We have shown that in any case, whether the condemning corporation has taken possession or not, but where the property owner has accepted the amount of the award, the only possibility of a valid appeal is one in behalf of the property owner, and who, if he does so appeal, thereby waives his constitutional right to consider the matter a finality, and his legal right to the money received. We have seen, too, that if there were any statute in contravention of these propositions, the statute would be unconstitutional and void.

But there is no such statute. Involved, in many respects meaningless, inartificially and carelessly drawn as it is, (See authorities, p. 29 *et seq. supra*), it does *not* provide, in case of an appeal by a party other than the private property owner who has so received his money, that a judgment may be rendered against him for any difference in favor of the railroad company, between a first and second awards. The only provision for judgment, in paragraph 3468, Sec. 11, is in terms for judgment against "*the party so appealing.*" Not only is this so in terms, but the adverse reading cannot be put upon it, even literally, save by act of the legislature. The subsequent sentences of this confused section show that the legislature which enacted this provision was dealing with an appeal by the property owner who had received his money; the legislative mind inserted the following sentence in an effort to preserve the status quo pending the appeal, among others: "*And when the same*" *(the appeal)* "*is made by others than the company, it shall not be heard except on a stipulation of the party appealing, not to disturb such possession during the pendency of such proceeding.*" No other construction can be put upon it than here contended for, except by holding that the words, "against the party so appealing," was a clerical error. And to hold that it is a clerical error is to force a construction, as we have seen, in violation of the fundamental law. The plaintiffs in error were *not* the "party so appealing."

But moreover, it is to be observed, there is no provision in the act as to the court in which judgment may be rendered. These proceedings, as shown, can be taken with equal validity and effect in the Probate Courts, and it is held of that court in direct connection with the condemnation statute, that they have no common law powers, and that such powers cannot be conferred by statute in aid of

the jurisdiction. They cannot enter a judgment even in proceedings within their original and peculiar jurisdiction except by statute. The Probate Court cannot enter a judgment, or exercise any common law powers, and such powers cannot be conferred upon them. See D., L. & N. R. R. vs. Probate Judge, 63 Mich., pp. 676, 680; Holbrook vs. Cook, 5 Mich., 228, and as to nature of Probate Courts; Ferris vs. Higley, 20 Wall., 375.

And further as to such statutory proceedings see authorities *infra*.

2. The Execution.

There is no provision in the statute for the issuing of an execution. It had been supposed, prior to the case at bar, that as to statutory proceedings and under statutes in derogation of the common law, the effect of which are to divest a citizen's real property, a grant of power under them did not carry with it all the usual and necessary means for the exercise of the power, and that there could be no implication of authority to piece out such statutes if ineffective; that other statutes or laws could not be invoked in aid of defects in the statutory processes, and for inefficiency the only resort must be to legislation.

Sibley vs. Smith, 2 Mich., 487. Citing 10 Pet., 161; 18 Johnson, 418; 2 Cowan, 199, 233-5; 2 Dal., 216; 4 Hill, 99.

But the majority opinion of the Supreme Court in this case delivered by Mr. Justice Long, in 103 Mich., 556, finds the authority for the execution in this case in Howell's Compilation, § 7664, Sec. 4, as follows: "Whenever "judgment shall have been or may hereafter be rendered "*in any court of record*, execution to collect the same may be "issued to the sheriff, or other proper officer of any county "in this State, and successive or *alias* executions may be "issued one after another upon the return of any execution

"unsatisfied in whole or in part for the amount re-"maining unpaid upon any such judgment." That is in the chapter entitled "Judgments and Executions," following the chapters covering, with this one, proceedings in courts of record at common law: "The Commencement of Suits," "Pleadings," "Evidence," "Trial of Issues of Fact," "Qualifications of Jurors," "Amending Pleadings and Proceedings" and "Assessment of Damages" in common law suits. That statute was adopted in 1849, and was and is the only general statute providing for the issuing of an execution in ordinary suits at common law. It is construed by the Supreme Court of the State as applying to no other judgment except judgments in such suits. In Michigan the action of replevin is strictly statutory. In Rathbone vs. Ranney (14 Mich., 382) the court—Cooley, Campbell, Christiancy and Marston, JJ.—construed this statute in a replevin suit and said:

"This statute does not apply to a writ of return, and "embraces only the *ordinary* executions upon money judg-"ments which are to be collected by execution. It is "claimed, however, that it extends by analogy to all kinds "of executions upon all judgments. *The statute of re-"plevin gives no such directions*, and we are remitted to "the old law to ascertain whether the various writs come "under the necessary connection." * * * *

"The analogies, then, are not such as to indicate the "propriety of extending the operation of the statute on "executions beyond its fair intent as expressed by its "language." It was held that the writ running to another county was invalid.

It was contended there that this general statute might apply to a case of judgment in replevin, and Mr. Lothrop, for the contention, showed that the writ of execution in replevin (*retorno habendo*) was a common law writ, and a true execution.

Now the Union Depot Act was enacted in 1881. In Dibell vs. The People, 22 Mich., 370, the *general* Justices' Act entitled "Of Courts held by Justices of the Peace," came up for consideration in connection with the claim that a justice could exercise certain powers under that act to piece out the exercise of power under a special act conferring jurisdiction in certain cases upon justices in the nature of forcible entry and detainer. The Court reviews the two statutes, and comments upon the fact that the general justice act was passed in 1855, and the fact that the special jurisdiction in entry and detainer was conferred in 1861; and the Court proceeds to hold: That whenever a justice of the peace proceeds to try one of these special proceedings "He derives all his "power to do so from—and must in all respects be gov- "erned by—Chapter 150 (act conferring jurisdiction in "forcible entry and detainer proceedings) and the acts "amendatory thereof, and that he cannot invoke, nor is "he bound by any of the provisions of Chapter 117 (Gen- "eral Justice Act) except so far as Chapter 150 or its "amendments may have adopted certain proceedings of "the former as substantially a part of the latter."

But by the universal holding in Michigan, as elsewhere, it is a general rule of jurisprudence, the violation of which is a departure from due process of law (Mo. Pac. R. R. Co. vs. Humes, 115 U. S., 520), that when proceedings are statutory, and in derogation of the common law, within the statute, which must be strictly pursued, must be found authority for every process; and if that statute fails to provide any proceedings essential to execute its purpose, the statute must be held to be ineffective for want of that essential. Nothing can be imported into it to help it out from other statutory and common law remedies. The remedies provided are exclusive.

A direction for execution is of course no part of a judgment. *Freeman on Judgments*, 4—Kramer vs. Redman, 9 Iowa, 114.

In no case under statutory proceedings where provision is made for judgment to be entered is an execution issued without a special provision for it in the statute itself, and in every case in Michigan there is in the statute authorizing judgment a special provision expressly authorizing an execution thereon. Judgments in attachment cases, §§ 8007, 8021. In garnishment and other cases, 8062, 8066, 8073, 8076, 8077, 8079, 8080, 8090, 8092, 8093, 8095, 8098; for costs and proceedings to recover possession of lands before Circuit Court Commissioners and courts of record, 8293, 8294, 8309; upon judgment for defendants in water craft cases, 8281; for costs in favor of defendant in suits on official bonds, 8226; on judgments in replevin, 8344, 8345; on judgments to enforce liens upon personal property, 8405; on judgments on recognizances, 8458; for collection of fines and costs in certain cases, in justices' and circuit courts, 8471, 8472; on judgments entered up upon awards of arbitrators, 8489; on judgments for costs for defendants in mandamus cases, 8677; to enforce decrees in chancery, 6653.

And so on wherever a judgment is provided by statute in every case.

Judge Cooley (Constitutional Limitations, 6th edition, p. 651, says of statutes permitting the condemnation of private property: "The powers granted by such statutes "are not to be enlarged by intendment, especially where "they are being exercised by a corporation by way of "appropriation of lands, or for its corporate pur-"poses. There is no rule more familiar or better settled "than this, that grants of corporate power being in dero-"gation of common right, are to be strictly construed; and "this is especially the case where the power claimed is a

"delegation of the right of eminent domain, one of the "highest powers of sovereignty pertaining to the State "itself and interfering most seriously and often most "vexatiously with the ordinary rights of property."

Said the Supreme Court of the State in Specht vs. Detroit, 20 Mich., 168: "In proceedings to take private prop- "erty for public use, there can be no substantial departure "from the fundamental requirements of the statute with- "out violating the whole procedure."

In Pearsall vs. Supervisors, 71 Mich., 438, the Court said of the exercise of this power in the taking of private property: "When the exercise of authority is limited by "statute, and its exercise affects private rights of indi- "viduals or divests them of property or valuable rights, "the record of the proceedings must show that the act by "which this is done is within the limits of the power con- "ferred."

In Derby vs. Gage, 60 Mich., 4, it is said of such proceedings, "These proceedings are purely statutory, and "the remedies therein provided are exclusive, and cannot "be extended beyond those contained in the act."

In the matter of Convers, 18 Mich., 459, it was contended that in condemnation proceedings, inasmuch as the Constitution provided for a jury, that the right of peremptory challenge could be imported from the general practice in suits at common law. The courts say on that subject: "The only provision under our law allowing "peremptory challenges in matters not criminal is found "in the chapter of the Comp. L. relating to the trial of "issues of fact and allows a challenge of two jurors in "civil cases, as well as in prosecutions. This does not ap- "ply to special proceedings, not in the ordinary course of "law, and which are regulated entirely by proper statute."

In Railroad vs. Campau, 83 Mich., 31, in a condemnation proceeding, it was attempted to apply the practice of the

common law courts in Michigan by propounding special questions to the jury, and requiring them to answer them. The jury failed to answer the questions, and error was assigned on appeal. The Court says: "There is no pro-"vision in the statute relative to condemnation proceed-"ings authorizing the submission of special questions." Held not error.

In 83 Mich., 513, in re George T. Smith Co., the Court said: "Upon statutes creating a liability where no con-"tract relations existed, and where no liability existed "before, or independent of the statute, a strict construc-"tion must be placed upon the statute, because, although "remedial they are in derogation of the common law, and "impose liabilities where none existed before."

In Weimer vs. Bunbury, 30 Mich., 201, it is said, "Where "the proceeding is in derogation of common law prin-"ciples, it must depend for its validity upon strict con-"formity to the statute."

In Sibley vs. Smith, in the 2nd Mich., it is said: "Such "statutes being in derogation of the common law, and "authorizing proceedings the effect of which is to divest a "citizen of his title to real estate, although it may be for "the good of the public, must be construed strictly. And "their provisions can be enforced no further than they are "clearly expressed. The Auditor-General can take no "power that is not expressly granted to him; he can as-"sume no power by implication, and when his acts are not "clothed by the authority of the statute they are of no "validity."

In the City of Detroit vs. Putnam, 45 Mich., 263 (Cooley, Campbell, Graves and Marston), "Where a statute at-"tempts in derogation of the common law to create a lia-"bility we cannot go beyond the clear expressed pro-"vision of the act. Such statutes are not to be extended or "enlarged in their scope by construction."

In Sheldon vs. Erskine, 78 Mich., 627, there was a provision of the statute providing for a decree for deficiency on foreclosure of a mortgage; the question came up where there were several holders of debts secured by the same mortgage, and as the statute did not provide for such a case, it was held that there being no provision for separate personal decrees of separate complainants, that the necessarily strict construction of the statute deprived them of the remedy contemplated by the statute. Says the Court: "The reasons are not material if there is no law providing "for this specific remedy. The statute, which transfers "to a court of equity, jurisdiction to give judgments be-"longing to the common law cannot be enlarged by con-"struction."

It may be said in passing that the statute here referred to provided for a judgment for a deficiency after foreclosure, also provides specifically for an execution for the deficiency. (Sec. 6702.)

The same holdings as to judgments in the Circuit Court in statutory proceedings in garnishment. (Maynards vs. Conwell, 3 Mich., 312; Sievers vs. Woodburn Co., 43 Mich., 275; Ford vs. Detroit, 50 Mich., 358.) In 82 Mich., 169, Wilson et al. vs. Reilly, Cir. Judge, it was provided by statute that certain proceedings might be taken against a defendant residing in another State. The statute did not provide in terms for more than one defendant, although the intention to do so was plain (and the statute was afterwards amended in accordance with that intent), but the Court held that no provision was made for cases where there was more than one defendant, and said: "We are "asked by counsel for respondent to construe the section "of the statute under which the proceedings were taken as "though it read, 'The principal defendant or *defendants or* "'*either of them* was a non-resident.' We do not feel au-"thorized to interpolate those words into the statute, but

"must leave that for the Legislature, if it chooses to so en-"large the statute."

The following cases are under the law providing that suits may be commenced by attachments. There has been no departure from the holding of the courts under such statutes since the decision from the earliest cases down.

In Greenvault vs. Bank, 2 Doug., Mich., 498, the Court said: "What then was the character of the Court and the "nature of the jurisdiction it exercised in suits of attach-"ment? The Circuit Court was a court of common law "jurisdiction in both civil and criminal cases. Its gen-"eral powers are clearly defined by statute. It was, in "other words, a court of superior jurisdiction. Do pro-"ceedings in attachment fall within the circle of the gen-"eral powers conferred upon the Circuit Court by statute? "They clearly do not. The jurisdiction in this respect is "special and extraordinary. The mode of proceeding is "peculiar and in derogation of common law."

Again, in Buckley vs. Lowrie, 2 Mich., 419, as to attachment proceedings, *"They do not derive their efficacy from the "general powers of the Court. The Court can act only under "the specially limited powers granted by the statute, and ac-"cording to its limited form of procedure."*

To the same effect Tannahill vs. Tuttle, 3 Mich., 104; Roelofson vs. Hatch, 3 Mich., 277; Brigham vs. Egglinton, 7 Mich., 291. In the last case with reference to the statute the Court said: "The whole attachment law being special, "the jurisdiction created being entirely statutory, and "such power must be confined within its legitimate ap-"pointed limits."

To the same effect King vs. Harrington, 14 Mich., 532; Matthews vs. Densmore, 43 Mich., 461; Millar vs. Babcock, 29 Mich., 525; Van Norman vs. Judge, 45 Mich., 204.

In the last case reference is made to a provision of the statute in attachment cases for the levy of execution on capital stock in a corporation, under a statute. The Court says: "In such circumstances the process of a "court of common law is powerless. The property is be- "yond its scope. Its statutory analogy is only capable of "applying when the interest is found standing as the prop- "erty of the debtor. The statute has made no provision "seizing under an attachment against one a share that be- "longs prima facie to another as an expedient to enable "the attaching creditor to contest the title of the apparent "owner, and as before suggested, the remedy is dependent "upon the statute, and not to be in any wise enlarged by "construction." In that case, too, the Legislature by another statute had assumed that the power to levy existed, but it was held that the assumption without express enactment worked no change in the law. See also in attachment cases: Jaffray et al. vs. Jennings, 101 Mich., 516; Borland vs. Kingsbury, 65 Mich., 59; Langtry vs. Judges, 68 Mich., 451; Drake vs. Lake Shore R. R., 69 Mich., 168.

The same principle is considered and held with strictness as to proceedings under miscellaneous statutes in the following cases: Dickinson vs. Von Wormer, 39 Mich., 14; Thurston vs. Prentiss, 1 Mich., 194; Craig vs. Butler, 9 Mich., 23, 24; Smith vs. Superintendents, 34 Mich., 56; Chicago R. R. vs. Sturgis, 44 Mich., 538; Bank vs. Potts Co., 92 Mich., 351; Newson vs. Hart, 14 Mich., 232; Hasceig vs. Tripp, 20 Mich., 216; Kowalka vs. Common Council, 73 Mich., 322; Lay vs. City, 75 Mich., 438, Singer Co. vs. Cullaton, 90 Mich., 639; Lantis vs. Reithmiller, 95 Mich., 47.

It may be said in closing under this caption, that if anything were wanting to show the tendency of the State

court to depart radically from the settled rules of jurisprudence in this case only, it may be found in the opinion of one of the majority in 92 Mich., at p. 58, where he finds authority for a Circuit Judge to grant new trials before another jury in condemnation cases, in the statute providing as to references of causes in courts of record, that the Court may "*discharge any referee on cause shown*" *and fill vacancies in the number of referees.* (How., § 7379, Sec. 5.)

The plaintiffs in error submit on this record that the judgment of the Supreme Court of Michigan must be reversed and the proceedings after the first award vacated.

DON M. DICKINSON,

Of Counsel for Plaintiffs in Error.

No. 55.

Add'l Brf. of Dickinson for P. E

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Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 55.

ABSALOM BACKUS, JR., AND A. BACKUS, JR., & SONS (A CORPORATION), PLAINTIFFS IN ERROR,

vs.

THE FORT STREET UNION DEPOT COMPANY.

ERROR TO SUPREME COURT OF MICHIGAN.

Some Commentaries on the Opinion of the Supreme Court of Michigan in Union Depot Co. vs. Backus, 92 Mich., 33.

DON M. DICKINSON,
Of Counsel for Plaintiff in Error.

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IN THE

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Some Commentaries on the Opinion of the Supreme Court of Michigan in Union Depot Co. vs. Backus, 92 Mich., 33.

I.

At page 37 of that opinion the following statement appears:

"We permitted in the present appeal a re-argument of that question for the reason that should we find we were then in error neither party will have lost any substantial right, as all the questions then presented are now before us for re-

view, and this court, under the statute, possesses ample power to correct any errors which may be found in the record and proceedings. The motion for *mandamus* was argued before us at the October term last, and such consideration was not given it then as the interests now involved in the controversy demand. We have now listened to a re-argument of the question then passed upon, and our attention has been called to several decisions, from which we conclude that the powers of the circuit courts in this class of cases were too much restricted by the former opinion."

Here is an essential error of fact. There was no re-argument of the question permitted in the sense that counsel for the plaintiffs in error here had any notice that an argument would be required or expected in a case decided by a unanimous bench at the previous term.

(*a.*) No re-argument was ordered or suggested in accordance with the rules of jurisprudence and the decisions of the supreme court of the State. (See Rec., p. 1831, bottom.)

(*b.*) A statement of the errors of fact was presented in the *petition for certiorari*, considered and allowed by the court (see this Record, p. 1804, top), and again therein fully presented (p. 1806, fol. 3023), and presented again in the assignment of errors in the State court (XXXIII,* p. 1815), and argued in that court.

(*c.*) The supreme court gets its jurisdiction to issue the common-law certiorari from the State constitution (Specht *vs.*

* It will be seen that by misprinting from some other place in the State record the three lines between the opening words of this assignment "In this" and the word "because" have been erroneously inserted and are foreign.

Detroit, 20 Mich., 171). Therefore, like the King's Bench, it may review errors like this in its own proceedings *coram nobis;* and to get before the court the question in regard to its own proceedings on the face of the papers reviewed by the court in allowing the writ, the questions are to be set out substantially in accordance with the requisites of a bill of exceptions. (Knapp *vs.* Gamsly, 47 Mich., 377.)

Statements in an application for certiorari not contradicted in the return are thus to be taken as true. (Wilson *vs.* Township, 87 Mich., pp. 240, 248; and see our main brief on certiorari, p. 21.)

The statement in the opinion as above quoted that "the motion for mandamus was argued before us at the October term last, and such consideration was not given it then as the interests now involved in the controversy demand," is erroneous, as shown by the record, for on the mandamus proceeding the return of the circuit judge below, printed in this record between pages 878 and 929, covers the same matter precisely and every authority cited, reviewed, and passed upon in 92 Mich., 33. They were passed upon, as shown, too, by the exhaustive opinion of the court, in the mandamus case in Backus *vs.* Gartner, 89 Mich., 209.

II.

(*a.*) There is not an authority cited in the opinion in 92 Mich., pages 38 to 41, from the Michigan supreme court, which sustains the conclusions of the court as to the power of the circuit judge to grant a new trial. They are simply to the conceded point that he may *vacate* the award.

(*b.*) The authorities cited to the point from other States, as shown by a complete citation of all the authorities in Michigan in our main brief, are inapplicable because of the radical difference in the constitutions of those States from the constitution of Michigan in respect of the questions discussed. Such authorities cannot be used to controvert the construction of the constitution and laws of Michigan, as held uniformly by the supreme court of Michigan itself, so as to bind this court or sustain the error complained of against the construction of the State court itself, standing unreversed (and cited by it in this opinion as not intended to be reversed) that *do* bind this court.

III.

At page 43 of the opinion it is said that no substantial injustice had been done. In respect of these plaintiffs in error, this cannot be true, for the reason that in the change of the rule laid down in the mandamus case we were deprived of a hearing on the proposed change, and directions were sent back to the circuit judge for a retrial, with our right to a plenary appeal to the State supreme court cut off by the statute itself from the result of a second trial below, and, more important still, were sent back to that circuit judge with power vested in him for further new trials without right of plenary appeal from his action in any of them.

IV.

The main ground of the reversal against the plaintiffs in error is set out at the bottom of page 47 and extending to page 55 of the 92 Mich. Manifest errors of fact, and errors going to the jurisdiction as reflecting upon counsel and disposing of their clients' interests (if they were denied a hearing), appear in this discussion; they are fully treated of in our main brief, beginning at page 67.

The practice and rights on certiorari (if allowed) to show error in the Supreme Court's own proceedings are pointed out under caption I, *supra*.

The point was raised at every stage of the proceedings and is carefully set out in the sworn application for the writ of certiorari in this record, at page 1804, and again in the same application, at page 1806, folio 3023. (Note clerical error in the sixth line from the bottom, page 1806, where the word "without" should plainly read "after," as at page 1804.) It was again presented in the assignment of errors in the State court, under XXXIII, page 1815, where the correction heretofore referred to as to the first three lines should be made.

V.

The taking of property without just compensation is shown in the opinion, 92 Mich., at page 55, where the rule as applied by the circuit judge as to valuation of one part of the plant by itself without regard to the injury to the business or to the remainder of the plant is adopted in direct violation, not only of the universal rule of just compensation, but of that rule applied by the State court itself as to other

citizens, both before and after the judgment complained of, as shown in our main brief, commencing at page 58. The Supreme Court of the United States will "inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the fixed right to just compensation" (166 U. S., p. 246). This the trial court below did, as shown at pages 60 and 61 of our main brief, and he did it in the charge which is quoted in the judgment of the State court which comes here (this Record, 1782, folio 2980): "The land described in the petition" was the land only on which the factory stood.

VI.

One of the concurring majority of the court in the 92 Mich., at page 57, states that the chief justice in the case in 89 Mich. referred to analogous proceedings in confirming reports in the case of referees in common-law courts, and he proceeds to sustain the majority view for the reversal of the mandamus judgment by citing (p. 58) section 7379, Howell's Statutes, as authority for the circuit judge to grant new trials in confirmation cases, and says of it:

"It cannot be doubted that under this section the circuit judge might, upon a showing that the referees were prejudiced or biased, discharge one or all of such referees and refer the same to new referees to be appointed by him."

The section referred to is from the procedure in common-law courts of record on references for accountings, &c., and we respectfully ask that the section cited by the learned justice be read.

VII.

In the opinion in 92 Mich., at page 36, the supreme court of the State quotes the *charge* made as to a juror. The court does not refer to it as a cause for reversal in any place, or show forth any evidence in support of it, nor does it refer to the complete exposure of the charge, as shown in this Record, at page 936 *et seq.*

In actions before a struck jury of business men, in which other active business concerns with whom they do business were engaged, the current course of business and payment of bills cannot be suspended. Even the circuit judge does not presume to refer to this subject in his reports to the Supreme Court.

Neither does the supreme court of the State refer to the fact that *after* agreeing upon their verdict, after four hours' deliberation and late at night, the jury sent out for a luncheon to be taken, including some *pint* bottles of lager beer (Rec., pp. 874 *et seq. et ante.*), although the circuit judge did send up to the supreme court for the record before them in the 92 Mich., 33, the statement that it had been *alleged* that while "deliberating upon their verdict" the jury "surreptitiously" obtained twelve *quarts* of beer. (Rec., p. 929.)

There was not even any justification for this certification in that extraordinary return of Judge Gartner, for no one had made any charge or hint as to twelve *quarts* of beer.

We are not prepared to concede even that it would be wrong for twelve gentlemen to drink a quart of beer each at supper after they had found a verdict and escaped jury duty; but a *pint* of beer—that is different; and we contend,

even vigorously, that a man may consume *half* a quart of beer, if taken with a substantial meal, without appreciable injury to his physical, intellectual, or moral well being, or to the accuracy of his perception of his proper duty to the Law and the Social Order. A quart might go to the jurisdiction—a pint never; and so it seemed to have appeared, in juridical contemplation, when counsel pointed out that Judge Gartner's return was doubly erroneous, in respect of the beer consumed by the juror Tribunal of the State constitution.

DON M. DICKINSON,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

ABSALOM BACKUS, JR., and A. BACKUS, JR., & SONS (a corporation),

Plaintiffs in Error,

vs.

THE FORT STREET UNION DEPOT COMPANY.

Error to Supreme Court of Michigan, October Term, 1897—No. 55.

PETITION FOR RE-HEARING.

The petition of Absalom Backus, Jr., and A. Backus Jr. & Sons, plaintiffs in error, respectfully represents and submits to the Court the following grounds for a reargument and rehearing of this cause:

I.

IN THE CONSIDERATION AND DISPOSITION OF ASSIGNMENT OF ERROR NO. 8, *THE LEARNED COURT, AS SHOWN BY THE OPINION, HAS OVERLOOKED: (a) THE MOST SUBSTANTIAL ERROR IN THE PROCEEDINGS BELOW IN RESPECT OF COMPENSATION; (b) HAS OVERLOOKED THE FACT THAT REQUESTS TO CHARGE WERE PREFERRED AT THE NISI PRIUS HEARING; (c) HAS OVERLOOKED THE UNIFORM HOLDINGS IN THE STATE OF MICHIGAN IN SUCH CASES THAT REQUESTS TO CHARGE WERE NOT REQUIRED; AND (d) HAS MISAPPREHENDED THE RECORD AS TO VALUATIONS OF THE PROPERTY IN QUESTION.

On the question of compensation below, we rested our main contention upon the fact that the plant of the plaintiffs in error

*Point IV. of the brief, pp. 15 bottom, 58 top.

consisted of three parts: (1) The mill itself, covering about $1\frac{3}{4}$ acres of land; (2) The receiving and shipping yard, consisting of 7 acres of land; (3) A block of ground in the City of Detroit for clean storage and sale.

See citations from brief, page 3, and record citations, id. 58.

The valuation at $150,000, referred to in the opinion, covered only the $1\frac{3}{4}$ acres of the mill site and did not embrace, as disclosed by the record, the value of the other parts of the plant. We insisted and still insist that the rule of just compensation required payment for injury to or diminution of value in respect of all the parts of the plant left remaining, and not merely payment for damages to the mill and mill site.

It seems to us clear that if the taking of the front of the mill site prevented the carrying on of that part of the business there, then as the three parts were an entirety as a plant, adjusted relatively to each other and to the situation, as they were when interfered with, then there could be no rule of just compensation which did not take into consideration the injury to the other parts of the plant when thus thrown out of adjustment.

There can be no doubt that the rule in Michigan was and is, that damages must be given for the parts of the plant remaining and which were not even touched by the railroad.

It is the universal holding. For luminous statements of this rule and of the reasoning in its favor we refer to the several opinions delivered in the leading English case on the subject, Cowper Essex vs. Local Board, 14 App. Cases, 153. There the lands immediately affected were not in contact with the other parts. As stated by Lord Macnaghten, at page 175: "It is "enough if both parcels of land are held by one and the same "owner, and if the unity of ownership conduces to the advant-"age or protection of the property as one holding."

The opinions of Lord Bramwell, at page 169, and of Lord Watson, at page 167, state the justice of the rule with clearness.

Now on this question, fully argued and carefully presented —an elementary rule of just compensation—we were entitled

without any request to charge, if any charge was given on the subject of damages, to have included in the consideration the other parts of the plant. But after the argument, and even in the general charge of the court below, this elementary rule of damages was *excluded* in these words:

"The amount to be allowed to Absalom Backus, Jr., as owner "in fee of the land described, and the amount to be allowed to "A. Backus, Jr., & Sons, as tenants in possession of such lands."

Now the lands "described" was that set out in the petition, as shown by the context* of the charge, and was the land only upon which the mill stood—the 1¾ acres.

This, we submit, was a manifest error, and we at once pointed it out in the following words:

"We except to that part of the charge of the Court wherein "he says that the damages are to be confined to the damage to "the real estate described, and the improvements upon it; "whereas, in our view, the damages are to the entire plant, in- "cluding the injury to the business from the impairment of the "mill as affecting its adjuncts, the lumber yard and the store- "house."—Record, p. 1784, fol. 2983.

This question is further pursued in our brief at page 59, et seq.

As shown in our original brief, by the express holding of the Supreme Court, under the railroad statute, of which the Union Depot Act is a transcript in haec verba, requests to charge or other similar forms of judicial procedure are not to be followed in respect of the tribunal of the Constitution, whether made up as commissioners or jury.

It is said in the learned opinion of this Court that that class of cases apply only to the general railroad act, and not to the Union Depot act. Aside from the rule that the adoption of

*The land "described in the petition" and thus pointed out, carefully describes the factory alone on the north side of River street (see Record, p. 5). But the 7 acres of yard were below on the south side of River street, and the block for clean storage was above on Fort street, and was was not in contact with River street.

the statute adopts its construction, we pointed out in our brief at page 23, that in respect of the construction of the Union Depot act, as to procedure, the Supreme Court of the State had in terms and by the citation of the leading cases, adopted for the Union Depot act the construction applied to the railroad act. Fort Street Union Depot Co. vs. Jones, 83 Mich., p. 412, which was a case under the Union Depot act.

So far as the practice of requests to charge is concerned, as that practice is uniformly held in the State Supreme Court, there has been no reversal of the holding in this case. All that the Court below had to say on that subject, 103 Mich., 556, is this:

"It is proper here to note that no requests to charge were "presented on behalf of the respondents."—See Record, page 1820, fol. 3044.

Such a statement made in passing can hardly be cited as a judgment of the Court that requests to charge were necessary as against the uniform rulings of the Court theretofore, that the practice was not required. But on the last trial at nisi prius, inasmuch as the Court had shown a disposition to charge the jury, a practice theretofore unheard of, we *did* request a charge upon these essential questions, in terms as follows:

"And I call your honor's attention to this, *so that in the instructions your honor contemplates giving, they may follow, not our construction of the decisions, but the language of the decisions of the Supreme Court*, speaking through such "learned justices as Justice Campbell and Justice "Cooley. * * * * * * Now what "is included within the terms of the constitution as compensa- "tion under the decision of the Supreme Court of this State, and "I shall only refer to a few. *I shall mark the passages, and "ask your honor's attention to them in giving your views of the "law to the jury.*"—Record, p. 1692, fol. 2827-2828, et seq.

Thus were the requests made to follow the marked passages, which passages were marked and handed to the Court, and were

read by counsel, as shown by the Record, and upon the failure to follow the marked passages as read, exception was taken in the following language:

"We except to the refusal of the court to charge as I request-"ed, in the language or in the substance, according to the decis-"ions of the Supreme Court, which I read in full upon the open-"ing of my argument and called attention of the Court to it, "especially to the expression of Campbell, J., in delivering the "opinion of the Court in G. R. & I. Co. vs. Weiden, 70 Mich., "393-395."—Record, p. 1784, fol. 2984.

It is not understood that this Court held in Chicago, Burlington, etc., R. R. vs. Chicago, 166 U. S., 226, that if any damages at all were given by the state tribunal that no complaint could be made of the deprivation of the fundamental right to "just compensation."

It is understood by that judgment that this Court will "in-"quire whether the trial court prescribed any rule of law for the "guidance of the jury that was in absolute disregard of the company's right to just compensation." (Page 246.) This Court did there hold that "many matters may occur in the progress of such "cases that do not necessarily involve, *in any substantial sense*, "the Federal right alleged to have been denied; and in respect "of such matters, that which is done or omitted to be done by "the State court may constitute only error in the administra-"tion of the law under which the proceedings were instituted." (Page 246.)

But here by the rules laid down by the nisi prius court we were deprived of any consideration of the true rule of compensation, not only on the question of breaking up a profitable business, but also as to the injury to the property left.

Non constat we may have received a verdict for $63,000 for certain things, under the ruling of the Court, yet if by improper limitations enforced by the State court we were deprived of compensation for other and greater injuries, then we were as much within the protection of the rule for relief as if we had not received a dollar in damages.

To hold that because a citizen gets any damages, he cannot appeal to the fundamental rule for his protection in respect of other causes for damage, would leave the citizen without any substantial protection in this provision of the constitution.

To receive $63,000 and to lose without relief three timse that amount may well be the difference between protection and ruin.

II.

IN THE CONSIDERATION AND DISPOSITION OF ASSIGNMENT OF ERROR NO. 12* THE LEARNED COURT, AS SHOWN BY THE OPINION, HAS MISUNDERSTOOD AND MISAPPREHENDED THE RECORD IN RESPECT OF THE DENIAL OF A HEARING TO THE PLAINTIFFS IN ERROR BY THE SUPREME COURT OF MICHIGAN.

In the opinion in this case this Court says:

"Under the fifth head counsel present two matters:

" '(1) The denial by the Supreme Court of the State of a hear-
" 'ing on the substantial and essential question, of whether coun-
" 'sel for plaintiffs in error abused their privilege as counsel by
" 'arguing to the jury on the question of necessity that the mar-
" 'gin of the depot grounds that belonged to the Michigan Cen-
" 'tral road could be taken for the elevated structure. * *

"With reference to the first, it is enough to say that the re-
"spondents did not appeal to the Supreme Court, and that
"under section 3468 it would seem that that Court was called
"upon to consider only such objections as had been particularly
"specified. 'Either party may appeal by notice in writing';
" 'such notice shall specify the objections'; 'the Supreme Court
" 'shall pass on such objections only, and all other objections,
" 'if any, shall be deemed to have been waived.' No objection
"to the finding of the jury as to the question of necessity has
"been made by the appellant, and therefore was to be treated

*Point V. of brief, p. 67.

"as waived. Under those circumstances it cannot be said that "the Supreme Court deprived the respondents of any rights by "refusing to hear counsel in respect to the question of necessity, "or connected with its determination."

Opinion, page 11.

The misapprehension of the Court is complete and consists in this: That counsel for plaintiffs in error did not attempt to argue the question of necessity as such, but were in the Supreme Court of the State in response to an appeal against an award, summoned there to answer, and the objections to the award which were specified as the grounds of that appeal, have been overlooked, thus:

"Notice of Appeal—

"The petitioner does hereby specify the following objections "to the proceedings had in the premises, that is to say: (Here "follow objections one to twenty-three, as set forth in the mo- "tion to vacate said verdict and award, dated August 15, 1891.)"

Record, p. 947, fol. 1636.

These grounds are set out at page 849 of Record, and it will be seen that the principal grounds of appeal which we were called upon to answer in the Supreme Court were that "The at- "torney for the respondents, taking advantage of the absence of "the judge, did improperly, erroneously and falsely claim and "pretend to and before said jury that the petitioner, the Fort "Street Union Depot Company, has power, under the statutes "of this State, to condemn right of way for an elevated rail- "road along the margin of the property of the Michigan Central "Railroad Company on the south side of River street, and for "that reason the jury ought to find that there is no public neces- "sity for taking a right of way in, upon and along said River "street for the elevated railroad proposed by the petitioner, and "thereby said attorney did, *by repeated arguments and asser- "tions to and before said jury, convince a number of said jury*

"*that the property of the Michigan Central Railroad Company "could be condemned by the petitioner under existing statutes, "so that when said jurymen came to yield on the question of "necessity, they were so biased and prejudiced against the "petitioner that they insisted upon the most extravagant, exor- "bitant and grossly excessive damages, to the great wrong and "injury of petitioner.*"

Record, p. 849, fol. 1462.

This is stated in various forms and ways, and these and our right to answer them (not to discuss the question of necessity) are discussed at length at p. 71 et seq. of our brief.

The question remains whether we had a right to be heard in reply to these grounds of appeal when summoned into court to reply to them as the principal grounds of appeal, and the substantial grounds of the adverse decision below.

It is clear that we were denied a hearing in the Supreme Court of the State in reply. It must be equally clear that we were entitled to be heard before the court could decide that these grounds of appeal were well taken. But by referring to the decision of the Supreme Court of Michigan in that case, 92 Mich., 33, it will be seen that the decision was adverse to us on all these very grounds of appeal on which we were denied a hearing.

Thus the Court below in that case passes on this series of objections to the verdict adversely to us, commencing as follows:

"The second objection urged by petitioner's counsel is that "'the attorneys for the respondents, taking advantage of the "'absence of the judge, did improperly, erroneously and falsely "'claim and pretend to and before said jury that the said peti- "'tioner has the power, under the statutes of this State, to con- "'demn a right of way for an elevated railroad along the margin "'of the property of the Michigan Central Railroad Company "'on the south side of River street, and for that reason the jury "'ought to find that there is no public necessity for taking a

"'right of way in, upon, and along said River street for the ele-
"'vated railroad proposed by the petitioner; and thereby said
"'attorney did, by repeated arguments and assertions to and be-
"'fore said jury, convince a number of said jury that the prop-
"'erty of the Michigan Central Railroad Company could be con-
"'demned by the petitioner under existing statutes, so that when
"'said jurymen came to yield on the question of necessity they
"'were so biased and prejudiced against the petitioner that they
"'insisted upon the most extravagant, exorbitant and grossly
"'excessive damages.'"

Record, p. 956, fol. 1652.

And then, after grouping a number of other objections of the same nature, proceeds to approve the ruling of the Court below upon them, in the following words:

"It would be difficult to conceive of an argument more effect-
"ive, the certain and inevitable tendency and effect of which
"would be to influence the jury and cause them to award the
"most extravagant and exorbitant damages." * * *
"It is the duty of the Court to interfere where matters foreign
"to the issue are rehearsed before the jury prejudicial to the in-
"terests of a party." * * * "There are many
"pages of the arguments of counsel in the Record showing the
"persistency with which counsel urged upon the jury the **right**
"of the petitioner to take the property of the Michigan Central
"Railroad Company, *and it is too plain for argument that it*
"*must have affected the jury in determining the amount of dam-*
"*ages to be awarded.* The jury ought not to have permitted the
"testimony to be given relating to that subject, or listened to
"arguments thereon."

Record, p. 960-961, fol. 1657-8.

It cannot be true that these plaintiffs in error could be sum-

moned into court to defend the rectitude of the award when attacked on the above grounds and be deprived of a hearing in answer or to sustain the rectitude of the award when so attacked except in plain and direct violation of the constitution of the United States as expounded by this court in Hovey vs. Elliott, 167 U. S., 425-424.

We submit that this Court could not have intended to hold that we were properly denied such a hearing, and that the only reason for the adverse holding is the misapprehension of the Record, plainly shown in the language above quoted from the opinion upon that part of the 5th point in our brief.

III.

On the effect of entering into possession the learned Court, as shown by the opinion (page 6) says:

"The argument is that the property owner has a constitu-
"tional right to have the amount of his compensation finally de-
"termined and paid before yielding possession; that the party
"seeking condemnation (in this case the Depot Company) can-
"not be let into possession until after all question as to the com-
"pensation has been finally settled, and the amount thereof paid;
"that it cannot take advantage of one report or verdict, pay the
"sum fixed by it, obtain possession and still litigate the question
"of amount; that if it does then pay and take possession its right
"to further litigate is ended. But the Supreme Court of the
"State held against this contention, and we must assume there-
"from that it is not warranted by the constitution and statutes
"of the State."

AND IT IS ERRONEOUSLY ASSUMED THAT THE UNIFORM CONSTRUCTION OF THE CONSTITUTION OF THE STATE BY THE SUPREME COURT OF MICHIGAN, POINTED OUT IN OUR BRIEF, THAT FINAL ASCERTAINMENT AND ACTUAL PAYMENT OF COMPENSATION MUST PRECEDE POSSESSION, WAS REVERSED BY THE SUPREME COURT OF THE STATE IN THIS CASE.

The opinion and judgment of the Court below in the 103 Mich., 556, does not refer to the fact that possession had been taken at all, and does not hold or intimate any different construction of the fundamental law in this regard; and in the case in the 92 Mich., 33, the court was dealing with a hypothetical case and not with possession fully and actually taken. It certainly does not hold to a different construction as to the effect of actual possession from that theretofore universally held in the State, because the Record did not disclose any such possession.

See as to the character of the possession as shown by the Record—Brief, p. 35, et seq.

In coming to the consideration of whether a citizen has been denied the "equal protection of the laws," the first matter for consideration is to ascertain what the law in question is. If the state court has passed upon it, that construction is conclusive upon this jurisdiction until reversed.

There has been no reversal of the settled holding of the Supreme Court of the State as to this, that possession cannot be taken, or if taken, legalized, until compensation has been finally ascertained and fully paid; and further that this is so by the constitution of the State. The laws and decisions of other States can have no application or authority.

IV.

THE STATE COURT HAS NOT REVERSED ITS UNIFORM HOLDING THAT BY THE CONSTITUTION OF THE STATE THE PROCEEDINGS FOR CONDEMNATION WERE NOT JUDICIAL, WHETHER THE TRIBUNAL TOOK THE FORM OF A JURY OR OF A BOARD OF COMMISSIONERS.

IN EITHER CASE THE UNIFORM HOLDING WAS AND IS UNDER THE UNION DEPOT ACT, THAT THE PROCEEDINGS SHALL NOT BE INFLUENCED BY ANY JUDGE OR LEGAL EXPERT. THERE IS NO QUESTION RAISED OF A VESTED RIGHT TO ANY PROCEDURE, BUT THE QUESTION RAISED IS TO A FUNDAMENTAL RIGHT UNDER THE CONSTITUTION AS SACRED AS THE RIGHT OF TRIAL BY JURY IN A CRIMINAL CASE.

If a right to procedure is secured by the fundamental law, it is a right which cannot be taken away; and it has been seen that the historic reasons for the adoption of the constitution as thus construed by the Supreme Court of the State are fully discussed and the firm holding reached that the right to be free from the interference of a court is a sacred and fundamental one.

There is no reversal of this construction of the constitution of the State in the 103 Mich., 556.

On the contrary, that decision was this:

"The same course pursued upon this proceeding was also "pursued in the case of Railway Co. vs. Dunlap, 47 Mich., 456, "and the Court refused to set aside the award, even though the "charge of the judge was 'ambiguous and open to criticism'. "Under the rule of that case this award canot be disturbed," etc.

Record, p. 1816, fol. 3040.

It is clear that the judgment in the 103 Mich., 556, affirms the case cited and assumes to rest upon it. It thus affirms the construction of the law of that case; and that is the leading case for our contention quoted and affirmed in repeated judgments,

all of which are cited at page 23 et seq., and 50 et seq., of the Brief.

The construction by that leading case, which was a case under the old railroad act, had also before been adopted by the Supreme Court of the State as the proper construction under the Union Depot act. Union Depot Co. vs. Jones, 83 Mich., p. 415, was a condemnation case under same act as in this case. There the Court cited and adopted the same leading case, 47 Mich., 456, supra, by quoting it as follows:

"*In all such cases the constitution*, as well as the principles of "the common law, makes them (the jury) judges of law and "fact." * * * "Their conclusions are not based "entirely on testimony. They are expected to use their own "judgment and knowledge from a view of the premises, and their "experience as freeholders, quite as much as the testimony of "witnesses to matters of opinion."

And then saying:

"It was there also held that the functions of the judge in such "cases were advisory merely, an that such controversies as this "cannot be disposed of on merely technical notions. These pro-"ceedings may be instituted in probate courts, the judges of "which are frequently not lawyers, and are unfamiliar with the "rules of evidence."

If the construction of the State constitution is for the State Court, and that construction remains unreversed by that Court, that construction is the law for this Court in considering the question of whether the plaintiffs in error have been denied the equal protection of that law.

It is respectfully submitted and urged that there should be a more full consideration of this case by this Court and by a full bench. No one can suffer from delay, as it appears by the Record that the Depot Company is in full possession of the property, and in addition is fully secured on other property for

the judgment, and that the legal rate of interest in the State of Michigan is six per cent.

Absalom Backus Jr.
A. Backus Jr & Sons.
Plaintiffs in Error,
By Dickinson Thurber Stevenson
their Attorneys

Don M Dickinson
Of Counsel.

I hereby certify that in my opinion the foregoing petition for rehearing is well founded in law.

May 3, 1898.

Don M Dickinson
Of Counsel for Plaintiffs in Error.

No. 55.

Brief of Defendant in Error.

JAN 10 1898
JAMES H. MCKENNEY
Clerk

UNITED STATES OF AMERICA.

Supreme Court of the United States.

Filed January 10, 1898.

OCTOBER TERM, 1897.

No. 55.

A. BACKUS, JR., & SONS, and ABSALOM BACKUS, Jr.,
Plaintiffs in Error,
vs.
THE FORT STREET UNION DEPOT COMPANY,
Defendant in Error.

Error to Supreme Court of Michigan.

Brief for Defendant in Error.

FRED A. BAKER,
Attorney for Defendant in Error.

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Brief for Defendant in Error.

STATEMENT OF THE CASE.

The provisions of the Michigan Union Depot Act of 1881 for the condemnation of private property to the public use, were copied from the Michigan general railroad law, first passed in 1855.

1 How. Stat. of Mich., p. 890, Secs. 3463-3471.
1 How. Stat. of Mich., p. 845, Secs. 3331-3340.

They were an adoption from the general railroad law

of 1850 of the State of New York, and are almost word for word the same.

General Stat. of N. Y., 1829-1851, Blatchford's Ed., p. 873.

The procedure prescribed by the act may be summarized as follows:

1. The filing of a petition in a court of record, and the service of the same, with notice of the time and place of the hearing thereon, on the owners and others interested in the property to be taken.

2. The appointment of three commissioners or at the option of the respondents, the selection of a jury of twelve disinterested freeholders residing in the vicinity of the property, to act as the trial court or tribunal.

In case a jury is demanded and is empanelled the judge of the court, or a circuit court commissioner to be designated by him, may attend the jury, to decide questions of law and administer oaths to witnesses. If no judge or commissioner attends, the jury conduct their own proceedings.

3. The trial or hearing of the case before the commissioners or the jury on sworn testimony, an inspection of the property, and arguments of counsel, substantially the same as in common law actions.

4. The determination of the case by the commissioners or jury, and the filing of their report or verdict with the court, showing their decision upon the questions (1) Whether it is necessary to take the private property described in the petition for the public use or benefit, and (2) The amount of the just compensation to be awarded and paid to the owner and other interested parties.

5. The confirmation of the report or verdict by the court, and the entry of an order directing to whom the

money is to be paid or when and where it is to be deposited by the company.

A certified copy of the order is to be recorded in the office of the register of deeds of the county.

"And thereupon, on the payment or deposit by the said company of the sum to be paid as compensation for such land, franchise, or other property, and for costs, expenses and counsel fees as aforesaid, and as directed by said order, *the company shall be entitled to enter upon and take possession of and use the said land, franchise and other property for the purpose of its incorporation; and all persons who have been made parties to the proceedings, either by publication or otherwise, shall be divested and barred of all right, estate and interest in such real estate, franchise or other property, until such right or title shall be again legally vested in such owner;* and all real estate or property whatsoever acquired by any company under and in pursuance of this act, for the purpose of its incorporation, shall be deemed to be acquired for public use: Provided, the said sum to be paid as damages and compensation, and costs, expenses and counsel fees as aforesaid, shall be paid by the company, or deposited as provided in this act, within sixty days after the confirmation of said report by the said court; and in case said company fail or neglect so to do, such failure or neglect shall be deemed as a waiver and abandonment of the proceedings to acquire any rights in said land or property."

It was held in New York in 1853, two years before the statute was adopted in Michigan, that the effect of recording the order of confirmation and the payment of the money, was to transfer the title to the property or right of way taken, to the company.

The Court said:

"In the words and by the necessary operation of the 18th section, on the recording of the order above mentioned and the deposit of the money, both which acts were performed by the company upon the original appraisal, the company were not only entitled to enter upon and use the land appropriated and appraised, but all the

parties to the proceeding were divested and debarred of all right, estate and interest in such real estate during the existence of the company. This is in substance and effect a statutory conveyance of the land, wholly divesting the owner of his title, and vesting it in the company. And this necessary effect of the proceeding is recognized by a further provision in this same section, that if on the second appraisal the compensation is increased, the difference shall be a lien upon the land appraised, thus treating it as it truly is, as the land of the company. A lien on one's own land would be a legal absurdity."

Crowner vs. Watertown, etc., R R., 9 How. Pr., 457.

6. The award so made and paid is subject, however, to such modification as may be the final result of an appeal by either party to the Supreme Court of the State.

The provisions providing for appeals are as follows:

"Within twenty days after the confirmation of the report of the commissioners or jury, as above provided for, either party may appeal, by notice in writing to the other, to the Supreme Court, from the appraisal or report of the commissioners or jury; such notice shall specify the objections to the proceedings had in the premises, and the Supreme Court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived; such appeal shall be heard by the Supreme Court at any general or special term thereof, on notice thereof being given according to the rules and practice of the court. On the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion. The second report shall be final and conclusive upon all parties interested. *If the amount of the compensation to be allowed is increased by the second report, the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited as the court shall direct; and in such case, all costs of the appeal shall be paid by the company; but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so ap-*

pealing. On the filing of the report, such appeal, when made by any claimant of damages, shall not affect the said report as to the right and interest of any party, except the party appealing; nor shall it affect any part of said report in any case, except the part appealed from; nor shall it affect the possession of such company of the land appraised; and when the same is made by others than the company, it shall not be heard except on a stipulation of the party appealing not to disturb such possession during the pendency of such proceedings."

It is also settled in New York that the statute permits the company to pay the award and take possession, without losing its right to appeal and secure a new appraisal; and that the property owner has the same right, that is, that he can accept the award, without losing his right to appeal and secure a new appraisal.

In re N. Y., etc., R. R., 94 N. Y., 287.
In re N. Y., etc., R. R., 98 N. Y., 12.

THE PROCEEDINGS IN THIS CASE.

In the case at bar, the owner, Absalom Backus, Jr., and his tenant, A. Backus, Jr., & Sons, a corporation, were duly notified and given full hearings before three different juries, before the Circuit Court for the County of Wayne on motions to confirm, and before the Supreme Court of the State on an appeal by the company, and again on a certiorari sued out by themselves.

1. The first jury disagreed.

Record, pp. 9-10.

2. The second jury awarded the respondents in the aggregate, $96,143.

Record, pp. 847-848.

3. The company paid the awards and took possession under the statute.

Record, pp. 1151-1152.

4. The Supreme Court of the State on an appeal by the company set the awards aside and granted a new trial, before a new jury.

Record, pp. 948-969.

5. The third jury awarded the respondents in the aggregate $63,000, being a reduction of $33,143.*

Record, p. 980.

6. The first awards having been paid to the respondents the trial court entered up judgments against them for the amount of the reduction and costs, according to the statute.

Record, pp. 1791-1792.

7. The judgments against the respondents were reviewed by the Supreme Court of the State on a common law certiorari; and they were duly affirmed.

Record, pp. 1816-1822.

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*The statement in the certificate of the Clerk of the Wayne Circuit that the verdict of the jury could not be found in the files of the court is not true. It was found in his office, and a certified copy was produced on the hearing in the State Supreme Court.

THE QUESTIONS IN THIS CASE.

The only questions in the case are whether the respondents below, and plaintiffs in error here, have been deprived of their property without due process of law, or been denied the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

In determining the federal questions, if any, presented by this record, it will be necessary to ascertain in the first place what the law of Michigan is and then to determine whether that law, as applied to and enforced in the case at bar, is in conflict with the provisions of the Fourteenth Amendment of the Constitution of the United States.

In the first three subdivisions of this brief I will discuss the questions in this case as state questions. In the next three subdivisions of this brief I will discuss the same questions as federal questions.

AS STATE QUESTIONS.

I.

The provisions of the Michigan Union Depot Act providing that in condemnation proceedings the company may pay, and the property-owner may receive, the amount of the first appraisal, and that the title to, and possession of, the property condemned, shall thereupon pass to the company, but subject to the right of the property-owner to obtain an increase, or of the company to obtain a reduction of the appraisal, as the final result of an appeal by either party to the State Supreme Court, are not in conflict with the constitution of that state.

The Constitution of Michigan contains the following general provision regulating the exercise of the power of eminent domain:

"When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve free-holders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law."

Art. XVIII., Sec. 2.

Another provision which has no application to railroad condemnations reads:

"Private property shall not be taken for public improvements in cities and villages without the consent of the owner unless the compensation therefor shall first be determined by a jury of free-holders and actually paid or secured in the manner provided by law."

Art. XV., Sec. 15.

Another provision which does apply to railroad condemnations is as follows:

"The property of no person shall be taken by any corporation for public use without compensation being first made or secured in such manner as may be prescribed by law."

Art. XV., Sec. 9.

The very learned and distinguished counsel for the plaintiffs in error, in his brief on the motion to dismiss, pp. 20-21, contends that the New York cases are not authority in Michigan, cause the New York Constitution of 1846, under wh their general railroad law of 1850 was passed, is not ae the Constitution of Michigan. The learned counsel is in error in referring to the provision of the Michigan Constitution relative to public improvements in cities and villages that the compensation "shall first be determined by a jury of freeholders and actually paid or secured in the manner provided by law;" but the legal effect of that provision as far as the time when the compensation is to be made or secured is concerned, is identical with the provision, relating to condemnations by private corporations, that the compensation must be "first made or secured in such manner as may be prescribed by law."

There are at least five separate and distinct answers to the position of the learned counsel:

FIRST ANSWER.

Where the property is taken by a private corporation, there is no difference as to the time when the compensation is to be paid or secured between the Constitution of 1846 of the State of New York, and the Constitution of 1850 of the State of Michigan. Under either instrument the compensation must be "*first*" paid or secured.

Nor is there any difference in the requirements as to commissioners or a jury. The only difference is that under the Michigan Constitution the commissioners or jury determine the question of public necessity as well as the question of compensation or damages. The New York Constitution of 1846 contains these provisions:

"Nor shall private property be taken for the public use without just compensation."

Art I., Sec. 6.

"When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record as shall be prescribed by law."

Art I., Sec. 7.

The provision that private property shall not be taken for public use without compensation is also in the New York Constitution of 1821.

Art. VII., Sec. 7.

There is no express requirement in these provisions that the compensation shall be *first* paid or secured, but it was settled in New York long before 1850, that a private corporation could not take private property for the public use unless it *first* paid or secured the property owner.

In Bloodgood vs. Mohawk & Hudson R. R. Co., 18 Wend., 9, decided in 1837, the act incorporating the company provided for the appointment of three commissioners by the Governor of the State "to determine the damages which the owner or owners of the land or real estate so entered upon by the corporation has or have sustained by the occupation of the same; and upon payment of such damages" (with the costs of the appraisement, or upon

depositing the amount of such damages in a bank in the City of Albany to the credit of such owner or owners, notice thereof being given) "then the said corporation shall be deemed to be seized and possessed of the fee simple of all such land or real estate," etc.

In an action of trespass quare clausum fregit, brought by the owner of land, against the company, the latter justified under condemnation proceedings, but did not allege that it had paid or deposited the damages awarded as provided for in the act of incorporation.

Held, that the plea of justification was insufficient and the demurrer thereto was sustained.

Chancellor Walworth in his opinion, pp. 17-18, said:

"But it certainly was not the intention of the framers of the Constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the Legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund, whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so. In the ordinary case of lands taken for the making of public highways, or for the use of the State canal, such a remedy is provided; and if the town, county, or State officers refuse to do their duty in ascertaining, raising, or paying such compensation in the mode prescribed by law, the owner of the property has a remedy by mandamus to compel them to perform their duty. The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the Legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid. In the case under consideration, if this company were authorized to take possession of the plaintiff's property and complete the construction of their road, before his damages were assessed and paid, or offered to be paid to him, he might

have been wholly without redress, as he had no power to compel the assessment of damages, and no adequate fund was provided for the payment of damages when ascertained. The citizen whose property is thus taken from him without his consent, is not bound to trust to the solvency of an individual, or even of an incorporated company, for corporations as well as individuals are sometimes unable to pay all their just debts; especially those corporations which are authorized to incur heavy responsibilities in anticipation of the payment of their capital by the subscribers for the stock; and if the true construction of this charter was such as is contended for by the defendants' counsel, I should hold that the provision which authorized the appropriation of the plaintiff's property to the use of the corporation before the damages had been ascertained and paid, was unconstitutional and void."

Senator Edwards, at pp. 27-29, said:

"I am aware that under the statutes authorizing the construction of canals, the commissioners are authorized to take private property; and that the damages are afterwards to be appraised and paid for by the State; and that the right of the commissioners to enter upon and take the property of individuals before the State compensates the owner, has been sanctioned by the judicial decisions of this State. See Rogers & Magee vs. Bradshaw, 20 Johns. R., 744; Jerome vs. Ross, 7 Johns. Ch. R., 343; Wheelock vs. Pratt, 4 Wendell, 650. And although I am decidedly of the opinion that the construction given to the Constitution under these decisions, is a forced construction, and one which was pressed upon the Court, from the extreme necessity of the case, I do not feel disposed to controvert them, nor is it necessary to do so, for the purpose of coming to the conclusion I have arrived at, in the case under review. The strong reason why a strict and rigid compliance with the terms of the Constitution has not been required, where private property has been taken for the construction of canals, is, from the undoubted responsibility of the State to compensate the owner. When legal provisions have been made for payment by the State, it has been deemed ready pay or an equivalent. But this reason cannot exist in its full force when applied to in-

«corporated companies. They are often irresponsible, and no such general rule can be established as applicable to them, without greatly hazarding the property of the individual. I am decidedly of the opinion, therefore, that no such construction can with propriety be given to the Constitution, when applied to them; and if the act admits of such a construction, and such only, then it is unconstitutional and void, and could furnish no protection to the defendants, even had they set out the proviso, unless they had averred that they had satisfied the damages, or that they were ready and willing to make satisfaction."

Senator Maison, at p. 36, referring to the opening of township highways before payment of compensation, said:

"Here, the faith and solvency of the town are pledged to the owner, that he shall certainly be paid for his property taken for the road. In such case the property is allowed to be taken and used before payment, and for the reason that the payment will certainly be made without hazard or doubt. Cadwallader's Heirs vs. McIlvoy, 1 A. K. Marsh R., 84; Jackson vs. Winns' Heirs, 4 Litt. R., 323."

Referring to an act for the opening of streets in New York City he said:

"The faith and solvency of the city are here pledged for payment."

Passing to a consideration of the proper construction of the act of incorporation, before the Court, Senator Maison, at p. 40, said:

"I have no doubt of the perfect solvency of this corporation, and their unquestioned ability to make compensation, either before they commenced or after they had completed their road; but we are looking for a principle which shall be of general application, irrespective of the solvency of any particular corporation—a principle which shall shield and protect the citizen from all hazard of loss, securing to him absolute certainty of compensation for his property taken for public use. To render the law constitutional, then, we must intend that the Legislature, in the provisions they have made, have declared

that compensation shall be made *before* the property can be taken. This is no forced construction of the act."

Senator Tracy, at p. 74, said:

"Assuming that land taken for the construction of a railroad is taken for public use, as much as when taken for a canal owned by the State, or for a public road laid out by the town officers under the highway act, or for a turnpike road, it is in vain to seek an analogy in respect to the certainty of the compensation secured in the one case and in the others. In regard to lands taken for State canals or for common highways, the fund from which compensation is secured is a public one and certain, and the means for ascertaining the damages and for reaching the fund, are defined, specific, and at the command of the party injured; and in regard to lands appropriated to a turnpike road, the statute requires not only that the damages shall be assessed, but actually paid or tendered before the lands can be entered upon by the corporation."

He concluded his opinion at p. 77, as follows:

"I conclude, therefore, that in the present case where there was no public fund, which in law and in fact must be deemed always adequate to insure the payment of such damages as shall be found to have accrued, that the Legislature could not authorize the defendants to enter upon and possess and use the lands belonging to the plaintiff, until they had *first* paid, or offered to pay to him, a just compensation therefor; and that the plea in this case, containing no averment that compensation had been made or offered, is bad, and therefore the judgment of the Supreme Court which sustains the sufficiency of the plea, should be reversed."

SECOND ANSWER.

The Michigan general railroad and union depot acts both plainly and unequivocally provide that the amount awarded by the first jury (that is, by the first jury finding in favor of the public necessity, and agreeing upon the amount of compensation to be paid for the property

taken), must be paid to the property owner, or be deposited as the Court may direct, before the company "shall be entitled to enter upon and take possession of and use the said land, franchise and other property, for the purpose of its incorporation."

1 How. Stat., Secs. 3468, 3337.

This statute does not permit the company to take possession, nor does it pass the title to the property, upon the filing of any sort of bond or other security; its peremptory requirements are, that the money must be actually paid to the property owner or be actually deposited so as to be within his reach. One of the objects of the provision authorizing a deposit of the money is to meet any exigency that might arise if the property owner should refuse to accept a tender of the money, or if there is some undetermined dispute between the owners and others interested as to who is entitled to receive the money, or if it is necessary to secure the appointment of a general guardian for any infant, or other incompetent person who is entitled to the award. The special guardian authorized to be appointed in these proceedings is only given power to "appear for and attend to the interests of such infant, idiot or person of unsound mind," and to that end it is provided that "all notices to be served in the progress of the proceeding may be served on such special guardian."

1 How. Stat., Sec. 3332, subd. 4.
Id., Sec. 3364, subd. 4.

Whatever may be the object of the provision authorizing a deposit of the money, this much is certain, that when the money is deposited as directed by the order of the Court, it is subject to the direction of the Court, and is to be paid over to the property owner or other inter-

ested party, whenever he is entitled to receive it. This is made clear by the following provision:

"If there are doubts about the title, or to whom the money, or any part of it, to be paid as compensation for the real estate or property taken, belongs, the Court may direct the money to be paid into said court by the company, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made."

1 How. Stat., Secs. 3338, 3469.

THIRD ANSWER.

There can be no valid constitutional objection to legislation which provides that the confirmation of an award in a condemnation suit shall be regarded as a final judgment, and that the award may be paid and received, and be fully acted upon by the parties, with the legal result and effect, that the title and possession of the property condemned is thereby transferred; but subject to the right of either party, or of both, to obtain a review of the award on allegations by the property owner that the amount is not adequate, or on allegations by the condemning corporation that it is excessive.

Legislation permitting such review can have no other object or purpose than that of furnishing an appropriate writ or remedy for the correction of any injustice that may be found to exist in the first or original award.

The statutes of Michigan relative to the action of ejectment provide that a judgment in ejectment shall be conclusive as between the parties, but that the defeated party can have a new trial at any time within three years upon payment of all costs and damages recovered thereby; and if the plaintiff has taken possession, and the defendant

recovers on the new trial, a writ of possession issues to restore the possession to the defendant.

2 How. Stat., Secs. 7821, 7822, 7827.

The first result reached in any litigation or in condemnation proceedings does not establish any such vested right and is not of any such conclusive and final nature as to preclude a subsequent review thereof for the correction of either errors of law or of fact, and the legislation in Michigan which provides for such review cannot possibly be held a violation of the Constitution of the State or of any constitutional guaranty known to American law.

We have already shown that the Michigan statute was adopted from the New York general railroad law of 1850.

A similar system was adopted in Massachusetts as early as 1833.

Mass. Rev. Stat., 1836, pp. 343-345.

The Massachusetts statutes provide for an original assessment of damages by the county commissioners, with a right in either party if dissatisfied, to apply for a jury.

Id., p. 344. Secs. 56. 57.

Other provisions are as follows:

"Sec. 61. In case of such application being made to the commissioners, either by any such owner or by any railroad corporation, for an estimate of damages, the commissioners shall, if requested by said owner, require the said railroad corporation to give security to the satisfaction of said commissioners, for the payment of all such damages and costs, as shall be awarded by the said commissioners or by a jury, for the land or other property so taken; and all the right or authority of said corporation to enter upon or use said land or other property, except for making surveys, shall be suspended until they shall give such security.

"Sec. 62. After the commissioners shall have made their estimate as aforesaid, the said railroad corporation may tender, to the owner of the land or other property, the amount of damages so estimated, in full satisfaction thereof; and if the said owner shall refuse to receive the same, with costs to be taxed to that period, and shall apply for a jury as aforesaid, he shall pay all costs caused by such application, arising after such tender, unless upon the final hearing he shall recover a greater amount of damages than the sum tendered; and if the said corporation shall apply for a jury, and upon a final hearing, the damages, as estimated by said commissioners, shall not be reduced, the said corporation shall pay all costs caused by such application."

Id., pp. 344, 345.

Section 62 was construed in the following cases:

Com. vs. Boston & Maine R. R., 3 Cush., 55.
Gray vs. Lowell & Lawrence R. R., 4 Cush., 609.
Harvard Branch R. R. vs. Rand, 8 Cush., 218.

It was held:

1. That where the railroad corporation obtained an assessment by a jury reducing the estimate of the commissioners it was not liable for costs to the property owner, but could not recover costs from him, because the statute did not provide for it.

2. That where the property owner applies for a jury, and the jury does not increase the award, or reduces it, he is not liable for costs, unless the railroad corporation had tendered to him the amount awarded by the commissioners and he had refused to accept it.

As pointed out by Mr. Justice Gray in the subsequent case of New Haven & Northampton Co. vs. Northampton, 102 Mass., 120, the Court in the prior cases overlooked the act of 1841, c. 125, sec. 3, which contained a new provision relative to the costs to be awarded on an assessment of damages by a jury in railroad cases:

"And upon any application for a jury to assess such damages, the *prevailing* party shall be entitled to his legal costs to be recovered in the same manner as in case of applications for juries to assess damages occasioned by laying out highways as provided in the twenty-fourth chapter of the Revised Statutes."

1 Laws of Mass., 1839 to 1842, n. s. pp. 403-4.

The general statutes of Massachusetts of 1860, following the act of 1841, provide:

"Either party, if dissatisfied with the estimate made by the commissioners, may at any time within one year after it is completed and returned, apply to a jury to assess the damages. Upon such application the prevailing party shall recover legal costs and the proceedings thereon shall be the same as is provided for the recovery of damages in the laying out of highways."

Gen. Stat. Mass., 1860, p. 352, Sec. 22.

Section 62 of the Rev. Stat. of 1836, above quoted, was retained in the revision of 1860.

Gen. Stat. Mass., 1860, p. 354, Sec. 35.

In the case above mentioned of New Haven & Northampton Co. vs. Northampton, 102 Mass., 116, the Court had occasion in an opinion by Gray, J., to review all this legislation and the prior decisions, in a case where the railroad corporation being dissatisfied with the estimate of the commissioners, did not make a tender, but applied for a jury and obtained a verdict reducing the estimate of the commissioners. The reasons which led the Court to the conclusion that the property owner, although the damages awarded to him were reduced in amount, was still the prevailing party, and entitled to costs were stated by the learned justice (commencing on p. 121), as follows:

"It is to be considered, in the first place, that this is the case of the owner of property taken for public uses by the right of eminent domain under statutes which would be unconstitutional if they did not secure to him the right of trial by jury. It is not to be presumed, without clear words, that the Legislature would afford to the citizen, whose property had been taken against his will, his constitutional right of having his damages assessed by a jury, only upon the condition of paying costs if the jury should assess them at a less sum than that estimated by public officers in whose appointment he had no greater share than any other citizen of the county, and whose estimate could not lawfully be made conclusive upon him."

"Upon the laying out of a highway indeed, which is for the immediate benefit of the whole public, and in no part for the profit of a corporation, it is expressly provided that, if the jury do not increase the damages, the land owner applying for a jury shall pay the costs of the application. Gen. Sts., c. 43, sec. 24, 44; Hamblin vs. County Commissioners, 16 Gray, 256. The railroad act contains no such provision, nor any other distinct allowance of costs against the land owner if any damages are assessed by the jury, except in the single case in which he persists in his application for a jury after a tender to him of the amount estimated by the commissioners, and fails to recover a greater sum. Gen. Sts., c. 63, sec. 35. All other cases fall under the general provision of section 22, that 'upon such application the prevailing party shall recover legal costs.'"

"The words 'prevailing party,' used in this statute, have a well settled meaning in the statutes regulating costs in actions at law. In those statutes, the general rule has long been that 'the prevailing party' shall recover his legal costs against the other. St. 1784, c. 28, sec. 9; Rev. Stat., c. 121, sec. 1; Gen. Stat., c. 156, sec. 1. And the established construction of such statutes is, that if, on an appeal from a lower to a higher court, or a new trial in the same court, the plaintiff finally recovers any damages, though for a less amount than on the first trial, he is entitled to full costs, in the absence of any special restriction by statute. Framingham Manufacturing Co. vs. Barnard, 2 Pick., 532; Sawyer vs. Bancroft, 21 Pick., 210; Stevens vs. Hale, 7 Met., 85; Fitch vs. Stevens, 2 Met., 506; Richardson vs. Curtis, 2 Gray, 497. In no case, we

believe, is a plaintiff, who finally recovers anything in an action at law, obliged to pay costs to the defendant, except when, after not accepting an offer of judgment, he fails to recover a greater sum than that so offered. Gen. Stat., c. 129, sec. 63. His own right to recover costs is indeed restricted in some cases in which he puts the defendant to increased expense by pursuing him in a jurisdiction which the result shows that he was not justified in resorting to; as if he brings a suit in a court of superior jurisdiction, and recovers no more than he might have sued for in an inferior court; or if he appeals from the judgment of an inferior court in his favor, and recovers no greater sum in the court appealed to. Gen. Stat., c. 156, secs. 4, 5; Lakeman vs. Morse, 9 Mass., 126; Abbott vs. Wiley, 17 Pick., 323; Joannes vs. Pangborn, 6 Allen, 243; Heims vs. Ring, 11 Allen, 352. Upon a writ of review, the rule is different, because that is a new action, brought after a final judgment, and a party who does not obtain a more favorable judgment on the review than in the original action is not the prevailing party upon the writ of review. Gen. Stat., c. 146, secs. 33, 34; Williams vs. Hodge, 11 Met., 266.

"An application for a jury, by a party dissatisfied with the estimate of damages by the county commissioners, is not a new action, or a process to reverse or revise a judgment already rendered; but is only a step in the same case, which suspends all proceedings to enforce the award of the commissioners until a verdict has been rendered or the right to a trial by jury waived. Gen. Stat., c. 43, secs. 41-43. The Gen. Stats., c. 63, sec. 22, do not even say that the jury shall 'revise' or 'reassess,' but that they shall 'assess the damages.' The original claim for damages is to be made out by the landowner, and tried by the jury, without any regard to the previous estimate of the commissioners. Connecticut River Railroad Co. vs. Clapp, 1 Cush., 559. If a verdict is returned in his favor, for whatever amount of damages, he is the prevailing party, and as such entitled, under the provisions of the railroad act, to recover costs."

The writs of review referred to are writs under which "final judgments in civil actions may be re-examined and tried anew."

Gen. Stat. Mass., 1860, p. 747, Sec. 19.

Other sections of the statute read:

"Sec. 33. The prevailing party shall recover costs unless the Court in granting the review imposed on the petitioners terms respecting costs."

"Sec. 34. If the sum recovered by the plaintiff in the original suit for debt or damages is reduced on the review, the original defendant shall have judgment and execution for the difference with costs; or, if the former judgment is not satisfied, one judgment may be set off against the other, and an execution issued for the balance. If the original plaintiff recovers a greater sum for debt or damages than was awarded to him in the original suit, he shall have judgment and execution for the excess."

The foregoing examination of the Massachusetts system for the condemnation of private property to the public use by railroad corporations makes it perfectly plain, that the only difference between that system and the system which prevails in New York and Michigan consists of this, that in Massachusetts the first estimate of damages or compensation, as made by the county commissioners, is regarded as a mere preliminary estimate in the same suit or proceeding in which an assessment by a jury may be subsequently had, while in New York and Michigan, the first award is made by commissioners appointed by the Court, or if the property owner so elects, by a jury, and the award so made is, when confirmed, a final judgment, to be acted upon by the parties, and which passes the title and possession of the property; but subject, however, to the right of either party, or both, to have the case reviewed by the Supreme Court of the State on appeal, and as the result of such review to have the case re-examined and tried anew, before the same or new commissioners or jury, substantially the same as an ordinary civil action can be retried in Massachusetts on a writ of review.

Subject to the question, whether under the Constitution of Massachusetts, the property owner is not entitled

to a jury trial in the first instance without running any risk, or being subjected to any burdens, as to costs, there can be no doubt but that the Legislature of that State could make railroad condemnation cases subject to their writ of review system, that is, if the first assessment was required to be by a jury, there could be no constitutional objection to legislation providing for a new or second assessment on a writ of review, and the entry of a judgment against the one party or the other for the difference in the awards, and the recovery of costs by the prevailing party on the review, the same as in civil actions.

The provision for a preliminary estimate by the county commissioners could be retained, and the second estimate, being the first assessment made by a jury, could be made subject to another assessment by a new jury on a writ of review.

And this is precisely what is now done in Massachusetts.

The Public Statutes of Mass., 1882, c. 49, sec. 105, provide that in condemnation cases the parties, instead of having a sheriff's jury, may have a trial at the bar of the court in the same manner as other civil cases are there tried by jury, and it has therefore been held, that the judgment of the Superior Court upon the verdict of the jury assessing damages upon the petition of one whose land has been taken for a railroad is a judgment in a "civil action" within the meaning of the statute authorizing writs of review.

Nantasket Beach R. R. Co. vs. Ransom, 147 Mass., 240.

The provisions providing for the entry of judgments to adjust the differences and giving costs to the prevailing party on the review, as construed in Williams vs. Hodge, 11 Met., 266, remain unchanged.

Public Stat. of Mass., 1882, p. 1080, Secs. 34, 35.

The act authorizing a trial at the bar of the court instead of a trial before a sheriff's jury was first passed in 1873.

Laws of Mass., 1873, C. 261.

So that since 1873 the Massachusetts procedure in railroad condemnation cases, has been identical with that in New York and Michigan in this particular, that the first assessment made by a jury is regarded when confirmed as a final judgment, but which judgment is subject to the results of another assessment on a writ of review; and costs are awarded to the prevailing party on the review, without regard to which was the prevailing party on the first or original assessment.

That provision for the review of final judgments in railroad condemnation cases has been made in Massachusetts as well as in New York without a suggestion in either State that the constitutional guaranties for the protection of private property have been violated, is some evidence that the Michigan general railroad and union depot acts in providing for such reviews, are not obnoxious to the constitutional safeguards which prevail in all the States, and the continuance of which is rendered imperative by the Fourteenth Amendment.

Wisconsin is another State where the legislation as to costs in railroad condemnation cases is the same as that of Michigan. The Wisconsin statute provides for a determination of the amount of the compensation or damages by commissioners, but gives the parties the right to appeal to the Circuit Court and to there have a jury trial. The statute provides that in these cases "costs shall be allowed to the successful party *on such appeal*, and if in favor of the plaintiff be added to the amount of the verdict; if in favor of the defendant be deducted therefrom; and judgment shall be rendered thereon according to the rights of the parties."

In Washburn and others vs. Milwaukee & Lake Winnebago R. R. Co., 59 Wis., 364, 378, the Court, in an opinion by Lyon, J., quoted the above statute and then said:

"This statute admits of but one rational construction, which is that the plaintiff is the successful party, if on his appeal the award of the commissioners is increased, or, on the appeal of the defendant company, if it is not reduced. Otherwise the defendant is the successful party. In the *Stringham cases* both parties appealed and the respective awards of the commissioners were reduced. The defendant was, therefore, the successful party and entitled to costs."

Alabama and Georgia legislation to the same effect was sustained by the affirmance of a judgment thereunder by the Supreme Court of Georgia. The charter of the Selma, Rome and Dalton Railroad was originally granted by the State of Alabama, and adopted by the State of Georgia. It provided that the value of land taken by the company for the purposes of its road should be determined by a sheriff's jury under a writ of *ad quod damnum*, but the parties were given the right to appeal to the Superior Court and to there have a jury trial *de novo*. The charter further provided that the appealing party should give bond "conditioned to pay the party appealed against all the costs of the trial *de novo*, as well as the costs of the writ of *ad quod damnum*, in the event that the finding of the jury in the trial *de novo* shall not be more favorable to the appealing party than the finding of the jury under the writ of *ad quod damnum* in the first instance," and that "if the trial *de novo* on the appeal shall not be more favorable to the appealing party than the original trial and verdict the party appealing shall pay all the costs of the whole proceeding," and again that "costs shall be paid by the company except in cases where appeal is taken, in which cases the costs to abide the result of the trial in the Circuit (Superior) Court as hereinbefore provided."

In Leak vs. Selma, Rome & Dalton R. R. Co., 47 Ga., 345, the sheriff's jury returned a verdict of $1,500, which was reduced by the jury in the Superior Court to $900, on an appeal by the company.

Held, that the owner of the land must r[illegible] the costs of the proceedings on appeal.

The Indiana Constitution of 1851 contains this provision:

"No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

Art. 1. Sec. 21.

In Lake Erie & Western Ry. Co. vs. Kinsey, 87 Ind., 514, appraisers assessed the damages of the property owner at $50, which was deposited by the company with the clerk of the court as provided by statute, before the company took possession. The property owner appealed, and in a trial before a jury he obtained a verdict for $790, and a judgment was rendered thereon. The judgment remained unpaid for some six months, when the property owner brought ejectment.

Held, that the property owner was entitled to recover possession.

The Court, at p. 517, said:

"Appellant insists that, under this statute, when it paid into the clerk's office the $50 awarded by the appraisers, the title to the land immediately passed to the appellant; and the fact that the appellee was awarded a much greater amount on the appeal makes no difference; that the title had already vested in appellant, and appellee must look to his judgment for compensation.

"Such a construction of the statute would be in conflict with the Constitution, and would make it unconstitutional and void in his respect. But we think the statute plainly admits of a construction that makes it in harmony with

the constitutional provision that just compensation shall be first made or tendered.

"The payment of the amount awarded by the appraisers gives the corporation a right to the immediate possession and a prima facie claim to the land subject to an appeal in ten days after the award is filed. If no appeal is taken, at the end of the ten days the title vests and relates back to date of payment. If an appeal is taken no title vests, and the corporation has no greater right than that of a license under the statute to hold possession and proceed with the construction of its road pending litigation. When the compensation has been finally fixed on appeal, then the corporation must pay or tender the compensation so fixed, and on failure to do so it acquires no title to the land, and its license to hold possession and prosecute its work ceases. Just compensation must be first made or tendered. The verdict of the jury and the judgment of the Court determine what that just compensation is."

The Kansas Constitution of 1859 contains the following provision:

"No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

Art. 12, Sec. 4

The only difference between this provision and that of the Michigan Constitution is that in Kansas the only constitutional way of giving the land owner security is by a deposit of money, and it is not competent to give a bond or any security other than a deposit of money, as it is in Michigan.

A Kansas statute passed in 1864 made the award of commissioners final, and did not permit any appeal. In 1868 an act was passed allowing an appeal, but in 1870 this act was amended so as to limit the scope and effect of the appeal, as follows:

"And an appeal shall be had from the determination of the Board of County Commissioners as to the value of the land, crops, buildings and other improvements on said land, and for all other damages sustained by such person or persons by reason of such right of way so appropriated, in the same manner as appeals are granted from the judgment of a justice of the peace to the District Court; and said appeal and all subsequent proceedings shall only affect the amount of compensation to be allowed, but shall not delay the prosecution of the work on said railroad, upon said company paying or depositing the amount so assessed by said commissioners with the County Treasurer of the county within which the said lands are situated; and upon the payment or deposit, as aforesaid, of the amount so assessed by said commissioners, and upon said company executing a bond with sufficient security, to be approved by the County Clerk, to pay all damages and costs which said company may be adjudged to pay by said District Court, said company may, notwithstanding said appeal, take possession of and use the said land and construct its road over the same."

The constitutionality of this statute was sustained by the Supreme Court of Kansas in an opinion delivered by Brewer, J., now one of the Judges of the Supreme Court of the United States.

C. B. U. P. R. R. Co. vs. A., T. & S. F. R. R. Co., 28 Kan., 453.

The grounds of the decision were:

(1.) That the appeal was a matter of favor and not of right, and the property owner could only appeal on such terms as the Legislature of the State saw fit to impose.

(2.) That the possession the company was allowed to take pending the appeal, upon paying or depositing the amount awarded by the commissioners, was provisional only, and if the company did not promptly pay any increased damages allowed in the District Court its provisional occupation of the land would cease to be lawful

and the land owner could recover possession as well as all damages for the injuries done to the land.

Judge Brewer concluded his opinion as follows:

"We have given this question the fullest consideration and our conclusion upholds the validity of this statute. We think the constitutional guaranty has been satisfied by it both in letter and spirit; that the rights of the land owner are protected, and at the same time no unreasonable obstruction placed in the way of railroad enterprises."

The Iowa Constitution of 1857 provides:

"Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof as soon as the damages shall be assessed by a jury."

Art. 1, Sec. 18.

A statute authorized a railroad company on depositing the amount awarded to the property owner by a sheriff's jury to take possession and construct its road, and then to take an appeal and obtain a reassessment. It was not required to give any security further than to deposit with the sheriff the amount of the first award.

In Peterson vs. Ferreby, 30 Ia., 327, the Court quoted the statutory provisions and answered the constitutional objection to them as follows:

"Day, J. The record presents but a single question, to wit: Does an appeal by a railroad company, from the assessment by sheriff's jury of damages for right of way, suspend, until the case is heard upon appeal, the payment to the landowner of the amount assessed and deposited with the sheriff? We feel constrained to answer this question in the affirmative. Railroads are works of great public convenience and necessity. Their construction requires much time, and involves the employment of great numbers of workmen. The work can be successfully prosecuted only through the intervention of contractors who undertake the building of specified portions. When

once begun, it is of the utmost importance that it be prosecuted without interruption or delay. Hence the law has wisely provided a summary mode in which damages for right of way may be primarily assessed, saving to either party the right to a more deliberate and careful adjudication upon appeal. But, in order that the company may not be subjected to vexatious delays, it provides that, under certain conditions, the appeal shall not suspend the prosecution of the work. The provision of the statute is as follows: 'If said corporation shall, at any time before they enter upon said real estate for the purpose of constructing said road, pay to said sheriff, for the use of said owner, the sum so assessed and returned to him as aforesaid, they shall be thereby authorized to construct and maintain their railroad over and across said premises: provided, that either party may have the right to appeal from such assessment of damages to the District Court of the county where such lands are situated, within thirty days after such assessment is made. But such appeal shall not delay the prosecution of the work upon said railroad, if said corporation shall first pay or deposit with the Sheriff the amount so assessed by said freeholders * * *.' Rev. Sec. 1317.

"This section, in direct terms, gives to the railroad company the right of appeal, and provides that, while the appeal is pending, the work may progress. But to this end, it is incumbent upon the company to deposit with the sheriff the amount assessed. The appeal would be shorn of half its benefits if the railroad, in order to adopt its provisions, is forced to an election, either to forego the prosecution of the work, or run the risk of recovering from the land owner the diminution of the damages upon appeal. It would be a novel construction, to hold that a party must satisfy a judgment before he can prosecute an appeal from it. The language of the section above referred to furnishes no basis for such a construction. It leads to the opposite conclusion. The former part of the section provides, that the corporation shall be authorized to construct and maintain their railroad over the premises, if they shall, at any time before they enter upon said real estate for the purpose of constructing the road, pay to said sheriff, for the use of said owner, the sum so assessed. But the portion of the section applicable to appeal provides that such appeal shall not delay the prose-

cution of the work, if said corporation shall first pay or deposit with the sheriff the amount so assessed. The difference in phraseology is material, and cannot be considered as the result of mere accident.

"The views herein expressed are not in conflict with the Constitution, which provides that 'Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury.' Const., art. I., sec. 18.

"The property is not taken, in an absolute sense, until the amount assessed upon appeal is paid. If the appellate jury, in this case, shall assess less than the sheriff's jury have assessed, the amount is secured to plaintiff, being in the sheriff's hands; if they shall assess more, the plaintiff can, by injunction, prevent the absolute appropriation of his property, until the increased sum is paid. Richardson vs. Des Moines Valley Railroad Co., 18 Iowa, 260.

"In either event, the landowner is fully protected. We are clearly of the opinion that the money paid the sheriff should remain a deposit in his hands, until the damages are finally assessed in the Appellate Court."

The Missouri Constitution of 1875 contains this provision:

"That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested."

The statutes of Missouri provide for an original or first assessment by the majority of three commissioners. Upon payment of the amount awarded by the commissioners to the clerk of the court, the railroad company is authorized to proceed with the construction of its road, and "to hold the interest in the property so appropriated for the uses aforesaid." Either party is authorized to file

exceptions to the report of the commissioners, and the Court is given power to review the report and to "make such order therein as right and justice may require, and may order a new appraisement upon good cause shown."

"Such new appraisement shall, at the request of either party, be made by a jury, under the supervision of the Court, as in ordinary cases of inquiry of damages; but notwithstanding such exceptions, such company may proceed to * * * construct said road or railroad; and any subsequent proceedings shall only affect the amount of compensation to be allowed."

In St. L. & S. F. Ry. Co. vs. Evans & Howard Brick Co., 85 Mo., 307, two of the three commissioners reported awards of $50,000 and $25,900, to two different owners. The third commissioner reported in favor of allowing $4,000 and $12,000 to these owners, respectively. The railroad company filed exceptions to the majority report, but paid to the clerk of the court the amounts awarded, and took possession of the property. Upon these facts the Circuit Court refused to hear the exceptions and entered an order directing the clerk to pay the awards to the property owners. On appeal to the St. Louis Court of Appeals the order of the Circuit Court was affirmed; but on error from the Supreme Court of the State it was reversed.

At page 326 the Court quotes the constitutional provision, and after referring to a rule of constitutional interpretation laid down by Judge Story, continues:

"In the first place, it would be doing violence to all known rules of interpretation to assume that those who framed and those who by their votes adopted our Constitution, were actuated by no intelligent purpose in that behalf. On the contrary, it must be assumed that they were familiar with the vicissitudes incident to condemnation proceedings and with the statutory provisions relating thereto; familiar with the fact that sometimes the land desired to be taken is not appraised at a suf-

ficiently large sum, and, therefore, the land owner files his exceptions; familiar with the fact that sometimes such land is appraised and the damages of the owner assessed at an exorbitantly large sum, and, therefore, the corporation, desiring to appropriate the land, files its exceptions; familiar with the fact that contests arise on the hearing and trial of these exceptions, and that frequently appeals are taken by the unsuccessful party to the court of last resort, to the end that the litigated matter may be finally adjudicated; familiar with the fact that such appeals cause delay; familiar with the fact that it concerns the public welfare that the enterprise of railroad building should not be retarded, and cannot be retarded without injuriously affecting the interests and prosperity of large communities in this State; familiar with the fact that in order to determine what the land proposed to be taken is worth, and how much the owner of it will be damaged by the taking, an imperious necessity exists that the precise strip of land required, its dimensions, etc., should first be ascertained, and that such strip should be marked out and sufficiently designated in order that those appointed to appraise it and assess the damages accruing to the land owner, can intelligently perform their work after they shall have 'viewed the property.' Taking all these things into consideration, as must be presumed to have been done by the framers and adopters of our Constitution, it does not seem difficult to reach a correct conclusion as to the meaning of the words employed. If the words, 'paid to the owner, or into court for the owner,' be taken in a literal sense, it cannot be doubted that the plaintiff company has brought itself within the very terms and letter of the organic law; the money has been 'paid * * * into court for the owner.' But grant that the words are not to be taken literally, and the result is not changed, if they are to be taken in their 'usual and most known signification' (1 Sto. Const., sec. 400), taken in the light of an intelligent purpose prompting those who used and those who adopted them. Viewed in this light, it is easy to discern the object contemplated by those who employed them and the reason they were employed. The very fact that they were employed, in and of itself, discloses a knowledge, on the part of the framers of the Constitution, of the frequent necessity, arising in the progress of condemnation proceedings, of paying money

'into court for the owner,' there to await the ultimate determination of the suit."

The Court, after answering the contention that the clause permitting payment into court for the owner was evidently intended as a provision for cases where the owner might refuse payment when tendered or might be unknown or not sui juris, proceeded to quote the different provisions of the statute, and then stated the conclusions of the Court as to their validity as follows:

"After a very careful examination of the section of the Constitution before quoted and a comparison of it with the statutory provisions already set forth, I have been unable to discover any necessary incongruity or repugnancy between the Constitution and the statute. The statute must, therefore, on the grounds stated, be held prima facie valid, and that the manner which it prescribes for ascertaining the compensation to be awarded to a land owner as possessed of equal validity. The manner in which the jury or commissioners shall ascertain the quantum of compensation is left entirely to the Legislature; that manner or method prescribed may well include all the necessary detail of motions and exceptions to the insufficiency or the exorbitancy of the amount of damages assessed, and the appointment of new commissioners or another jury 'as right and justice may require.' There is certainly nothing repugnant to the Constitution in prescribing such details; on the contrary, it is in furtherance of the constitutional mandate requiring that 'just compensation' be made. This embraces all means necessary to that end, not inconsistent with the Constitution. Nor is any incongruity apparent between the different sections of the statute. In Ring vs. Mississippi Bridge Company, 57 Mo., 496, it was ruled that section 3, which now corresponds with section 894, and section 4, which now substantially corresponds with section 896, should be construed together, and that the corporation, having paid the money to the clerk for the owner, might still except; but notwithstanding such exceptions, having made full compensation, as aforesaid, might still proceed with the construction of the road and the subsequent proceedings would only affect the amount of compensation to be allowed."

The California Constitution of 1879 provides:

"Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner," etc. Art. I., sec. 14.

Supplementary to this constitutional provision the California code of civil procedure provides that in all condemnation cases, before the property can be taken, it must appear that the use to which it is to be applied is a use authorized by law, and that the taking is necessary to such use. 3 Deering's Codes and Statutes of Cal., sec. 1241.

It is further provided that when the damages have been assessed, and a judgment of confirmation has been entered, upon paying "into court, for the defendant, the full amount of the judgment and such further sum as may be required by the Court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use," the plaintiff may, if already in possession, continue therein, and if not in possession, he may take possession and use the property "during the pendency of and until the final conclusion of the litigation." The trial Court is authorized to grant a new trial, but if it is granted on the application of the defendant and he does not obtain a greater compensation than was allowed him upon the first trial, the costs of the new trial are taxed against him. Either party may appeal to the Supreme Court. Pending a motion for a new trial, or an appeal, defendant is allowed to draw the money deposited for him upon the judgment, if he abandons all defenses except his claim for a greater compensation. Id., secs. 1254, 1257.

In Spring Valley Water Works vs. Drinkhouse, 92 Cal., 528, the property owner appealed to the Supreme Court

on the questions of public use and necessity, and also on the ground of error in assessing the damages. The Court decided against him on the question of public necessity, but found error in the proceedings to assess the compensation. The Court below was directed to retry the issues as to the value of the land sought to be taken. At page 532 the Court said:

"There is no doubt of the proposition, that before land can be taken for a public use, it must appear that the taking is necessary for such use. This is a question of fact to be determined by the Court or jury in view of all the evidence in the case, and the burden of proof is upon the plaintiff. The evidence must be sufficient to show that the land is reasonably required for the purpose of effecting the object or carrying on the business for which the plaintiff was organized, and in this case not only the present demands of the public upon the plaintiff, but those which may be fairly anticipated on account of the future growth of the city, are to be considered. We think the evidence was sufficient to show a necessity for the taking of defendant's land within the meaning of the law, and we cannot disturb the finding of the Court below on that point."

After the Court had made the decision granting a new trial of the question of damages, the property owner petitioned the Court for a writ of restitution to restore to him possession of the property taken. In denying this petition the Court referred to the statute providing for a transfer of possession after confirmation of the first award on a deposit of money into Court, and also to the constitutional provision, and then continued as follows:

"It would seem that the framers of both the Constitution and the statute had in view the delays incident to condemnation proceedings, and the necessity in many cases of allowing property to be taken and used for a public use during the progress of the litigation, provided an adequate fund to fully reimburse the land owner was first paid into Court. This construction of a quite similar

provision of the Constitution of the State of Missouri was fully adopted in the case of St. Louis, etc., R'y Co. vs. Evans and Howard Brick Co., 85 Mo., 326. It is conceded that respondent's possession of the premises was lawful down to the time of the reversal of the judgment; the authorities are uniform to that extent. Now, the order of the Court, made in the language of the statute, gave respondent possession of the premises 'during the pendency of and until the final conclusion of the litigation;' if the Legislature had the power by statute to give the possession of the premises to the respondent pending proceedings upon appeal, under certain conditions and limitations, it had the same power to extend respondent's possession 'until the final conclusion of the litigation.' The latter clause is no more violative of the constitutional provision than the former. These views are fully supported in Lake Erie, etc., R'y Co. vs. Kinsey, 87 Ind., 514."

Spring Valley Water Works vs. Drinkhouse, 95 Cal., 220, 223.

The Constitution of Montana provides:

"Private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner."

Art. 3, Sec. 14.

The Montana code of civil procedure provides for an assessment of damages before commissioners, with the right of appeal to the District Court and an assessment of the damages by a jury. If the appeal is taken by the property owner and he does not succeed in increasing the award he is required to pay costs to the appellee. Sec. 2224. Further appeal to the Supreme Court of the State is allowed, where the costs, if a new trial is ordered, are in the discretion of the Court. Secs. 1722, 1855.

Other provisions governing the proceedings in the District Court on appeal from the award of the commissioners are as follows:

"§ 2229. At any time after the report and assessment of damages of the commissioners has been made and filed in the Court, and either before or after appeal from such assessment or from any other order or judgment in the proceedings, the Court or any judge thereof at chambers, upon application of the plaintiff, shall have power to make an order that upon payment into Court for the defendant entitled thereto of the amount of damages assessed, either by the commissioners or by the jury, as the case may be, the plaintiff be authorized, if already in possession of the property of such defendant sought to be appropriated, to continue in such possession; or, if not in possession, that the plaintiff be authorized to take possession of such property and use and possess the same during the pendency and until the final conclusion of the proceedings and litigation, and that all actions and proceedings against the plaintiff on account thereof be stayed until such time: provided, however, that where an appeal is taken by such defendant, the Court or judge may in its or his discretion require the plaintiff, before continuing or taking such possession, in addition to paying into Court the amount of damages assessed, to give bond or undertaking, with sufficient sureties, to be approved by the judge and to be in such sum as the Court or judge may direct, conditioned to pay defendant any additional damages and costs over and above the amount assessed, which it may finally be determined that defendant is entitled to for the appropriation of the property, and all damages which defendant may sustain if for any cause such property shall not be finally taken for public uses. The amount assessed as damages by the commissioners or by the jury on appeal, as the case may be, shall be taken and considered, for the purposes of this section, until re-assessed or changed in the further proceedings, as just compensation for the property appropriated; but the plaintiff, by payment into Court of the amount assessed, or by giving security as above provided, shall not be thereby prevented or precluded from appealing from such assessment, but may appeal in the same manner and with the same effect as if no money had been deposited or security given; and in all cases where the plaintiff deposits the amount of the assessment and continues in possession or takes possession of the property as herein provided, the defendant entitled thereto, if there be no dispute as to the ownership

of the property, may at any time demand and receive from the Court the money so deposited, and shall not by such demand or receipt be barred or concluded from his right of appeal from such assessment, but may, notwithstanding, take and prosecute his appeal from such assessment; provided, that if the amount of such assessment is finally reduced on appeal by either party, such defendant who has received the amount of the assessment deposited shall be liable to the plaintiff for any excess of the amount so received by him over the amount finally assessed, with legal interest on such excess from the time such defendant received the money deposited, and the same may be recovered by action; and provided, further, that upon any appeal from assessment of damages by the commissioners to a jury, the jury may find as compensation or damages a less as well as an equal or greater amount than that assessed by the commissioners."

"§ 2230. Costs may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides, in the discretion of the Court."

In State vs. McHatton, 15 Mont., 159, a railroad company commenced proceedings to condemn private property to the public use. The three commissioners appointed by the District Court awarded the owner $6,400. The company deposited the said sum in Court and applied for an order allowing it to take possession pending the final determination of the proceeding. About the same time the property owner appealed from the award of the commissioners and resisted the application of the company for an order allowing it to take possession. The Court granted the order permitting the company to take possession.

On certiorari to review this order the Supreme Court of the State duly affirmed the same, and stated the question and the grounds of its decision as follows:

"Relator insists that the District Court exceeded its jurisdiction in allowing said railway company possession of the ground proposed to be taken and appropriated for

such right of way previous to the final determination, and deposit of the amount awarded as damages, because Section 14 of Art III. of the Constitution of this State provides that 'private property shall not be taken or damaged for the public use without just compensation having been first made to, or paid into Court for, the owner.' This is the pivotal point of contention. The view insisted on by relator is, that no just compensation has been ascertained and deposited in this case, because its appeal has, in effect, abrogated and set aside the commissioner's award, and leaves the payment of said six thousand four hundred dollars into Court as a fact without vital force, and it is not a compliance with the exaction of the Constitution in such a case.

"Upon mature consideration of this question, and the authorities relating thereto, we are unable to concur in relator's view. The compensation has been fixed by the tribunal instituted by law for that purpose as the just compensation for the damage proposed. The authorities hold that award to be a substantial fact which fixes the just compensation to which relator is entitled, until revised on appeal. (Lewis on Eminent Domain, § 581, and authorities cited in respondent's brief.) This is reasonable. The compensation has been determined by the tribunal thereunto authorized, and although there be a right of appeal to resubmit the question of damage, that appeal may never be prosecuted to effect, in which event the original award would remain as the just compensation ascertained and deposited in such case; but the most that can be done on appeal in favor of the party whose property is to be taken for public use is to add something to the award already made, but until that is formally done it cannot be reasonably held that no award has been made. The first award and deposit may exceed what the jury or Court may award on determination of the appeal. In that event the deposit would not only equal the amount first awarded, but would more than answer for the just compensation finally determined. It should also be borne in mind in this consideration that the order for possession on review here is not final. It is temporary, and the whole subject matter, together with the thing sought to be condemned, is within the jurisdiction of the Court, and therefore the taking of the property, or the ultimate divestiture of the owner thereof, has not been consummated, but

only temporary possession given. In treating a similar case (Central Branch, etc., Ry. Co. vs. Atchison, etc., Ry. Co., 28 Kan., 453), Mr. Justice Brewer, delivering the opinion of the Court, said: 'The occupation of the land by the railroad pending the appeal is provisional merely; its entry is not a permanent appropriation of the right of way, and it acquires by such entry no vested rights.' Surely an award, considered in the judgment of the commissioners to be just compensation in lieu of complete deprivation or of continued use of the property condemned, must be sufficient deposit to answer for the temporary possession granted by the Court on deposit of the first award. If the award should be increased through the trial on appeal, there will be no final judgment confirming to the railway company the right of way proposed to be condemned, until deposit or payment of the additional amount, and, in default of such additional payment, the Court having jurisdiction of the subject matter and the parties would oust the party seeking to condemn the property from the temporary possession which the Court had given, and mete out to the owner adequate damage for temporary use and injury, applying the deposited sum thereto. In our opinion these conditions fulfill the exactions of the Constitution. Moreover, the statute provides that, where temporary possession is sought before final determination of the proceeding, the Court, before granting such temporary possession, shall exact a bond, conditioned for payment of all further compensation and damages which may be awarded to the owner of the premises. This would afford the owner another remedy which he might elect to pursue if desirable. The statute of our State on the subject of eminent domain, enacted prior to the Constitution, as well as an amendment thereto adopted since, authorizes the Court to let the party seeking condemnation into temporary possession and use, on certain conditions *falling short of the payment or deposit in Court required by the clause of the Constitution above cited. These statutes, however, provide the procedure in such cases; but in so far as they provide for giving possession without fulfilling the exactions of the Constitution, we hold them insufficient.* The constitutional provisions must be complied with before the Court is authorized to let the party seeking condemnation into possession. The trial Court required this before granting the order for

temporary possession in the case at bar; and, having required the deposit provided for by the Constitution, the Court granted the order for temporary possession, proceeding therein as provided by statute.

"We find no ground for reversal or modification of the order of the trial Court, complained of, and therefore affirm the same."

FOURTH ANSWER.

The Michigan legislation in question expressly provides that if the amount of the compensation is increased by the second report or verdict the difference shall be a lien on the land appraised, that is, on the land taken, and it shall be paid to the parties entitled to the same.

No express statutory declaration was necessary to create this lien. It has been held in Massachusetts that the right of the owner of the land taken to compensation, if not strictly a lien, has at least the nature of a lien or encumbrance upon the land taken which may be enforced against the corporation and its assigns as superior to any subsequent rights.

Drury vs. Midland R. R. Co., 127 Mass., 571.

The property owner having received a part of his compensation, cannot very well insist that the real estate taken will not be adequate security for the balance of his compensation.

It appears, therefore, that the statute furnishes to the property owner the security required by the Michigan Constitution, and that he has no possible ground for complaint on the theory that he is not secured.

In this connection it must be remembered that in addition to the lien given by the statute, the property owner would also be entitled to enjoin the company from using

the property condemned, until the increased compensation was paid.

In Bricket vs. Haverhill Aqueduct Co., 142 Mass., 394, the company was authorized by an act passed in 1867 to take private property, for the purpose of supplying the town of Haverhill with water by an aqueduct, and the act provided that "all damages sustained by entering upon and taking land, water or water rights for either or any of the above purposes, shall, in case of disagreement with the parties injured, be ascertained, determined and recovered in the same manner as is now provided in cases where land is taken for highways."

The act was claimed to be unconstitutional and invalid because it did not make adequate provision for the recovery of damages by the property owner.

The Court disposed of the objection as follows:

"The Constitution provides that, 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.' Declaration of Rights, art. 10. Undoubtedly, a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void. Connecticut River Railroad vs. County Commissioners, 127 Mass., 50, and cases cited. But the Statute of 1867 does not undertake to do this. It provides, in substance, that the corporation shall be liable to pay all damages for injury to private property, and specifies a sufficient remedy to enable the person injured to recover such damages. We are not aware of any case in which it has been held that such provisions are not a sufficient compliance with the requirement of the Constitution. The instances are numerous in which aqueduct companies have been incorporated by statutes which contain the same provisions for securing compensation. The successive legislatures, in these statutes, recognized the constitutional obligation to make adequate compensation, and deemed that such provisions did, with practical certainty, secure the rights of individuals whose property was taken or injured.

"They undoubtedly took into consideration, not only the special remedy provided by each statute, but the other rights and remedies which an individual would have under the general laws, if his damages were not paid after they were ascertained. Take the case before us. If the plaintiff, or any person injured, had, upon proper application, had his damages ascertained, he would be entitled to a warrant of distress to compel the payment of them. Pub. Sts., c. 110, sec. 18. If this was ineffectual, and the defendant still refused to pay, without doubt this Court would, by proceedings in equity, restrain the defendant from a further use of the water, and, if necessary, order the removal of the dam.

"The question whether the provision for compensation furnished by the statute is an adequate one is a practical question. It seems to us that the remedy which the statute in question furnishes against the corporation, supplemented by the remedies afforded by the general laws, if it refuses to pay the damages assessed, affords to any person whose property is taken or injured by the acts of the corporation a reasonable certainty that he will recover and receive compensation therefor. We are not, therefore, prepared to hold that the statute is unconstitutional, because it does not make adequate provision for compensation."

FIFTH ANSWER.

While the statute provides that the title to property taken and the right to the possession shall pass on the payment or deposit of the first award made by the commissioners or a jury, it is equally explicit and positive that if as a result of a new trial the award is increased, the increase "shall be paid by the company to the parties entitled to the same, or shall be deposited as the Court shall direct."

If the company should refuse to pay or deposit the increase in the award as directed by the Court, the inevitable consequence would be that the title and the right of possession vested in it by the payment of the award first

made would be defeated, and such title and right of possession would be again vested in the owner.

The statute provides that on the payment of the first award the owners and others interested "shall be divested and barred of all right, estate and interest in such real estate, franchise or other property until such right or title shall be again legally vested in such owner."

Under this legislation the title and right of possession which first pass to the company are provisional and conditional, and do not become fully operative and final until the payment of any subsequent increase of the compensation on a new trial.

Cherokee Nation vs. Southern Kansas R. Co., 135 U. S., 641, involved the construction of an act of Congress which provided that three referees appointed by the President should in the first instance determine the compensation to be paid for land taken by a railroad company. Either party was entitled to appeal from the decision of the referees, and the company on paying into court double the amount of their award, to abide the result of the appeal, was authorized to take possession.

It was urged against the validity of this act that the trial de novo on the appeal, might result in an award greater than the amount deposited in Court, and the property owner would have no security for the excess.

The Court, in an opinion by Mr. Justice Harlan, after referring to Kennedy vs. Indianapolis, 103 U. S., 599, 604, said:

"In the case now before us the property in respect to which the referees made the award will be conditionally appropriated for the public use when the defendant makes a deposit in court of double the amount of such award, and it only remains to fix the just compensation to be made to the owner. But the title has not passed, and will not pass, until the plaintiff receives the compensation ultimately fixed by the trial de novo provided for in the statute. So that, if the result of that trial should be a

judgment in its favor in excess of the amount paid into court, the defendant must pay off the judgment before it can acquire the title to the property entered upon, and, failing to pay it within a reasonable time after the compensation is finally determined, it will become a trespasser, and liable to be proceeded against as such. And, in such case, if the plaintiff shall sustain damages by reason of the use of its property by the defendant pending the appeal, the latter will be liable therefor. The apprehension, therefore, that the plaintiff may lose its property without receiving just compensation therefor, is without foundation."

The case of Kennedy vs. Indianapolis, 103 U. S., 599, involved a construction of the provision of the Constitution of Indiana of 1816 that no man's property should be taken for public use "without a just compensation being made therefor."

The Court in an opinion delivered by Mr. Chief Justice Waite examined the Indiana cases, and made the following statement of, and quotation from, Hankins vs. Lawrence, 8 Blakf., 256:

"That was a case in which the White Water Valley Canal Company had acquired the title of the State to the White Water Canal, one of the works the board of internal improvements was authorized to construct under the act of 1836, and the question was whether it could, under its charter, enter upon lands to complete that canal, for the purposes of its incorporation, without first having made just compensation, to the owner. Upon this the Court said: 'The question whether payment must be made before the land is taken and used * * * has been already decided by this Court. * * * The possession and use of the land in question by the White Water Valley Canal Company are upon the condition subsequent, that they will not be in default with respect to the payment of the same, as prescribed by the charter, nor with respect to the erecting of the works for which the land is taken. It may be that, should any person claiming under the company remain in possession of the land after a default in such payment, or in erecting the works, he would be considered as a trespasser ab initio.' So far as

we have been advised, these cases are still the law of Indiana, and they are certainly supported by high authority."

Reference is then made to the following cases:

Rexford vs. Knight, 11 N. Y., 314.
Nichols vs. R. R. Co., 43 Me., 359.
Cushman vs. Smith, 34 Me., 258.

While the Michigan statute in question in this case does provide that the title shall pass as the result of the payment of the award first made and confirmed, it is contemplated by the statute, and such is its correct construction, that the title passes subject to the condition subsequent, that prompt payment is to be made of any increase in the award resulting from a new trial and a reassessment of the damages or compensation.

The State is under no obligation to provide for any appeal in condemnation cases, and if it did not, the first award would be conclusive and final. It cannot very well be held that the State violates the constitutional guaranties of the Fourteenth Amendment, because it provides that that first determination of the compensation which it might have made final, is to be treated and regarded as prima facie and temporarily correct, and legally sufficient to authorize a transfer of the title and possession, that is, that the parties may act upon the same as final, until it has been reviewed on a new trial, and an increase or decrease has been had. It is not altogether clear that the State is under the same constitutional obligation to make provision for, or to secure the payment of, the increase as it was under to make provision for or to secure the payment of the original award. Legislation providing that the first award shall be conclusive and final, but reserving to the parties the privilege of obtaining an increase or decrease in the compensation,

and giving them the usual legal remedies of judgments and executions, for the recovery of the same, would seem to be more of a limitation upon the right of appeal or review, than a deprivation of rights of property without due process of law.

Legislation securing to the property owner the same rights and remedies to enforce payment of an increase in his compensation, as must be and is accorded to him to compel payment of the compensation first awarded, cannot possibly violate his constitutional rights.

II.

The jury of freeholders provided by the Constitution and laws of Michigan for the trial of condemnation cases was intended to be and is a common law jury.

By the express requirement of one provision of the State Constitution, and the legal meaning of the word "jury," in another provision of that instrument, the jury must consist of twelve jurors.

Art. XVIII., Sec. 2; Art. XV., Sec. 15.
Campau vs. Detroit, 14 Mich., 276.
Pearsall vs. Eaton Supervisors, 71 Mich., 438, 446.

The verdict of the jury must be unanimous.

Chicago & Mich. L. S. R. R. Co., vs. Sanford, 23 Mich., 418.

Neither of the parties or their counsel can be permitted to participate in the deliberations of the jury by giving advice or counsel or aiding in drawing up their verdict.

Paul vs. Detroit, 32 Mich., 108, 114, 117.

The right to a challenge for cause cannot be taken away by statute.

Kundinger vs. Saginaw, 59 Mich., 355, 364.

III.

The Michigan condemnation jury, as a common law jury, or the equivalent of one, is subject to control, instruction and direction by the Court, the same as a common law jury in civil actions, or they may be permitted to sit out of Court, or to act independently of the Court, the same as a sheriff's or coroner's jury in common law inquests.

The Michigan Union Depot Act, and the general railroad law of the State both provide that the judge of the Court, or a Circuit Court Commissioner to be designated by him, *may* attend the jury to decide questions of law and administer oaths to witnesses. The judge also appoints the sheriff or some other proper officer to attend and take charge of the jury while engaged in the proceedings.

1 How. Stat. of Mich., p. 893, Sec. 3466; p. 851, Sec. 3335.

This is nothing more than the sheriff's jury of English law, and of many American States, with the additional safeguard that a judicial officer may attend the jury to swear the witnesses, rule on questions of evidence, and advise the jury on questions of law.

The sheriff's jury, without the attendance of a judicial officer, was well known in the early history of Michigan.

The first act providing for the condemnation of private property to the public use by a railroad corporation was passed by the Territorial Legislature in 1832.

Territorial Laws of Michigan of 1832, p. 68.

The company was authorized to apply to any justice of the peace of the county who was to "thereupon issue his warrant under his hand and seal directed to the sheriff of said county, or if the sheriff was interested, to some disinterested person, requiring him to summon a jury of twelve freeholders in the county not in any way interested in the matter, or related to the parties, to meet on or near the property or materials to be valued on a day named in said warrant," etc.

Each party was permitted to strike off three names, and the six remaining persons constituted the jury to make the appraisement. They were sworn by the sheriff and were required to reduce their inquisition to writing and file it in the office of the clerk of the Circuit Court of the county. The Court had power to confirm the award, or to direct another inquisition to be taken.

Id., p. 72, Sec. 12.

Many similar acts were passed prior to the adoption of the State Constitution of 1850. Some provided for a sheriff's jury of six, and others for a jury of twelve.

3 Territorial Laws, pp. 1028, 1125.
Territorial Laws of 1834, pp. 40, 70.
Territorial Laws of 1835, Special Session, pp. 5, 32, 83, 101.
State Laws of 1836, pp. 267-358.
State Laws of 1837, pp. 217, 227, 269.
State Laws of 1837, Adjourned Session, p. 16.
State Laws of 1838, pp. 145, 175, 196, 200, 212.
State Laws of 1844, p. 125.
State Laws of 1846, pp. 37, 45, 111, 145, 170, 179, 227; 276.
State Laws of 1847, pp. 5, 11, 106, 109.
State Laws of 1848, pp. 197, 278, 294, 351.

The system of granting special charters was abolished by the Constitution of 1850, which provides that corporations shall only be created under general laws.

Art. XV., Sec. 1.

The first general railroad law was passed in 1855. It was revised in 1871.

Mich. Laws of 1855, p. 153.
1 Mich. Laws of 1871, p. 328.

It was not until the revision of 1871 that any provision was inserted in the act for the attendance of the judge of the Court to administer oaths to witnesses and decide questions of law. In 1873 the clause was added authorizing the judge to designate a Circuit Court Commissioner to attend the jury in his place.

1 Mich. Laws of 1873, pp. 496, 515.

The State Constitution provides for the election of one or more Circuit Court Commissioners in each county "who may be vested with judicial powers not exceeding those of a judge of the Circuit Court at chambers."

Art. VI., Sec. 16.

In Massachusetts each county has three county commissioners who are authorized to lay out highways, and to determine in the first instance the damages private property owners may sustain.

Mass. Rev. Stat., 1836, p. 231, Sec. 11.

Any party dissatisfied with the award of the commissioners may have a jury to redetermine the damages.

Id., p. 231, Sec. 13.

The county commissioners issue a warrant to the sheriff, or his disinterested deputy, or to a coroner, to summon a jury of twelve men, and the commissioners may, at the request of either party, "appoint some suitable person to preside at the trial by the jury, in which case the jury may be attended by any deputy sheriff; but if there be no such person appointed, the sheriff of the county shall preside at such trial; or when the sheriff shall be interested, or unable from sickness or other cause to attend, a coroner of the county shall preside."

The person who presides is given power to preserve order, to swear the jury and the witnesses, and to "decide all questions of law arising on the trial, which would be proper for the decision of a judge."

Id., pp. 232-233, Sec. 18, 23-25.

The sheriff in presiding over the jury acts as a judge exercising judicial powers, but in attending the jury after they have retired to deliberate on their verdict he acts as an executive officer just as his deputy might.

Read vs. Cambridge, 124 Mass., 567.

It is the duty of the officer presiding and not the jury to determine upon the admissibility of the evidence.

Merrill vs. Berkshire, 11 Pick., 269, 274.

AS FEDERAL QUESTIONS.

I.

The fact that under the Constitution and laws of Michigan the parties are permitted to act upon the first award, and to thereby pass the title and possession of the property taken but subject to such subsequent increase or reduction of the award as may be the result of an appeal and a new trial, does not make the proceedings obnoxious to the provision of the Fourteenth Amendment that no State shall deprive any person of his property without due process of law.

The Supreme Court of Michigan sustained the constitutional validity of the statute in question in this case by affirming the judgments rendered thereunder by the Circuit Court for the County of Wayne against the plaintiffs in error in this case.

Backus vs. Fort Street Union Depot Co., 103 Mich., 556.

There can be no doubt but that the question whether the statute is in conflict with the provisions of the Constitution of the State relative to the condemnation of private property to the public use is one on which the decisions of the State Supreme Court are conclusive, and are binding on the Supreme Court of the United States.

Morton vs. Shelby County, 118 U. S., 425.

In Adams Express Co. vs. Ohio, 165 U. S., 194, 219, Chief Justice Fuller, speaking for the Court, said: "The conten-

tion that the act in question is invalid because repugnant to the Constitution of the State of Ohio has been disposed of by the decision of the highest tribunal of that State sustaining its validity."

While the construction of the constitutional and statutory provisions of a State relative to the condemnation of private property to the public use is primarily within the exclusive jurisdiction of the State courts, it is nevertheless true, that such construction must always be subject to the requirement of the Fourteenth Amendment of the Constitution of the United States, that no State shall deprive any person of his property without due process of law.

The Supreme Court of the United States has an undoubted jurisdiction to interfere with, and overrule, the decisions of the Supreme Court of a State concerning the taking of private property for public purposes just so far as it may be necessary to do so, to see that the process employed is due process of law; but beyond this, the Supreme Court of the United States cannot lawfully go.

The most serious objection urged against the adoption of the Constitution of the United States was the fact that it contained no bill of rights. The ratification of the necessary number of nine States was only secured by an understanding, expressed in some of the States in the very resolutions of ratification, that amendments should be forthwith adopted curing this defect or imperfection of the original instrument.

In pursuance of this understanding the first congress at its first session proposed the first ten amendments of the constitution. The fifth of these amendments contains these words: "No person shall be" * * * "deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

At the first blush one would naturally suppose that the clause requiring the payment of a "just compensation" was added because the prior clause requiring "due process of law" was not of itself sufficient to make the payment of a just compensation the constitutional rule. But it requires very little reflection to see that the just compensation clause was added out of abundant caution and for greater certainty.

The constitution first adopted, in some of the states, contained no bill of rights. This is true of the New Hampshire constitution of 1776; the South Carolina constitution of 1776; the New Jersey constitution of 1776; the Delaware constitution of 1776; the Georgia constitution of 1777, except a provision securing the right to a trial by jury; and the New York constitution of 1777, except provisions that the right to a jury trial should remain inviolate forever, and prohibiting acts of attainder for crimes committed after the close "of the present war."

In Virginia a bill of rights was adopted in 1776 prior to the adoption in the same year of a constitution. The bill of rights provides "that all men having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected." The due process of law provision relates to personal liberty only, and reads: "That no man be deprived of his liberty except by the law of the land or the judgment of his peers." Secs. 6, 8.

The Pennsylvania constitution of 1776 contains a declaration of rights, which is very nearly identical, in these particulars, with that of Virginia just quoted. The due process of law or law of the land provision is the same. The other provision reads: "That every member of society hath a right to be protected in the enjoyment of

life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary or an equivalent thereto: But no part of a man's property can be justly taken from him or applied to public uses without his own consent or that of his legal representatives."

The Maryland constitution of 1776; the North Carolina constitution of 1776; the South Carolina constitution of 1778; and the New Hampshire constitution of 1784, each contain the "law of the land" provision in the usual form as a protection to "life, liberty or property," but the North Carolina provision omits the words "by the judgment of his peers." Neither of these constitutions contain any provision that a just compensation shall be paid for private property taken for the public use.

The first state constitution to make specific provision for compensating the owner of private property taken for public purposes is the Vermont constitution of 1777, which provides: "That private property ought to be subservient to public uses when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the pu lic, the owner ought to receive an equivalent in money." Other provisions of this Vermont constitution are a duplicate of those above quoted from the constitution of Pennsylvania. The inadequacy of these provisions as actually worded may explain why a specific provision applicable to cases where private property is taken for the public use, was thought to be advisable, if not actually necessary, and was, therefore, made a part of the Vermont constitution of 1777, and were readopted unamended in the Vermont constitution of 1786.

It was not until the adoption of the constitution of Massachusetts in 1780 that the "law of the land" or "due process of law" provision as it has come down to us

from Magna Charta, was incorporated into a state constitution without qualification, and was at the same time accompanied with a provision requiring compensation to be paid for private property taken for the public use. Part First, Art. X., XII.

Here, then, we have the forerunner of the provisions of the Fifth Amendment of the Constitution of the United States that no person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for the public use without just compensation."

No New Hampshire constitution has ever contained a specific provision requiring compensation to be paid for private property when taken by the public, but the Supreme Court of that state had no difficulty in holding that compensation was constitutionally as necessary in that state as in any other.

Opinion of Justices, 66 N. H., 629, 633.

The grounds of the decision were that an act of the legislature of the state taking private property without compensating the owner would not be within the power conferred by the provision that "The supreme legislative power within the state shall be vested in the senate and house of representatives;" and further that it would not be "due process of law."

The first ten amendments of the constitution of the United States were adopted as limitations on the federal government only, and therefore, prior to the adoption of the Fourteenth Amendment the Supreme Court of the United States had no jurisdiction to determine whether proceedings in a state for the condemnation of private property to the public use were or were not in conflict with the limitations upon the federal government con-

tained in the Fifth Amendment. Since the adoption of the Fourteenth Amendment, however, the Supreme Court of the United States has had jurisdiction to determine whether any such state proceedings are due process of law, and as the better opinion seems to be that this question depends upon the fact whether a just compensation is required to be paid to the owner of the private property taken, the practical result is that the clause of the Fifth Amendment, that private property shall not be taken for public use without just compensation, has become, in this indirect way, a limitation on the states as well as on the general government.

If there is any distinction between the power of this court to determine whether a federal proceeding for the condemnation of private property provides for just compensation to owners, and the power of the court, to determine whether a state proceeding for the same purpose is due process of law, that distinction must be in the direction that the court has less power to review and pass upon a state statute establishing the method or course to be pursued in such cases than it has to review and pass upon the validity of an act of congress enacted for a like purpose.

From this analysis of the subject I respectfully submit that if the state statute provides for a fair trial or hearing before a competent court or tribunal, or for a succession of such trials or hearings, within a reasonable period after the property is taken, and also provides for the payment of the compensation awarded within a reasonable time after it has been finally ascertained, the Supreme Court of the United States can have nothing further to say, and cannot impose upon the states any additional requirement either of substance or detail.

The Fourteenth Amendment became operative in 1868,

but the first case in which the Supreme Court of the United States was called upon to determine the validity of a state proceeding for the condemnation of private property to the public use was decided in 1875.

Garrison vs. New York, 21 Wall., 196.

In that case it appeared that a statute of the state of New York passed in 1869 for the widening of Broadway in New York city provided for an assessment of damages before three commissioners, whose awards when confirmed by the Supreme Court were required to be paid by the city. Under this statute Daniel Garrison was awarded $40,000 and the award was confirmed by the court. A prior statute passed in 1813, and applicable to the proceedings, made the order of confirmation "final and conclusive." Nearly two months after the order of confirmation was entered, the legislature, February 27, 1871, passed an act authorizing an appeal by the city from the order of confirmation, and also authorizing the Supreme Court on an application by the city to vacate the order of confirmation, if it should appear that there had been any error, mistake or irregularity or illegal act in the proceedings at any stage, or that the assessments for the benefits or the award of damages had been unfair or unjust. The court was authorized to send the matter back to new commissioners for a new assessment.

On application by the city the Supreme Court vacated the order of confirmation and ordered another assessment before new commissioners.

Daniel Garrison then brought an action in the United States Circuit Court against the city to recover the $40,000 on the ground that he had a vested right to the award.

The Supreme Court in New York had held the subsequent statute authorizing a vacation of the order of confirmation constitutional.

Matter of Widening Broadway, 61 Barb., 483.

The New York Court of Appeals had held in an opinion by Judge Peckham that independent of the subsequent statute the Supreme Court had power to set aside the order of confirmation and to order a new assessment.

Matter of Widening Broadway, 49 N. Y., 150.

These decisions were approved and followed by the Supreme Court of the United States in an opinion by Mr. Justice Field. Among other things he said:

"The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the state, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it. And she can to that end vacate or authorize the vacation of any inquest taken by her direction, to ascertain particular facts for her guidance, where the proceeding has been irregularly or fraudulently conducted, or in which error has intervened, and order a new inquest, provided such methods of procedure be observed as will secure a fair hearing for the parties interested in the property. Nor do we perceive how this power of the state can be affected by the fact that she makes the finding of the commissioners upon the inquest subject to the approval of one of her courts. That is but one of the modes which she may adopt to prevent error and imposition in the proceedings. There is certainly nothing in the fact that an appeal is not allowed from the action of the court in such cases, which precludes a resort to other methods for the correction of the finding where irregularity, mistake or fraud has intervened."

The opinion concluded as follows:

"There is no such vested right in a judgment, in the party in whose favor it is rendered, as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed; and the award of the commissioners, even when approved by the court, possesses no greater sanctity."

There can be no such vested right of property in a judgment in a condemnation suit, or in any other legal proceeding, as will prohibit the legislature or the courts of a state by authority of the legislature from granting a new trial or a rehearing, even in cases where the laws did not provide for it at the time the judgment was rendered.

Calder vs. Bull, 3 Dal., 386.
Baltimore & Susq. R. R. vs. Nesbit, 10 How., 395.

Where the laws of a state at the time a judgment in a condemnation suit, or any other judgment, is rendered expressly provide that such judgment may be reviewed on appeal, motion to vacate, or otherwise, and a new trial granted, it would be absurd to say that it had become an absolutely vested right of property.

In Sweet vs. Rechel, 159 U. S., 380, the Supreme Court of the United States, in an action to try the title to land, commenced in the Circuit Court of the United States for the District of Massachusetts, passed upon the constitutional validity of a state statute for the condemnation of private property to the public use. The city of Boston was authorized by an act passed in 1867 to take possession of certain low lands and raise the grade of the same for the purpose of promoting the public health. Title was to pass and possession could be taken whenever a description of the lands was filed by the city in the office of the register of deeds. Within one year after the lands were so taken any person interested in them could bring a

suit in equity in behalf of himself and all other persons for the recovery of compensation. The court was authorized to appoint commissioners to hear the parties, to assess the value of the lands taken, and to report to the court. Any party aggrieved by the report might except thereto and have his exceptions heard as in a suit in equity, or might apply for the framing of proper issues to be tried by a jury. The sections providing the means of enforcing payment of the compensation awarded and for costs read:

Sec. 7. "When it shall be finally determined what amount of damages any party is entitled to recover against the city of Boston, or the Boston Water Power Company, or any other defendant, a separate decree shall be entered accordingly and execution therefor shall be issued, without regard to the pendency of the claims of any other party or parties or of any other claims of such complainant."

Sec. 8. "If any party shall elect a jury he shall recover his legal costs, if the award of the commissioners shall be altered in his favor; otherwise he shall be liable for the legal costs of the other party or parties."

Those who did not present their claims within a time to be allowed by the court for that purpose were forever barred from recovering anything. A suit in equity was brought under this statute and is reported as Cobb vs. Boston, 109 Mass., 438, where the statute is quoted in full. The question before the United States Circuit Court and the Supreme Court of the United States on error, was whether the city of Boston had acquired title by virtue of the statutory proceedings. It was insisted by counsel that the statute was unconstitutional because it did not provide for the payment of the compensation before or at the time the property was taken. The Supreme Court of the United States, in an opinion by Mr. Justice Harlan, disposed of this objection as follows:

"But must compensation be actually made or tendered in advance of such taking or appropriation? Is it not sufficient, in order to meet the requirements of the constitution, if adequate provision be made for compensation?

"The constitutions of some of the states expressly require that compensation be first made to the owner before the rights of the public can attach. But neither the constitution of Massachusetts nor the constitution of the United States contains any such provision. The former only requires that the owner 'shall receive a reasonable compensation,' the latter, that private property shall not be taken for public use without just compensation. Reasonable compensation and just compensation mean the same thing."

The learned justice then referred to some Massachusetts cases and stated the conclusions to be drawn from them as follows:

"In view of these authorities, it is clear that as the constitution of Massachusetts does not require compensation to be first actually made or tendered before the rights of the public, in the property taken or applied, become complete, the requirements of that instrument are fully met where the statute makes such provision for reasonable compensation as will be adequate and certain in its results. It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process.

"Substantially the same principles have been announced by this court when interpreting the clause of the constitution of the United States that forbids the taking of private property for public use without just compensation."

Judge Harlan here quoted from Cherokee Nation vs. Southern Kansas Railway, 135 U. S., 641, and Kennedy vs. Indianapolis, 103 U. S., 599. Commenting upon the last named case he said:

"But that case by no means controverts the doctrine that the legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which under the constitution he is entitled, and to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation. The Massachusetts statute of 1867, unlike the Indiana statute, expressly declares that from the moment the property was taken in accordance with its provisions, the title should be vested in the city of Boston; that the city should thereupon proceed forthwith with the work of raising the grade; and that the owner should have the right, for the prompt enforcement of which adequate provision was made, to obtain reasonable compensation for his property."

After referring to some of the cases relied upon by counsel, Judge Harlan stated the final conclusion of the court, on the question under consideration:

"The case now before us differs from all, or nearly all, of those cited by the plaintiffs in this, that in the latter the statute, under which the property was taken, either expressly, or by necessary implication, made the payment or tender of the compensation awarded to the owner of the property appropriated to public use, a condition precedent to the acquisition of title by the party at whose instance the property was taken; whereas, in the present case the statute vests the title in the city of Boston from, at least, the time it filed in the office of the registry

of deeds a description of the lands taken by it describing them with as much certainty as is required in a common conveyance of lands, and stating that the same were taken pursuant to the provisions of the statute. As soon as they were so taken the city—invested from that time with the title—had the right forthwith to raise the grade, and could not throw the property back upon the former owner, or compel him to pay the cost of raising the grade; and the owner became from the moment the property was taken absolutely entitled to reasonable compensation, the amount to be ascertained without undue delay, in the mode prescribed, and its payment to be assured, if necessary, by decree against the city, which could be effectively enforced.

"We are of opinion that, upon both principle and authority, it was competent for the legislature, in the exercise of the police powers of the commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate."

In the recent case of Chicago, Burlington & Quincy Railroad Co. vs. Chicago, 166 U. S., 226, the court, in an opinion by Mr. Justice Harlan, made an exhaustive examination of the question whether a state proceeding taking property for the public use could be considered due process of law if it did not provide for compensating the owner, and reached the very satisfactory conclusion that compensation to owners was necessary to the validity of any such proceeding. (Pp. 235-241.)

In the case before the court, however, it appeared that the constitution and laws of the state of Illinois plainly provided for compensation, the only question in controversy being whether in the particular case under consideration, the constitution and laws of the state, in respect to compensation, had been observed.

The city of Chicago opened a highway across the tracks and right of way of the Chicago, Burlington & Quincy

Railroad, and a jury fixed the compensation of the company at one dollar. Judgment was entered on this award, and the same was affirmed by the Supreme Court of the state. 149 Ill., 457.

The jury making the award had all the elements and qualifications of a common law jury, and for that reason the Supreme Court of the United States, in reviewing the decision of the State Supreme Court, was subject to the provision of the Seventh Amendment of the constitution of the United States that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

In view of this limitation on the power of the court to review the facts Judge Harlan said:

"Even if we were of opinion, in view of the evidence, that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, we cannot, on that ground, re-examine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.

"We say, 'in absolute disregard of the company's right to just compensation,' because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the federal right alleged to have been denied; and in respect to such matters, that which is done or omitted to be done by the state court, may constitute only error in the administration of the law under which the proceedings were instituted.

"In Lent vs. Tillson, 140 U. S., 316, 331, which was a case of the widening of a public street, for the cost of which bonds were issued, to be paid by taxation on the

lands benefited, in proportion to the benefits, and in which it was alleged by a property-owner that the local statute had been so administered as to deprive him of his property without due process of law, this court said: 'Errors in the mere administration of the statute, not involving jurisdiction of the subject matter and of the parties, could not justify this court, in its re-examination of the judgment of the state court, upon writ of error, to hold that the state had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont street, or whether the board of supervisors should have so declared, or whether the board of commissioners properly apportioned the cost of the work, or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds were issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are none of them issues presenting federal questions, and the judgment of the state court upon them cannot be reviewed here.'

"In harmony with these views, we may say in the present case that the state court having jurisdiction of the subject matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation. See also Marchant vs. Pennsylvania Railroad, 153 U. S., 380."

II.

The just compensation the plaintiffs in error were entitled to receive for the property taken was fairly and impartially determined in the courts of the state after notice and a full hearing, and the rendition of a regular, valid and final verdict by a common law jury. The judgments rendered upon the verdict were duly affirmed by the Supreme Court of the state, and there is no foundation for the contention of the plaintiffs in error that they were deprived of their property without due process of law; nor is there the slightest reason to believe the compensation finally awarded was inadequate or unjust.

1. Each of the juries empanelled in this case, under the constitution and laws of Michigan, was a jury within the meaning of the seventh amendment of the constitution of the United States, providing that "in suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law."

This is settled by a very recent decision of this court in a case in which the opinion of the court was delivered by Mr. Justice Harlan.

> Chicago, Burlington & Quincy R. R. vs. Chicago, 166 U. S., 226, 242-46.

After referring to the constitution and laws of Illinois providing for a jury in condemnation cases the opinion states the conclusions of the court on the question as follows:

"The persons empanelled in this case to ascertain the just compensation due to the railroad company constituted a jury as ordained by the constitution of Illinois in cases of the condemnation of private property for public use, and, being a jury within the meaning of the Seventh Amendment of the constitution of the United States. the facts tried by it cannot be retired 'in any court of the United States otherwise than according to the rules of the common law.' The only modes known to the common law 'to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings.' Parsons vs. Bedford, 3 Pet., 433, 447, 448; Railroad Company vs. Fraloff, 100 U. S., 24, 31.

"To this may be added that congress has provided that the final judgment of the highest court of a state in cases of which this court may take cognizance shall be re-examined upon writ of error, a process of common law origin, which removes nothing for re-examination but questions of law arising upon the record. Egan vs. Hart, 165 U. S., 188."

2. The damages awarded in this case were entirely just to the property-owners. The plaintiffs in error have no possible ground of complaint on that score.

The second jury made an aggregate award of $96,143.

The Circuit Court for the County of Wayne had occasion to consider this award on a motion for a new trial, in which the company alleged that the damages awarded were "grossly extravagant, exorbitant and excessive;" that they were "so excessive, unwarranted and unjust as to show that the jury were actuated by passion or prejudice;" and that they were "unwarranted by and against the weight of evidence."

Record, pp. 849, 862, folio 1486.

These grounds were sustained by the court in an able and well-considered opinion by Circuit Judge Gartner.

Record, pp. 878, 928, folio 1601.

The Supreme Court of the state on a subsequent examination of the same record on appeal, reached the same conclusion and approved of the opinion expressed by the Circuit Judge.

Record, pp. 948, 961, folio 1658.
Fort Street Union Depot Co. vs. Backus, 92 Mich., 33, 55.

I would be very glad to discuss the correctness of these rulings on the facts disclosed by this record, if the question was open to consideration in this tribunal; but until otherwise instructed by the court I shall assume that the courts of a state in setting aside a verdict as against the weight of evidence do not violate the constitution of the United States.

The third jury awarded the plaintiffs in error $63,000, or $33,143 less than the prior verdict. Upon this record and the facts of the case as disclosed by it, there is no reason to believe that the last award is not the more just and reasonable one.

III.

There was no such interference with the functions or province of the juries empanelled in this case, or with the due and regular course of the proceedings, or denial of the right to be fully heard or disregard of the facts of the case, or abuse of the judicial power of the state, as to furnish any ground whatever for the conclusion that the plaintiffs in error were deprived of their property without due process of law, or that they were denied the equal protection of the laws.

The distinguished counsel for the plaintiffs in error makes the general charge that the State Supreme Court did not apply to this case the settled law of the state as applied and enforced in other like cases, and that his clients were discriminated against in violation of the Fourteenth Amendment.

To sustain this charge he relies upon the following particulars or specifications:

(1) He alleges that the settled law of the state is that the verdict of the jury in a condemnation suit upon the questions of public necessity and just compensation must be a unit, and that the State Supreme Court violated this law when it affirmed the verdict of the second jury on the question of necessity, and ordered a new trial on the question of compensation only.

Brief for Plaintiffs in error, p. 45.

(2) He alleges that the settled law of the state is that the Circuit Judge, or other judicial officer has no right to attend the jury and preside over them during the inquest or trial, and no right to rule on questions of evi-

dence or to advise or instruct the jury on the law of the case, and that the State Supreme Court violated this law in affirming the action of Circuit Judge Gartner, in presiding over the third jury, and conducting the inquest as a common law trial.

The learned counsel presented no assignment of error to the State Supreme Court, nor does he make any assignment of error or argument in this court, to the effect that Judge Gartner erred in any ruling on evidence, or in any instructions or want of instructions to the jury. His whole objection is based on the presence of Judge Gartner at the inquest.

Brief for Plaintiffs in error, p. 49.

(3) He alleges that it is the settled law of the state that the plaintiffs in error were entitled to compensation for injury to their business, including damages to the other parts of their plant, (parcels of real estate and buildings, situated long distances from the property taken, that is, from the property in front of which the elevated railroad or viaduct was built), and that the Circuit Court on the motion to set aside the verdict of the second jury, and the Supreme Court in considering the same verdict on appeal, failed to apply this measure of compensation.

He makes no assignment of error or argument to show that the Circuit Judge on the third trial refused or neglected to properly instruct the jury on the measure of damages, or that the jury in the award made were not governed by a just measure of compensation.

Brief for Plaintiffs in error, p. 58.

(4) He further contends that the Supreme Court of the state denied to the plaintiffs in error, as appellees in that court, on the appeal of the Depot Company from

the verdict of the second jury, a hearing on two important and vital questions of law.

Brief for Plaintiffs in error, p. 67.

(5) He further and finally contends that the plaintiffs in error were deprived of the property levied upon under the judgment rendered and the executions issued against them in this case, because such judgments and executions were, as he alleges, without statutory authority and "unknown to jurisprudence."

Brief for Plaintiffs in error, p. 87.

I will consider the questions raised by counsel in the order in which I have summarized them.

(1) Must the verdict of the jury on the two issues, of public necessity and just compensation, be inseparable?

The only ground for any such contention is that furnished by the case of Paul vs. Detroit, 32 Mich., 108, 118, where the Supreme Court of the state passed on the validity of the provisions of a city charter for the opening of streets and alleys, which required the jury to determine the question of necessity on a view of the premises before hearing any evidence, and also required them to assess the damages awarded, on the property benefited by the improvement. The court held (1) that the parties should be heard by evidence and otherwise, before the jury determined the necessity; and (2) that inasmuch as the damages awarded could not exceed the benefits to be assessed, the questions of necessity and compensation were dependent upon each other and could not be disposed of separately. After laying down the first of the foregoing propositions the court said:

"But this is not all. A jury can render only one verdict, and that can only be given when the whole inquiry before them is ended. In cases like this they cannot determine the necessity by itself. It depends on the other facts, as well as on the question of convenience.

"The owner of the property taken is entitled to receive full compensation for any damages done him. The jury have no right, without foreswearing themselves, to give him any less than just compensation. If the damages are to be charged on property according to its benefits, that property cannot be charged with more than its benefits, and if the benefit does not equal the cost, that ends the inquiry. It can never be legally necessary to take property unless the result of the taking is a benefit equal to the cost, and it can never be legal to compel an owner to receive less than just compensation. Until the jury determine, not only that the improvement is desirable, but that it is worth to the public or to the parties chargeable all they must severally pay to fully remunerate the owner, the necessity cannot be established, and the property cannot be lawfully taken."

It is hardly necessary to say that such a case is entirely different from a condemnation by a private corporation. Such a corporation must pay a just compensation for the property taken, whether it receives a corresponding benefit or not, and where there is no statute limiting the compensation to, or making it dependent upon, the benefits, there is no reason why a verdict in favor of the public necessity may not be affirmed, and a new trial ordered on the question of compensation only.

(2) Is it competent for a state to provide that a condemnation jury may be permitted to hold an inquest without the attendance of a judge or other judicial officer, or that a judge, (or an officer to be designated by him), may attend the jury and preside at the inquest, with power to decide questions of law?

With those who are reasonably familiar with the sheriff's jury of English law, and the sheriff's jury of most of the states, or with the sheriff's jury of Michigan law,

before the adoption of the constitution of 1850, to propound the foregoing question is to answer it. I here recall attention to the third general subdivision of this brief.

The question whether the State Supreme Court refused in this case to follow its own decisions, on the part a judge can take in a condemnation suit, is fully examined by me in the brief herewith submitted in support of the motion to dismiss, pp. 18-21, and it therefore need not be again examined here. It is plain there is nothing in the point either as a state or federal question.

(3) Is it true that the State Supreme Court refused to apply to the property of the plaintiffs in error the same measure of damages or compensation that it has applied in other like cases?

The only thing referred to by the learned counsel as indicating any such thing is that part of the opinion of the Supreme Court approving the opinion of Circuit Judge Gartner, that the $96,143 verdict was excessive. There is not a word in the record indicating that either the Circuit Judge, the Supreme Court or the third jury, refused to give the plaintiffs in error damages for injury to their business, or for injury to their general manufacturing plant.

After stating to the jury that they were to determine the amount to be awarded to Absalom Backus, Jr., as the owner of the fee of the land described, and to A. Backus, Jr., & Sons, as tenants in possession of such lands, the Circuit Judge advised the jury upon the subject of damages as follows:

"Upon this question, viz.: compensation or damages, what I have to say must necessarily be in a broad and most general way. This is a question for you, and from the very nature of a proceeding of this character you are vested with large powers and great discretion. These

powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power, the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent and unbiased judgment. The compensation or damages must be neither inadequate or excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with under the so-called power of eminent domain, a power somewhat, and necessarily, arbitrary in its character, and that where this is done the party whose property is taken, or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the conditions of things as they exist. Under the constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."

There is absolutely nothing in this language excluding any element of damages from the consideration of the jury. The court allowed the jury to exercise their own judgment, and if the counsel for the plaintiffs in error had desired any particular directions to the jury, he should have submitted requests to charge. There was nothing objectionable in the instructions, and there is

no sort of foundation for the claim that the just measure of compensation enforced in other like cases, was not observed in this case.

(4) Is it true that the Supreme Court of Michigan denied to the plaintiffs in error a hearing upon any question of law involved in their case?

a denial on two different questions of law: (1) on the

Their counsel insists that the court was guilty of such question whether the adjoining railroad property of the Michigan Central Railroad Company was not subject to condemnation by the Fort Street Union Depot Company; (2) on the question whether the circuit courts in Michigan have power to set aside the verdicts of condemnation juries and to grant new trials.

On the first and second trials the counsel for the respondents, the plaintiffs in error here, contested the public necessity of occupying River street with the elevated railroad or viaduct of the Depot Company, on the ground that the more proper and better place to construct the same was over and along the railroad property of the Michigan Central Railroad Company adjoining River street opposite the property of the respondents. The learned counsel, in his zeal to serve his clients, made this claim in the face of a statute of the state expressly prohibiting the condemnation by one railroad or depot company of the rights of way or depot grounds of another company, except for the purpose of making crossings.

1 How. Stat., Secs. 3463, 3331.
Union Depot Co. vs. Backus, 92 Mich., 49-51.

There being no judge present to rule on the question, the counsel was under no restraint, and he went so far as to prove by the witness J. B. Mulliken, the superintendent of a railroad, that Geo. V. N. Lothrop, for many

years the recognized leader of the Michigan bar, had once advised him that a railroad company wanting terminal facilities could condemn the grounds of the Michigan Central.

Record, p. 259, folio 445.

Notwithstanding the statements and arguments of the learned counsel, and the testimony so introduced, the second jury found in favor of the public necessity of building the viaduct in River street, and assessed the damages of the respondents as stated.

Record, p. 847, folio 1459.

The Fort Street Union Depot Company appealed from this award and from the confirmation thereof. The second to the tenth grounds of the appeal were to the effect that the erroneous and misleading contentions of the counsel for the respondents in regard to the power to condemn a right of way along the property of the Michigan Central had prejudiced the jury against the Fort Street Union Depot Company on the question of damages.

Record, p. 947; pp. 849-861.

When the appeal was submitted to the State Supreme Court these grounds were fully discussed in the briefs of counsel, and also in their oral arguments as far as they saw fit to do so. The court carefully examined the subject in the opinion delivered, and sustained the position of counsel for the appellant.

Union Depot Co. vs. Backus, 92 Mich., pp. 33, 49-55.

The court affirmed the award on the question of necessity but ordered a new trial of the question of damages.

The new trial of the latter question resulted in the reduction of the damages as stated.

Record, p. 980.

Judgments were entered in favor of the company for the reductions so made.

Record, p. 1791.

The respondents sued out a writ of certiorari to review these judgments.

Record, p. 1802.

Their thirty-third assignment of error was in part that on the former hearing in the Supreme Court, on the appeal of the company, "the Chief Justice of the court, when counsel for respondents were about to argue the question as to whether the property of the Michigan Central Railroad could be taken, and as to whether it was error below for counsel for respondents to argue that the said Michigan Central Railroad Company's property could be taken, stopped that part of the argument of said counsel for the respondents, and stated that this court did not desire to hear argument on that question, because the verdict of the jury had been unfavorable to the respondents on the question of necessity; but nevertheless this court did, without having offered to hear counsel for petitioners, decide the same adversely to the respondents."

Record, p. 1815.

Although there is nothing in the record anywhere on which to base any such assignment of error, counsel has renewed it in this court.

Record, p. 1828.

The facts are that when counsel undertook to discuss the power to condemn the Michigan Central property, he

did so as an attack on the verdict of the jury on the question of necessity the same as if he had appealed therefrom.

But as he had not appealed, the Chief Justice called his attention to the fact that the verdict of the jury had disposed of the question of necessity, unfavorably to the Michigan Central route. Counsel had not reached the question whether his contentions before the jury in regard to the Michigan Central Railroad property had not prejudiced the jury on the question of damages, and as he closed his argument without further reference to the subject, the court had a right to suppose that he submitted that part of the case upon his printed brief, which covered the question fully.

If the Supreme Court of a state should deny a party a hearing on a question of fact or of law under such circumstances as to deprive him of his life, liberty or property without an opportunity to be heard, it would be incumbent upon the aggrieved person to take direct means of reviewing the action of the court, and it would be necessary for the Supreme Court of the United States to obtain some sort of return from the State Supreme Court, or by other evidence to ascertain just what did occur and just what the facts were, upon which it was called upon to exercise the jurisdiction vested in it by the constitution. It would hardly do to act upon what appears to be an unsupported and unwarranted assignment of error.

The other contention of the learned counsel under this head is equally without merit.

The Circuit Court for the County of Wayne on a motion regularly made set aside the verdict of the second jury in this case, and granted a new trial.

Record, p. 930.

On an application for a mandamus the State Supreme Court held that the Circuit Court had no power to grant a new trial in a railroad condemnation suit.

Backus vs. Gartner, 89 Mich., 209.

A copy of the order granting the mandamus having been filed in the Wayne Circuit, that court, in obedience thereto, entered an order confirming the verdict of the jury.

Record, pp. 930, 945.

The Fort Street Union Depot Company then took an appeal under the statute to the State Supreme Court, and among other grounds of appeal, insisted that the order of confirmation was entered under a writ of mandamus improvidently issued by the Supreme Court.

Record, p. 931.

On the hearing of the appeal in the Supreme Court the question of the powers of the Circuit Court in condemnation cases was carefully examined and discussed by counsel on both sides. Carefully prepared and elaborate briefs were also presented. It is creditable to the Supreme Court of Michigan that being convinced the previous ruling was erroneous, it promptly overruled it.

Fort Street Union Depot Co. vs. Backus, 92 Mich., 33.

But the writ of mandamus had already done its work, and the new trial ordered by the Wayne Circuit never took place.

The Supreme Court referred to this feature of the case as follows:

"The court below acting in the present case upon the motion before it undoubtedly had the power to pass upon

the question presented to it by the affidavits, and to vacate and set aside the award of the jury. No substantial injustice has been done, however, by the mandate of this court compelling the court below to confirm the findings and award of the jury, for the reason that under the statute, this court, under its appellate power, may consider all the questions there involved and determine the rights of the parties thereunder."

In the exercise of its appellate power the Supreme Court examined the case and set aside the verdict of the jury awarding compensation, and granted a new trial on that question.

The most remarkable feature of the case is that the learned counsel for the plaintiffs in error should contend that a ruling of the State Supreme Court, which had no operation whatever in their case, deprived them of their property without due process of law, and this in face of the fact that they were given as full and complete a hearing on the question as it is possible to give a litigant.

(5) Is it true that the judgments and executions against the plaintiffs in error are without statutory authority and unknown to jurisprudence?

The opinion of the State Supreme Court disposes of these questions as follows:

"The amount of the first award was paid to the respondents pending the appeal to this court. Upon the second trial the award was diminished, and judgment entered for the petitioner for the difference between the two awards. The statute provides for the payment of this sum by the respondents to the petitioner. We think judgment for this amount was properly entered. As already stated, this proceeding is in the Circuit Court, and the statute clearly contemplates the entry of judgment and the issue of execution to enforce the finding of the jury. The statute expressly provides for the entry of judgment. How. Stat., § 3468. A general statute also

provides for issuing execution upon any judgment rendered in any court of record. How. Stat., § 7664."

Backus vs. Fort Street Union Depot Co., 103 Mich., 556, 563.

There can be no doubt but the construction so given the statutes is correct.

At all events it is a matter on which the decision of the State Supreme Court is conclusive.

The hearing of this case has been delayed because of the engagements of the distinguished counsel for the plaintiffs in error as senior counsel for the United States before the Behring Sea Commission, and for that reason I request an early decision.

I respectfully submit that the writ of error should be dismissed, or the judgments below should be affirmed.

FRED A. BAKER,
Attorney for the Fort Street Union Depot Company.

Office Supreme Court U. S.
FILED.
JAN 18 1898
JAMES H. McKENNEY,
CLERK

No. 55.

Add'l Brf. of Baker for D. C.

Filed Jan. 18, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 55.

A. BACKUS, JR., & SONS, AND ABSALOM BACKUS, JR., PLAINTIFFS IN ERROR,

vs.

THE FORT STREET UNION DEPOT COMPANY, DEFENDANT IN ERROR.

ERROR TO SUPREME COURT OF MICHIGAN.

ADDITIONS TO BRIEF FOR DEFENDANT IN ERROR.

I.

To be added to that part of brief headed "Third answer" and extending from page 16 to page 42:

The Louisiana constitution of 1845 contains this provision:

"Nor vested rights be divested unless for purposes of public untility and for adequate compensation previously made."

Title VI, sec. 109.

The same provision is in all subsequent constitutions of Louisiana, the word "previously" being omitted from the provision in the constitution of 1868; it was restored in the constitution of 1879, and at the same time the following additional provision was adopted: "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."

1852—Title VI, sec. 105.
1864—Title VII, sec. 109.
1868—Title VI, sec. 110.
1879—Arts. 155, 156.

A statute for the expropriation of lands for railroads and other works of public utility was passed in 1855.

Acts of La., 1855, p. 32.
Rev. Stat. of La., 1856, p. 117.

It is still in force.

Rev. Stat. of La., 1870, p. 290.

The procedure prescribed is simple. The first or original assessment of the compensation or damages is made by a sheriff's jury, but either party can appeal to the supreme court, the effect of an appeal being controlled by the following section of the statute:

"SEC. 1483. Any appeal to the supreme court from the verdict of the jury and the judgment of the lower court, made by either party, shall not suspend the execution of such judgment, but the payment of the amount of the verdict by the company to the owner, or the deposit thereof, subject to the owner's order, in the hands of the sheriff, shall entitle the corporation to the right, title, and estate of the owner in and to the land described in the petition in the same manner as a voluntary conveyance would do. But in the event of any change being made by the final decree in the decision of the cause, the corporation shall be bound to pay the additional assessment or be entitled to recover back the surplus paid as the case may be."

Rev. Stat. of La., 1870, p. 291.

It has been held that the expropriation act of 1855 is not in conflict with the Louisiana constitution of 1879.

N. O. & Pac. R'y Co. *vs.* Robertson, 34 La. An., 865.

If the supreme court grant a new trial, the case is remanded to the court below, where it is again tried.

N. O. Pac. R'y Co. *vs.* Gay, 32 La. An., 471.

In a case where the supreme court itself on an appeal by the company reduced the damages the property-owner was required to pay the costs of the appeal.

Shreveport, etc., R'y Co. *vs.* Hollingsworth, 42 La. An., 749, 752.

The right of the property-owner in Louisiana to be paid the amount of the first or original award before the company takes possession is protected by the writ of injunction. This is shown by a case in which the opinion of the court was delivered by Justice White, now a member of the Supreme Court of the United States.

Gay *vs.* N. O. Pac. R'y Co., 32 La. An., 277.

The right to an injunction can be waived by laches in applying for relief.

Jefferson, etc., R'y Co. *vs.* New Orleans, 31 La. An., 478.

The statute provides that "the corporation shall be bound to pay the additional assessment," and it is apparent from the above cases that if it failed to do so the court would enjoin it and its assigns from making any use of the property, and if necessary would set aside the statutory conveyance resulting from the payment of the original award and restore the title and the possession to the owner.

The Ohio constitution of 1851 provides:

"No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record as shall be prescribed by law."

Art. XIII, sec. 5.

The statutes of Ohio provide for condemnation proceedings in the probate court, with a right in either party to file successive petitions in error in the court of common pleas, in the district or circuit court, and in the supreme court of the State. Pending proceedings in error, and the new trial or trials that may be granted thereon, the company is permitted to pay or deposit the first award, and the property-owner is permitted to receive it without prejudice to the proceedings in error.

The statutory provisions read:

"Upon payment to the party entitled thereto, or deposit with the probate judge of the amount of the verdict and such costs as have lawfully accrued in the case up to the time against the corporation, the corporation shall be entitled to take possession of and shall hold the property, rights, or interests so appropriated for the uses and purposes for which the appropriation was sought as set forth in the petition, and the judge shall enter of record an order to that effect, and, if necessary, proper process shall be issued to place the corporation in possession thereof."

1 Rev. Stat. Ohio, 1890, sec. 6433.

"Either party may file a petition in error in the court of common pleas of the proper county within thirty days from the rendition of the final judgment in the probate court, and the proceedings in error shall be conducted as in civil actions, but the corporation may on rendition of final judgment in the probate court pay into said court the amount of the judgment for compensation and costs therein rendered,

and proceed to enter upon and appropriate the property, notwithstanding the pendency of the proceedings in error."

Id., sec. 6437.

A general statute provides for petitions in error to the circuit (formerly district) court to review the judgments of the common pleas court.

Id., sec. 6709.

The same statute provides for petitions in error to the supreme court of the State to review the judgments of the circuit courts, and by leave of the supreme court or a judge thereof a petition in error may be filed in the supreme court to directly review a judgment of the common pleas or probate court.

Id., sec. 6710.

Costs are awarded on all these petitions in error as follows:

"When a judgment or final order is reversed the plaintiff in error shall recover his costs, and when reversed in part and affirmed in part the court may apportion the costs between the parties in such manner as it deems equitable."

Id., sec. 6727.

In *Meily vs. Zurmehly*, 23 Ohio St., 627, the railroad company paid the amount awarded by the jury in the probate court into court, and also filed its petition in error in the court of common pleas. The latter court affirmed the judgment of the probate court. The company then filed its petition in error in the district court. During the pendency of these proceedings in error the property-owner demanded the money on deposit with the probate judge, and payment being refused he brought an action against the probate judge on his official bond.

Held, that it was the duty of the probate judge to pay

the money over to the property-owner on demand, and that plaintiff was entitled to recover.

The court stated its conclusions on the construction to be given to the statute as follows:

"The statute seems to contemplate that when the corporation takes the land the owner shall have an equal right to have the amount adjudged to him therefor, and leaves each party the risk of any recovery, to which one may be entitled against the other, as a result of the proceedings in error."

It is settled law in Ohio that where a judgment has been collected or paid and it is subsequently reversed, the court has an inherent power to enter a judgment against the defendant in error for the money so collected or paid.

Bickett *vs.* Garner, 31 Ohio St., 28.

Hiler *vs.* Hiler, 35 Ohio St., 645.

It is a universal rule that where a money judgment has been collected and it is subsequently reversed on error, the judgment debtor can recover in an action, and if the facts appear of record he can have a judgment for restitution without being required to bring an action.

The common-law rule is stated by Holt, C. J., in *Anonymous*, 2 *Salk.*, 588:

"Where the plaintiff has execution and the money is levied and paid, and that judgment is afterwards reversed, there, because it appears of record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid; there must then be a *scire facias*, suggesting the matter of fact, viz., the sum levied, &c."

The rule is stated the same way upon the authority of the above case in Tidd's Pract., 1033, 1186. At page 1186 it is further said:

"If a man recover damages and have execution by *fieri facias*, and upon the *fieri facias* the sheriff sell to a stranger

a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff sold by command of the writ of *fieri facias*."

It was accordingly held by Justice Field at the circuit that a sale of real estate on execution would stand, but the money collected could be recovered on a reversal of the judgment.

South Fork Canal Co. *vs.* Gordon, 2 Abb., U. S., 479.

A summary order for a return of the money may be granted.

Exp. Morris, 9 Wall., 605.

Chancellor Walworth, in a case in New York, after stating the common-law rule, says:

"But I believe the modern practice has been to apply to the court on affidavit for leave to suggest the fact of record and upon which judgment of restitution is awarded."

Safford *vs.* Stevens, 2 Wend., 158, 165.

II.

To be added to that part of the brief headed "Fourth answer" and extending from page 42 to page 44:

Penn. Mutual Life Ins. Co. vs. Heisz, 141 *Ill.*, 35, is a case where the owners of lots abutting on a street recovered judgments against a railroad company for constructing a railroad with the consent of the municipality along the street.

The constitution of Illinois of 1870 provides:

"Private property shall not be taken *or damaged* for public use without just compensation. Such compensation when not made by the State shall be ascertained by a jury as shall be prescribed by law."

Art. 2, sec. 13.

There was no statute requiring a railroad company building in a street to institute condemnation proceedings to determine the damages it should pay to abutters.

Held:

(1.) That the abutters were not left without remedy, as they could by common-law action have their damages "ascertained by a jury," as prescribed by the constitution.

(2.) That the judgments obtained by the abutters against the railroad company were a first and paramount lien on the railroad constructed in the street, and that such lien was good as against any subsequent alienee or incumbrancer.

At page 62 the court said:

"It may be, as we have before seen it has been held, that the citizen is remediless until the damage has actually occurred, and by appropriate remedy he has determined the extent and amount thereof; but when the damages are ascertained in the mode provided by law, the right of the lot-owner to the payment of the same as compensation is guaranteed to him by the constitution as a condition to the continued appropriation of the street to the public use, whereby the injury to his private property is inflicted."

In a case in Pennsylvania, where the statute required the company to pay the award or tender adequate security therefor, and it had done neither of these things, although the compensation had been ascertained and a judgment rendered against the company in favor of the property-owner, it was held that the right of the owner to compensation was paramount to the rights of a corporation which had succeeded on a mortgage sale to all the property of the original company, and the succeeding company was required to pay the judgment against the prior company with interest.

West Penn. R. Co. *vs.* Johnston, 59 Pa. St., 290.

It has since been settled in Pennsylvania that where a railroad company gives a bond approved by the court as security for the compensation that the property-owner must look to the company taking his property and to the bond, even though the sureties subsequently become insolvent and the bond worthless.

Fries *vs.* South. Penn. R., 85 Pa. St., 73.
Hoffman's Appeal, 118 Pa. St., 512.
Wallace *vs.* R. R. Co., 138 Pa. St., 168.

In the case last cited the court, referring to the requirements of the Pennsylvania constitution of 1873, that the compensation must be first paid or secured, said:

"The legislature can grant the right to take private property for public use subject to these restrictions, and it has never been doubted that the legislature may prescribe the kind and character of the security to be given and the manner in which it shall be given. The power to so prescribe must be lodged somewhere else than in the parties immediately concerned, viz., the corporation and the property-owner, because they might never agree. The State has retained this power and has exercised it, and its right to do so will not, I think, be questioned."

Further on the court said:

"The only reasonable and therefore the true construction of the word 'secured' in the constitution is that it shall be made reasonably safe or sure that the owner of the property taken shall be able to collect the compensation for it, and the words 'sufficient sureties' in the act must be construed to mean such sureties as at the time they are taken make it reasonably certain that the owner of the property taken can collect from them a just compensation."

FRED A. BAKER,
Attorney for Defendant in Error.

BACKUS *v.* FORT STREET UNION DEPOT COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 55. Argued January 17, 18, 1898. — Decided March 7, 1898.

As the respondents, both at the trial in the Circuit Court of the State, and in the subsequent proceedings on the certiorari in the Supreme Court of the State, specifically set up and claimed rights under the Federal Constitution which were denied, the jurisdiction of this court is not open to doubt.

While this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation, it may not inquire into matters which do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied.

The settled rule of this court in cases for the determination of the amount of damages to be paid for private property condemned and taken for public use, is that it accepts the construction placed by the Supreme Court of the State upon its own constitution and statutes.

In case of such condemnation and taking, a State may authorize possession to be taken prior to the final determination of the amount of compensation, provided adequate provision for compensation is made.

As to the court to determine the question, or the form of procedure, all that is essential is that, in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation; and when this has been provided for there is that due process of law which is required by the Federal Constitution.

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There is no vested right in a mode of procedure established by state law for the condemnation of property for public use; but each succeeding legislature may establish a different one, provided only that in each is preserved the essential element of protection.

An appellate court is not required to set aside the judgment of the trial court by reason of failure to give instructions which were not asked for.

The limit of interference by this court with the judgments of state courts is reached when it appears that no fundamental rights have been disregarded by the state tribunals.

The Supreme Court of Michigan was called upon to consider only such objections as had been particularly specified, and all others were deemed to have been waived.

The decision by the Supreme Court that it had power to set aside the verdict and order a new trial was not a reversal of a ruling that the Circuit Court had no such power.

This court is bound to accept the construction placed upon the state statute by the Supreme Court of the State, and to hold that it means that if the second appraisal was less than the first, and the amount of the first had been paid, the company was entitled to recover the difference from the party to whom it had been paid.

The facts in this case are as follows: The defendant in error is a corporation created under the laws of the State of Michigan, for the purpose of constructing a union depot in the city of Detroit. In order to connect this depot with the railroads desiring to enter, it was necessary to place tracks on River street, and some of the way, at least, these tracks had to be elevated above the grade of the street. As a part of its enterprise the Depot Company undertook the work of constructing these tracks. The plaintiffs in error were the owners of a manufacturing plant. The individual plaintiff in error held the title in fee to the property and the corporation plaintiff in error was his lessee. This manufacturing plant fronted on River street, and fronted on that part of it where the tracks were necessarily on a viaduct far above the surface. No part of the ground actually occupied by the plant was sought to be taken, but under the laws of Michigan the owner of a lot fronting on a street owns to the centre of the highway and is entitled to recover damages in case that street is appropriated to the use of a railroad. The third clause in section 4 of the Union Depot act (1 How. Comp. § 3461) provides specifically that the amount of these damages shall be ascer-

tained in the same way as is provided in ordinary cases of condemnation.

The constitution of Michigan provides:

Article XV, Section 9. "The property of no person shall be taken by any corporation for public use without compensation being first made or secured, in such manner as may be prescribed by law."

Article XVIII, Section 2. "When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law."

The Michigan Union Depot act (Act of June 9, 1881, No. 224) was passed in 1881. Public Acts, 1881, p. 320. It prescribes proceedings for the condemnation of private property, substantially similar to those in the Michigan General Railroad Law, first passed in 1855. Act of February 12, 1855, No. 82, Sections 9, 10 and 11 of the Depot act, being sections 3466, 3467 and 3468 of 1 How. Comp., provide:

§ 3466 — Sec. 9. "The commissioners shall take and subscribe the oath prescribed by article eighteen of the constitution. . . . They may view the premises described in the petition, and shall hear the proof and allegations of the parties, and shall reduce the testimony, if any is taken by them, to writing, if requested to do so by either party, and after the testimony is closed in such case, and without any unreasonable delays, and before proceeding to the examination of any other claim, all being present and acting, shall ascertain and determine the necessity of taking and using any such real estate or property for the purposes described; and, if they deem the same necessary to be taken, they shall ascertain and determine the damages or compensation which ought justly to be made by the company therefor to the party or parties owning or interested in the real estate or property appraised by them. . . . They shall make a report to said court or judge, signed by them, of the proceedings before them, if any, which

may be filed with the clerk of the court, either in vacation or term time, or the probate court, as the case may be. . . . In case a jury shall have been demanded and ordered by the court, pursuant to section eight of this act, the said jury shall proceed to ascertain and determine the necessity of taking and using any such real estate or property, and the damage or compensation to be paid by the company therefor, in the same manner and with like effect as is provided in this section in the case of commissioners, and as is further provided in said section eight. . . . The said judge, or a circuit court commissioner to be designated by him, may attend said jury, to decide questions of law and administer oaths to witnesses, and he may appoint the sheriff or other proper officer to attend and take charge of said jury while engaged in said proceedings. And the jury shall proceed to determine the amount of damages to be awarded, and shall have all the powers hereby conferred upon commissioners; and a report signed by the jury, whether the judge is or is not in attendance, shall be valid and legal. . . ."

§ 3467 — Sec. 10. "On such report being made by the commissioners or jury, the court, on motion, shall confirm the same on the next or any subsequent day when in session, unless for good cause shown by either party; and when said report is confirmed, said court shall make an order containing a recital of the substance of the proceedings in the matter of the appraisal, and a description of the real estate or property appraised, for which compensation is to be made, and shall also direct to whom the money is to be paid, or when and where it shall be deposited by the company. Said court, as to the confirmation of such report, shall have the powers usual in other cases."

§ 3468 — Sec. 11. "A certified copy of the order so to be made shall be recorded in the office of the register of deeds for said county, in the book of deeds; and thereupon, on the payment or deposit by the said company, of the sum to be paid as compensation for such land, franchise or other property, and for costs, expenses and counsel fees as aforesaid, and as directed by said order, the company shall be entitled to

enter upon and take possession of and use the said land, franchise and other property for the purpose of its incorporation; and all persons who have been made parties to the proceedings, either by publication or otherwise, shall be divested and barred of all right, estate and interest in such real estate, franchise or other property, until such right or title shall be again legally vested in such owner; and all real estate or property whatsoever acquired by any company under and in pursuance of this act, for the purpose of its incorporation, shall be deemed to be acquired for public use: *Provided*, The said sum to be paid as damages and compensation, and costs, expenses and counsel fees aforesaid, shall be paid by the company, or deposited as provided in this act, within sixty days after the confirmation of said report by the said court; and in case said company fail or neglect so to do, such failure or neglect shall be deemed as a waiver and abandonment of the proceedings to acquire any rights in said land or property. Within twenty days after the confirmation of the report of the commissioners or jury, as above provided for, either party may appeal, by notice in writing to the other, to the Supreme Court, from the appraisal or report of the commissioners or jury; such notice shall specify the objections to the proceedings had in the premises, and the Supreme Court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived; such appeal shall be heard by the Supreme Court at any general or special term thereof, on notice thereof being given according to the rules and practice of the court. On the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion. The second report shall be final and conclusive upon all parties interested. If the amount of the compensation to be allowed is increased by the second report, the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited as the court shall direct; and in such case all costs of the appeal shall be paid by the company; but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may

have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing. On the filing of the report, such appeal, when made by any claimant of damages, shall not affect the said report as to the right and interests of any party, except the party appealing; nor shall it affect any part of said report in any case, except the part appealed from; nor shall it affect the possession of such company of the land appraised; and when the same is made by others than the company, it shall not be heard except on a stipulation of the party appealing not to disturb such possession during the pendency of such proceedings."

The proceedings were commenced in the usual form by a petition filed by the Depot Company, January 24, 1891, in the circuit court for the county of Wayne, in which county the city of Detroit is situate.

The plaintiffs in error, respondents below, demanded a jury. The first hearing commenced on February 25, 1891, and terminated on March 18, 1891, in a disagreement of the jury upon both issues, that of necessity and that of compensation. A second hearing was had, commencing on June 10, 1891, and resulting on July 16, 1891, in a verdict in favor of the Depot Company on the question of public necessity, and assessing the damages of the respondents as follows: To Absalom Backus, Jr., as the owner of the fee, $17,850; to the corporation, A. Backus, Jr., & Sons, $78,293. At neither of these hearings was the judge of the circuit court present. Upon the motion of the Depot Company the circuit court vacated the award of damages, and ordered that a new jury be empanelled. Thereupon the respondents applied to the Supreme Court of the State for a writ of mandamus, to compel the setting aside of this order. That court, on November 19, 1891, issued a peremptory writ of mandamus, as prayed for. 89 Michigan, 210. On November 30, 1891, the circuit court, in compliance with this writ, entered an order which, as amended, confirmed the verdict and award of the jury, and also provided as follows:

"It is further ordered that within sixty days from the date of this order the Fort Street Union Depot Company is required to tender and pay to Absalom Backus, Jr., the sum of seven-

Statement of the Case.

teen thousand eight hundred and fifty dollars, and to A. Backus, Jr., & Sons the sum of seventy-eight thousand two hundred and ninety-three dollars, and to James N. Dean and William H. Davidson, executors, the sum of one dollar, together with their costs and expenses, if the same have been taxed, including an attorney's fee of twenty-five dollars; and if the said parties or either of them refuse to accept the tender and payment of said sums, the Fort Street Union Depot Company is required to deposit the same, under the supervision of the clerk of this court, in the Detroit National Bank and to the credit of this cause, including said costs and expenses; provided, that if said costs and expenses have not been taxed within the said sixty days, the same to be so deposited within five days after they are taxed.

"Said money shall remain on deposit in said bank, but at the risk of the petitioner, subject to be drawn therefrom and to be paid to the parties entitled to the same on orders signed by one of the judges of this court and countersigned by the clerk.

"It is further ordered that upon the tender and payment or deposit of said sum of ninety-six thousand one hundred and forty-four dollars, and of said costs, expenses and counsel fees, as aforesaid, the said Fort Street Union Depot Company shall be entitled to enter upon and take possession of and use the right of way above described for the purpose of its incorporation under its articles of association and the constitution and laws of this State, and that said respondent shall be divested and barred of all right, estate and interest in such right of way until such right or title shall be again legally vested in them and said right of way shall be deemed to have been acquired by said company for public use."

On December 2, 1891, the Depot Company appealed from the award of the jury, and from the confirmation thereof, to the Supreme Court of the State. On January 26, 1892, the Depot Company paid to the respondents, and they received, the amounts awarded to them, and thereupon the Depot Company took full possession of the property, constructed its tracks and has been ever since in possession and use of them.

Statement of the Case.

On March 3, 1892, the appeal was argued in the Supreme Court, and on June 10, 1892, its decision was announced. 92 Michigan, 33. It was held by a majority of the court (the Chief Justice dissenting) that the opinion expressed on the granting of the mandamus had too narrowly restricted the powers of the circuit court, and it was ordered that the verdict of the jury, while confirmed so far as it determined the question of necessity, should be vacated and set aside so far as it awarded compensation; and that the cause be remanded to the circuit court, with directions to proceed with a new appraisal, the costs of the appeal to abide the event of such appraisal.

It was also held that the fact that the amount of the award and confirmation had been paid to the respondents and the property taken possession of by the Depot Company since the taking of the appeal did not affect the right of the Depot Company to a new trial upon the question of compensation.

When the case was returned to the circuit court the respondents objected to any further proceedings, but the same were overruled, and a jury empanelled. The sessions of this jury were presided over by the circuit judge, and, after hearing the testimony and examining the property, it returned a verdict, assessing the damages of the individual respondent at the sum of $15,000, and of the corporation respondent at the sum of $48,000. Thereupon, on motion of the Depot Company, and on December 28, 1893, the circuit court entered a judgment against the individual respondent for $2850, the difference between the amount of the first and second awards, and a like judgment against the corporation respondent for $30,293, and also a judgment against both respondents for the costs of the appeal and subsequent proceedings taxed at $4168.20. On the 26th of June, 1894, the respondents filed their petition in the Supreme Court of the State of Michigan, praying for a writ of certiorari. The writ was allowed, whereby the entire record was transferred to that court, which, in an opinion filed on January 8, 1895, affirmed the proceedings below, with costs. 103 Michigan, 556. Whereupon the plaintiffs below sued out this writ of error.

Mr. Don M. Dickinson for plaintiffs in error.

Mr. Fred. A. Baker for defendant in error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

Inasmuch as the respondents, both on the trial in the circuit court and in the subsequent proceedings on the certiorari in the Supreme Court, specifically set up and claimed rights under the Federal Constitution which were denied, the jurisdiction of this court is not open to doubt. They again and again insisted that certain provisions of the Federal Constitution, which they named, stood in the way of any further proceedings against them.

It is also not open to further debate, since the decision in *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation. But in this respect we quote the restriction placed in the opinion then filed (p. 246):

"We say, 'in absolute disregard of the company's right to just compensation,' because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted."

While in cases of this kind coming from the Supreme Court of a State, questions of fact passed upon in the state courts are not here open to review, *Egan* v. *Hart*, 165 U. S. 188, and

cases cited in the opinion, it may not be inappropriate to notice that the award of compensation as finally sustained gave to the respondents the sum of $63,000. As the valuation they placed upon the plant, outside of the realty, was only $150,000, and of the realty the like sum of $150,000, though the realty cost in 1871 less than $30,000, and as none of the ground, upon which the plant stood and the business was carried on, was taken by the Depot Company, but only the use of the street in front thereof, and that not so as to exclude them from its use, it is obvious that the award, whether adequate or not, was not one in reckless disregard of their rights.

It is not questioned by counsel that the settled rule of this court in cases of this kind is to accept the construction placed by the Supreme Court of the State upon its own constitution and statutes as correct. *Long Island Water Supply Company* v. *Brooklyn*, 166 U. S. 685; *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461, and cases cited in those opinions. His contention, however, is that the true construction of the constitution and laws of the State, as settled by repeated decisions of its Supreme Court, was wholly disregarded in this case, and that by reason thereof the respondents were denied that equal protection of the laws which is guaranteed by the Fourteenth Amendment to the Federal Constitution. His contentions are grouped under the following heads:

"I. They were denied the fundamental right to have an ascertainment and determination of the amount of compensation and its final payment before being deprived of their property.

"II. They were denied the protection of that guaranty of the state constitution providing that the questions of compensation and necessity should be passed upon by one and the same jury, and of the settled, uniform and unreversed construction of the constitution to that effect by the state judiciary in respect of all other citizens.

"III. They were denied the protection of a trial on the questions of necessity and compensation by the tribunal

guaranteed by the constitution of the State, in accordance with the settled, uniform and unreversed construction of that constitution in respect of all other citizens.

"IV. They were denied that measure of just compensation for their property taken, guaranteed by the constitutions, Federal and state, as the same was and is accorded to all other persons than themselves.

"V. They were denied a hearing and deprived of a hearing guaranteed by the Constitutions, Federal and state, as 'due process of law,' when summoned into court as appellees to defend their property, rights and themselves from imputations upon them.

"VI. Finally, having been deprived of their property sought by the railroad company for its purposes, their personal assets of the value of one hundred and ten thousand ($110,000) dollars were taken from them under the color of a judgment and process unknown to the constitution and statutes of Michigan, and unknown to jurisprudence, whereby they were deprived of their property without 'due process of law.'"

Attention is called to the fact that while upon the return of the first verdict the respondents moved to confirm it, which motion was denied by the circuit court and the verdict set aside, yet after the decision of the Supreme Court awarding the writ of mandamus, they did not renew that motion; that the petitioner alone asked for confirmation, though, as expressly stated, for the purpose of taking an appeal to the Supreme Court; that, after the order of confirmation had been entered, it paid the amount of the award to the respondents, which sum was accepted by them, and that thereupon it took possession of the property and has since continued in undisturbed possession and use. It is insisted that such payment and taking possession created under the constitution and statutes of Michigan a finality so far as the Depot Company was concerned, and that to this effect had been the repeated adjudications of the Supreme Court of the State. The argument is that the property owner has a constitutional right to have the amount of his compensation finally determined and

paid before yielding possession; that the party seeking condemnation (in this case the Depot Company) cannot be let into possession until after all question as to the compensation has been finally settled, and the amount thereof paid; that it cannot take advantage of one report or verdict, pay the sum fixed by it, obtain possession, and still litigate the question of amount; that if it does then pay and take possession its right to further litigate is ended. But the Supreme Court of the State held against this contention, and we must assume therefrom that it is not warranted by the constitution and statutes of the State. Indeed, the language of that constitution is "made or secured." Does this amount to a denial of the right to that protection to property which is guaranteed by the Fourteenth Amendment to the Federal Constitution? In other words, is it beyond the power of a State to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, and *Sweet* v. *Rechel*, 159 U. S. 380. There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof.

Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many States the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. *Boom Company* v. *Patterson*, 98 U. S. 403, 406; *United States* v. *Jones*, 109 U. S. 513; *Cherokee Nation* v. *Kansas Railway Company*, *supra*.

Neither was there anything in the proceedings actually had

before the last jury and in the Circuit Court which conflicts with any mandate of the Federal Constitution. Counsel say that the respondents were entitled to a trial by a jury of inquest, but were forced to trial before a common law jury, presided over and controlled by the circuit judge. But the Constitution of the United States does not forbid a trial of the question of the amount of compensation before an ordinary common law jury, or require, on the other hand, that it must be before such a jury. It is within the power of the State to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge. These are questions of procedure which do not enter into or form the basis of fundamental right. All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution. *Bauman* v. *Ross*, 167 U. S. 548, 593. These considerations dispose of all the objections embraced in the first three contentions of counsel so far as those objections run to the validity of the proceedings actually had, providing those proceedings were warranted by the constitution and statutes of the State.

But it is insisted that those proceedings were not so warranted; that the settled, uniform and unreversed construction thereof by the Supreme Court of the State theretofore forbade them, and hence there was a discrimination against the respondents, and they were denied that equal protection of the laws which the Federal Constitution guarantees. Thus, for instance, it is insisted that the previous rulings of the courts, both trial and Supreme, had been to the effect that a jury called under these condemnation statutes was a jury of inquest and not a trial jury, whereas in this case the ruling was practically to the contrary, and the respondents were compelled to submit their rights to a trial jury, subject to the control of

the presiding judge, as in ordinary common law cases. We deem it unnecessary to review the many authorities from the Supreme Court of Michigan cited by counsel, or determine whether the ruling in this case as to methods of procedure and the true construction of the statute is or is not in harmony with prior decisions of that court. Accepting the contention of counsel, that in this case the Supreme Court of the State has put a different construction on the state statutes from that theretofore given, and has sustained modes of procedure different from those which had previously obtained, still it does not follow that this court has a right to interfere and say that the present ruling is erroneous and the prior construction correct, or that the change of construction works a denial of any fundamental rights. There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each are preserved the essential elements of protection. The fact that one construction has been placed upon a statute by the highest court of the State does not make that construction beyond change. Suppose it were true, in the fullest sense of counsel's contention, that for a series of years the courts had ruled that the jury in condemnation cases was a jury of inquest, or in the nature of a sheriff's jury — one determining for itself all matters of law and fact, and that in this case, for the first time, they held otherwise, and that such jury was a common law jury, subject to be controlled by the presiding judge, whose duty it was to determine all questions of law, and still, whatever might be thought of the propriety of such a change of construction, there is in it nothing to justify this court in reversing the judgment of the state court and denying the correctness or validity of this last ruling. We fail to see why the presence of the judge with this jury, his assumption of power to control its proceedings, his instructions to it on questions of law, necessarily vitiated the proceedings. Grant that such a course had never been taken before; grant that it had never been held to be a proper proceeding; grant that it was unexpected by counsel, and yet if the judge's rulings and instructions were in themselves correct, and the propriety of

his presence and control be held by the Supreme Court of the State warranted by the statutes, we do not perceive that any right possessed under the Constitution of the United States has been violated.

The question is not presented of a distinct ruling by a state court that one party is entitled to certain rights and the benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws. But that does not prevent a legislature, which has established a certain rule of procedure, and continued it in force for years, from subsequently repealing the act and establishing an entirely different mode of procedure. In other words, there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar thought controls where the courts of the State have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. This last adjudication cannot be set aside in the Federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws.

We, of course, do not mean to affirm that there has been by the Supreme Court of the State such a change of adjudication. We simply in this respect accept the contention of counsel for the respondents, and hold that, even if the facts be as claimed by him, they furnish no ground for interference by this court. It should be noticed in passing, however, that nearly all, if not absolutely all, of the cases which he cites from the Supreme Court of Michigan arose under the provisions respecting condemnation in the General Railroad Act, while these proceedings were had under the Union Depot Act, and, although the two acts may be substantially similar, yet this adjudication is under a different statute from that

under which most, if not all, of the prior decisions were made.

Passing now to the fourth point. Under this it is claimed that the trial judge gave to the jury an improper measure of damages. During the argument of counsel for the respondents this colloquy took place, as appears from the record:

"COURT: A question which arises in my mind is this: There is no question but what the Backuses are entitled to full compensation for such damages as they may suffer, but does not the other rule also attach, and that is, that the jury are not in any way to consider any speculative damages or any probable damages?

"MR. DICKINSON: They can only consider the damages which are actually shown, but the other rule follows, may it please your honor, that they are not to estimate those damages for a year, or estimate the present injury done by the railroad, but they must assume that the railroad is running to its maximum capacity, that it has other railroads, that it may double, treble or quadruple its trains, so far as that is concerned, and they must estimate the damage for the future time, not for a year or three years or five years or ten years.

"COURT: That is undoubtedly true to a certain extent, but the question that I have thought about considerably within the last few days is in regard to the testimony which was admitted in the case in regard to their profits, the profits of their business. Do they not come within the rule which applies in regard to speculative damages?"

Afterwards, when the counsel for petitioner was making his argument, he said:

"In other words, if the court please, the question as to what business is carried on there, and as to how profitable an institution it might be is merely an element to be considered in establishing the market value of the property."

Upon which the judge made this comment:

"In other words, if a profitable business is carried on in connection with a certain site, the profitableness of the business itself must be taken into consideration by the jury in estimating the value?"

Opinion of the Court.

After the arguments were over the judge charged the jury as follows:

"Upon this question, viz., compensation or damages, what I have to say must necessarily be in a broad and the most general way. This is a question for you, and from the very nature of a proceeding of this character, you are vested with large powers and great discretion. These powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power, the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent and unbiassed judgment. The compensation or damages must be neither inadequate or excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with, under the so-called power of eminent domain, a power somewhat and necessarily arbitrary in its character, and that where this is done the party whose property is taken, or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the condition of things as they exist. Under the constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation.

"I shall not call attention to any particular part of the testimony in the case: the responsibility of its application and the weight to be given it rests with you, always regarding that which is real and substantial and disregarding that which is fictitious and speculative; treating conditions as they have been shown and as they are, without speculating as to what might possibly happen or occur, taking conditions as you find them, and the natural and probable consequences following such conditions."

And this was all which was said in reference to the measure of compensation. Now, it is insisted by counsel that the profits which the manufacturing plant was making were to be taken into consideration by the jury in awarding compensation, inasmuch as the business of that plant was seriously interrupted, if not practically destroyed, by this condemnation; that inasmuch as the query was suggested by the judge during the argument whether profits did not come within the rule as to speculative damages, the failure to charge distinctly that they were proper subjects of consideration was equivalent to an instruction that they were not to be considered, and that, therefore, the true rule of compensation was not given to the jury.

It is evident that the judge did not attempt to define the several elements which enter into the general fact of compensation, or the various matters to be considered by the jury. He simply charged generally that as this was an arbitrary taking of the property of the respondents they were entitled to full compensation, and left to the jury the duty of determining what should be such compensation, telling them plainly that they were vested with large powers and great discretion. If it be said that the judge had intimated by his query that the matter of profits came within the rule applicable to speculative damages, it must also be noticed that further on he suggested that the profitableness of a business was to be taken into consideration in estimating the value. It is true he nowhere instructed the jury to make the profits of the business the criterion of value, nor indeed would he have been justified in so doing. The profitableness of the business was undoubtedly a matter to be considered, and so the judge fairly intimated in

these prior colloquies. But the profits of a business are not destroyed unless the business is not only there stopped, but also one which in its nature cannot be carried on elsewhere. If it can be transferred to a new place and there prosecuted successfully, then the total profits are not appropriated, and the injury is that which flows from the change of location.

But beyond this no special instructions were asked by the respondents at the time of the giving of the charge. The statute (§ 3466) provides that the judge "may attend said jury, to decide questions of law." So far as he gave instructions it is obvious that he stated that which was the law, and the real objection is that he did not go further and enter into a more minute description of the elements which were to be taken into consideration by the jury in fixing the amount of compensation; that they may from the colloquies which had taken place during the arguments have drawn improper inferences as to the limit to which they were warranted in going, and that those inferences he failed to correct by specifically stating what matters they should consider. A sufficient answer is that the respondents did not ask any further instructions. All they did was to except to what had been stated. By well-settled rules no appellate court would under such circumstances be required to set aside the judgment of the trial court. *Shutte* v. *Thompson*, 15 Wall. 151, 164; *Mutual Life Ins. Co.* v. *Snyder*, 93 U. S. 393; *Texas & Pacific Railway* v. *Volk*, 151 U. S. 73; *Isaacs* v. *United States*, 159 U. S. 487.

But a more complete and satisfactory answer is that whatever error there may have been affords no ground for the interference of this court. The respondents were not thereby deprived of any rights secured by the Federal Constitution. They were not denied "due process of law." The proceedings were had before a duly constituted tribunal, in accordance with the declared law of the State, with full opportunity to be heard. Nor were they denied "the equal protection of the laws." The rule as to the necessity of asking special instructions was administered in this case no differently than in others. *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380.

The error, if any there be, was not one "in absolute disregard of their right to just compensation," but was only error in the administration of the law under which those proceedings were instituted. As clearly pointed out in *Chicago, Burlington & Quincy Railroad* v. *Chicago*, *supra*, it is not every error occurring in a state court in the administration of its law concerning condemnation of private property for public purposes that opens the door to review by this court. We are not called upon to search the record simply to inquire whether there may or may not have been errors in the proceedings. Our limit of interference is reached when it appears that no fundamental rights have been disregarded by the state tribunals.

Under the fifth head counsel presents two matters:

"(1) The denial by the Supreme Court of the State of a hearing on the substantial and essential question, of whether counsel for plaintiffs in error abused their privilege as counsel by arguing to the jury on the question of necessity that the margin of the depot grounds that belonged to the Michigan Central road could be taken for the elevated structure; and (2) the reversal of the unanimous judgment of the Supreme Court of the State in 89 Michigan, 209, without a rehearing, by the judgment in 92 Michigan, 33."

With reference to the first, it is enough to say that the respondents did not appeal to the Supreme Court, and that under section 3468 it would seem that that court was called upon to consider only such objections as had been particularly specified. "Either party may appeal, by notice in writing;" "such notice shall specify the objections;" "the Supreme Court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived." No objection to the finding of the jury as to the question of necessity had been made by the appellant, and therefore was to be treated as waived. Under those circumstances it cannot be said that the Supreme Court deprived the respondents of any rights by refusing to hear counsel in respect to the question of necessity, or connected with its determination.

With regard to the second, technically the decision on the mandamus proceeding and that on the appeal did not conflict.

The writ of mandamus directed the circuit judge to set aside the order which he had entered vacating the award. It thus in effect declared that that judge ought not to have made such an order. On the appeal the Supreme Court itself ordered that the award be set aside, and a new jury empanelled, and remanded it to the Circuit Court for such new appraisal. This is within the letter of the statute, (§ 3468,) "on the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion." The decision by the Supreme Court that it had power to set aside the verdict and order a new appraisal was not a reversal of a ruling that the Circuit Court had no such power, although it may suggest consequences somewhat singular. Appreciating that fact, in the last opinion the court declared that in the former decision its language restricting the power of the Circuit Court had been too strong.

Coming now to the last point, the Supreme Court held that as upon the second appraisal the damages were less than those awarded on the first, and the amount of the first had been paid to the respondents, the petitioner was entitled to a judgment for the difference. The language of the statute (§ 3468) is "but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing." It may be that this language is not entirely apt, for in this case the party appealing was not the landowner but the Depot Company, and so it cannot be said that judgments were rendered against "the party appealing." But the true intent of the statute is obvious, and at any rate we are bound to accept the construction placed upon it by the Supreme Court, and hold that it means that if the last appraisal was less than the first and the amount of the first had been paid, the company was entitled to recover the difference from the party to whom it had been paid. Nothing is said, it is true, in the statute about execution, but the Supreme Court ruled that under the general statutes the recovery of the judgment carried with it a right to an execution.

These are all the questions in this case. We find nothing in them which justifies an interference by this court with the proceedings of the state courts; nothing in which it can be said that any ruling of those courts was in absolute disregard of the respondents' right to compensation. The judgment must, therefore, be

Affirmed.

MR. JUSTICE HARLAN dissenting.

Did the trial court prescribe any rule of law for the guidance of the jury that was in absolute disregard of the right of the plaintiffs in error to such compensation?

In *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, 241, it was held that "a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

Before proceeding with his argument to the jury, Mr. Dickinson, the attorney for the plaintiffs in error, called the attention of the trial court to some of the principles which, in his judgment, should control the ascertainment of the just compensation to which they were entitled. Addressing the court in the presence of the jury, he said: "Now, as to what is compensation, I refer your honor to the case of *The Grand Rapids & Indiana Railroad* v. *Heisel*, in 47 Michigan, 398: 'It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been if the injury had not occurred. Nothing short of this is adequate compensation. In the case of land actually taken, it includes its value, or the amount to which the value of the property from which it is taken is depreciated, and in *Jubb* v. *Hull Dock Co.*, 9 Q. B. 443, it was held, where the property taken was a brewery in

operation, the damages included the necessary loss in finding another place of business. In cases where damage is by injury aside from the actual taking of property, the rule has been to make the party whole as nearly as practicable, and where it affected the rental value or enjoyment the same principle has been applied as in other cases. There is no reason, and so far as we can discover, no law which allows the wrongdoer to cast any portion of an actual and appreciable loss on the party whom he injures.' (In this case the same rule of damages would apply as in the Grand Rapids and Indiana case, and the suit was brought for damages, and the question was what was compensation.) 'In such a case as this, it is in the power of the company and always has been to have the compensation settled once for all, and to get any benefit which the law attaches to such a method of ascertainment. Until this is done the possession is a continual wrong.'"

At this point the court interrupted the argument of counsel with this observation: "A question which arises in my mind is this: There is no question but what the Backuses are entitled to full compensation for such damages as they may suffer, but does not the other rule also attach, and that is, that the jury are not in any way to consider any speculative damages or any probable damages?" To this counsel made the following response: "They can only consider the damages which are actually shown, but the other rule follows, may it please your honor, that they are not to estimate those damages for a year, or estimate the present injury done by the railroad, but they must assume that the railroad is running to its maximum capacity, that it has other railroads, that it may double, treble or quadruple its trains, so far as that is concerned, and they must estimate the damage for the future time, not for a year or three years or five years or ten years." The court then said: "That is undoubtedly true to a certain extent, but the question that I have thought about considerably within the last few days is in regard to the testimony which was admitted in the case in regard to their profits, the profits of their business. Do they not come within the rule which applies in regard to speculative damages?"

Counsel then observed: "Not at all, your honor. If the profits are shown and the business is destroyed, you can only show it by the effect upon the business, and upon that point I call your honor's attention to the unanimous opinion of the Supreme Court delivered by Mr. Justice Campbell in the case of *Grand Rapids & Indiana Railroad* v. *Weiden*, 70 Michigan, 390, 393: 'Under our present constitution there is never any presumption that a railroad is necessary, or that any particular land ought to be given up to its uses. Every landowner therefore has a perfect right to object to giving up his land, and is not confined to objections depending upon price or value. . . . And a road already established has no better claim than any other to extend or change its lines. Although railroads are allowed by public policy to condemn lands, because they cannot exist otherwise, nevertheless the enterprise is, under our laws, which prohibit public ownership of railways, one of private interest and emolument, and must show its claims to legal assistance.' Now upon the question of profits: 'We are bound to see that parties are not deprived of their property without necessity, or without full compensation for being compelled to relinquish it. And, while respect is due to the honest action of juries, it is not conclusive, and is subject to comparison with the facts in the record. Both of the appellants were using their property in lucrative business, in which the locality and its surroundings had some bearing on its value. Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether for want of access to any other that is suitable for it. Whatever damage is suffered must be compensated. Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses.' That goes directly upon the question which

your honor suggests. Now I shall not take time to refer to the other cases."

I cannot doubt, from what passed between the court and counsel in the presence of the jury, that the court meant to characterize profits from the business of the parties owning the real estate as speculative damages.

After the counsel for the parties concluded their argument to the jury upon the whole case, the trial judge delivered a carefully prepared charge, in which he said: "The question, and the only question before you for your determination, is that of compensation, and of compensation only. Your duty, and your only duty, is to ascertain and determine what compensation or damages ought justly to be paid by the Fort Street Union Depot Company to the respondents for the real estate, property, franchises, easements and privileges described in the petition, viz.: 1. The amount to be allowed to Absalom Backus, Jr., as the owner of the fee of the land described. 2. The amount to be allowed to A. Backus, Jr., & Sons, a corporation, as tenants in possession of such lands. Upon this question, viz., compensation or damages, what I have to say must necessarily be in a broad and the most general way. This is a question for you, and from the very nature of a proceeding of this character you are vested with large powers and great discretion. These powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent and unbiassed judgment. The compensation or damages must be neither inadequate or excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with under the so called power of eminent domain, a power somewhat and necessarily arbitrary in its character, and that where this is done the party whose property is taken,

or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the conditions of things as they exist. Under the constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."

Is it not clear that the trial judge, while indulging in very general language as to the duty of the jury not to allow too much or too little compensation, gave the jury to understand that compensation was to be ascertained upon the basis only of the ownership by Absalom Backus, Jr., of the fee in the land described, and of the rights of A. Backus, Jr., & Sons as tenants in possession, excluding damages to the business of the plaintiffs in error, which would arise from the condemnation of their property rights? The jury were, in effect, instructed that the profits derived by them from their business were to be excluded from consideration as being "fictitious or speculative."

That he was so understood by counsel for the plaintiffs in error is manifest from the circumstance that, immediately upon the charge being concluded, he made the following exceptions to it: "We except to that part of the charge of the court wherein he says that the damages are to be confined to the damage to the real estate described and the improvements upon it; whereas, in our view, the damages are to the entire plant, including the injury to the business from the impairment of the mill as affecting its adjuncts, the lumber yard and

the storehouse. . . . To what is said by the court as to avoiding the giving of speculative damages, in view of what has been said before by the court in regard to taking into consideration the profits, I refer to what has been said upon the records in the course of the testimony and upon the argument, expressing the views of the court against taking into consideration the profits. We except to the refusal of the court to charge as I requested in the language or in the substance, according to the decisions of the Supreme Court, which I read in full upon the opening of my argument and called attention of the court to it, especially to the expression of Campbell, J., in delivering the opinion of the court in *Grand Rapids & Indiana Railroad* v. *Weiden*, 70 Michigan, 395, 398."

If the trial judge did not intend to say to the jury that injury to the business of the plaintiffs in error was to be deemed speculative, and therefore to be excluded from consideration, he would instantly have said that no such impression was intended to be made as that indicated by the exceptions taken to his charge.

The views expressed by counsel for the plaintiffs in error as to the principles which should guide the jury in the matter of compensation were sustained by the authorities. In addition to the cases in 47th and 70th Michigan above referred to, reference may be made to many others decided by the Supreme Court of Michigan.

In *Commissioners* v. *Chicago &c. Railroad*, 91 Michigan, 291, which was a case of the condemnation of the lands of a railroad company, that court said: "If, therefore, their adjoining land is rendered less valuable by the location of a public highway, or another railroad across its property, there is no reason why they should not recover compensation therefor. Situated near this crossing is a small tract of land used for warehouse purposes. It is insisted by the respondents that, by reason of this crossing, this land, with the warehouse thereon, is rendered less available and less valuable for the purposes for which it was constructed and used. This was a proper element of damage, and should have been submitted to the jury."

At the same term the court, in *Commissioners* v. *Moesta*,

91 Michigan, 149, 154, quoted with approval what had been said in *Grand Rapids Railroad Co.* v. *Weiden*, 70 Michigan, 295, saying: "The constitutional provision entitling the owner of private property, taken for public use, to just compensation, has uniformly been construed to require full and adequate compensation. The rules to be applied in fixing the compensation are not necessarily the same as obtain in fixing damages in actions upon contracts. The correct rule of compensation in such cases is more nearly analogous to the remedy afforded in an action in tort in which property rights have been interfered with without the owner's assent. In such cases damages for the interruption of the owner's business are allowed. *Allison* v. *Chandler*, 11 Mich. 549." In *City of Detroit* v. *Brennan*, 93 Michigan, 338, the court reaffirmed the doctrine of the former cases, that the full measure of compensation and the injury done to the business should be allowed, and said: "The law considers the rights of the property and business carried on by the respondent as of equal consideration and entitled to as much protection as the right of the city to take the property and interfere with the business; and will not permit the property to be taken and the business to be interfered with, unless an actual public necessity exists for the making of the improvement. . . . The element of damages are: (1) The value of the property taken for the opening of the street; the injury to the works and property not taken, and left in the parcel of land from which the property is taken; (2) the injury to the business of the owner; (3) compensation for all prospective loss or injury resulting from the opening of the street, and the taking of the property for that purpose."

See also *Grand Rapids &c. Railroad* v. *Chesebro*, 74 Michigan, 466, where the court said: "An owner has a right to be indemnified for anything that he may have lost. The farming test, which is the one petitioner sought to apply, would be of no particular use in a great many cases of suburban lands. . . . The mere taking of four acres for a right of way could not be regarded, in any sensible point of view, as compensated by one tenth of the value of the forty acres, taking acre for acre.

The damages in such a case must be such as to fully make good all that results, directly or indirectly, to the injury of the owners in the whole premises and interests affected, and not merely the strip taken." Further: "The jury here, as in all cases where no certain measure exists, must trust somewhat to their own judgment. That is one of the purposes for which juries of inquest are provided. They are expected to view the premises and use their own senses. . . . But the purpose throughout is to give all the damages which they reasonably discover, past or present, and to result, but no more. No one can read this record without seeing that the jury did not deal fully with the case. It is manifest that they gave no damages beyond what they assumed to be the price of four acres by the acre. . . . It cannot be said there is any real conflict as to the damages arising from the cutting off one part from the other of the forty acres, and this was left out altogether, unless they regarded the proofs of value wantonly, which we cannot believe." See also *Pearsall* v. *Supervisors*, 74 Michigan, 558; *Barnes* v. *Michigan Air Line*, 65 Michigan, 251; *Grand Rapids &c. Railroad* v. *Railroad*, 58 Michigan, 641, 648; *Toledo &c. Railway* v. *Detroit &c. Railroad*, 62 Michigan, 564; *Commissioners* v. *Chicago Railroad*, 91 Michigan, 291; *Commissioners* v. *Chicago &c. Railroad*, 90 Michigan, 385; *City of Grand Rapids* v. *Bennett*, 106 Michigan, 528.

Without referring to other matters discussed at the bar and in the elaborate brief of counsel, I place my dissent from the opinion and judgment of the court upon the ground that the trial court committed error in its charge to the jury as to the principles which should guide them in determining the just compensation to which the plaintiffs in error were entitled. The rules laid down by the Supreme Court of Michigan, in the cases above cited, as to what was just compensation, were, I think, in accord with the principles that obtain in the courts of the Union when determining the just compensation to be made for private property taken for public use.

Mr. Justice Brown took no part in the decision of this case.